

IP Justice Report: TOP MYTHS About Karaoke CD-G Users' Legal Rights

Little case law exists in the United States that specifically deals with a consumer's legal rights to use Karaoke CD+Graphic (CDG) discs. The lack of case law in this area leads to uncertainty among consumers regarding the legality of different uses of a CDG disc. This legal uncertainty has also led to intimidation and fear of lawsuits stemming from over-zealous threats from karaoke producers, music publishers or record companies who hope to extend their rights in an unchartered area. Private consumers, karaoke hosting businesses (KJs), bars, restaurants, and others all make use of CDG discs in different ways and for different purposes. As a result, their legal rights may vary in some situations. In all cases, one should use a lawfully produced and acquired CDG disc (i.e., one which has been licensed by the music publishers for a CDG and that a person lawfully possesses). This article is intended to clear up some of the uncertainties and myths regarding what consumers can and cannot do with their lawfully acquired CDG discs.¹

MYTH #1: Copyright law does not allow for copying a CDG disc for private non-commercial use.

TRUTH: Copyright law clearly allows a person to copy their lawfully acquired CDG for private non-commercial use.

Copyright law is intended to provide a legal framework to balance rights between creators and consumers. So while creators are granted the right to control copying under copyright law, an important exception to that right is Fair Use.² Under US copyright law fair use permits certain socially important copying, even when the copyright holder does not wish to allow such copying. The US Supreme Court has described fair use as "the breathing space" that is necessary for copyright to avoid conflict with First Amendment's free expression guarantees. Fair use generally permits copying for research or educational purposes, to criticize or comment on a work, for archiving, news reporting, and personal use.

So when a person copies his or her music CD onto an iPod or computer hard drive, that person is exercising his or her lawful fair use rights to make that copy. Fair use rights apply equally to karaoke CDG discs as to other types of entertainment, so consumers are entirely within their fair use rights to make a copy of their CDG discs for private non-commercial uses. CDG discs closely resemble computer software, which consumers have an explicit legal right to make a back-up copy of under the law.

When the recording industry tried to outlaw MP3 players upon their introduction to the market in 1999 because they permit digital copies of music on computers, the 9th Circuit Court of Appeals unanimously held that consumers have a fair use right to "space-shift" their copyrighted music to another device, such as a hard drive or other digital storage device.³ In the *Diamond Rio* case, the court ruled that space-shifting (or format-shifting) of music was similar to time-shifting of video recordings, something recognized by the US Supreme Court to be a lawful fair use in the famous 1984 *Sony Betamax* decision.⁴

Relying on the *Sony Betamax* precedent, the court in the *Diamond Rio* case found the digital storage of music to be lawful fair use. The court held that this type of format conversion fell within the personal use right of consumers to make analog or digital copies of copyrighted music for private noncommercial use. The *Diamond Rio* case established consumers' right to digitize their music collections onto their computer hard drives and MP3 players.

Since consumers are permitted to copy their video and music under *Sony Betamax* and *Diamond Rio*, it is entirely reasonable to expect, should it ever be addressed by the courts, that consumers would likewise have a fair use right to copy their CDG discs for private non-commercial uses. Thus consumers who copy their CDG discs onto their computer hard drives would be protected by copyright law's fair use privilege also.

MYTH #2: Copyright law forbids copying a CDG disc for any commercial purposes.

TRUTH: While a commercial use weighs against fair use, copyright law permits copying a CDG disc in a number of commercial circumstances. Commercial use, does not by itself, determine if it is an illegal use.

A particular use will be considered “commercial” if the use is made with an expectation of commercial advantage or private financial gain.

While no court has ruled on the issue, a karaoke KJ’s copying of his CDG discs to a computer could arguably be considered commercial if it is done as part of a paying job. However, even if a KJ’s copying of his or her CDG discs to a computer were considered to be “commercial”, should it ever be tested in court, it can still be perfectly legal under fair use.

Fair use involves an analysis of at least 4 factors in relation to the particular circumstances of the case. If a person copies a CDG disc for a commercial purpose, then that factor weighs against a finding of fair use in the overall analysis. But whether or not a use is commercial in nature is only 1 of the 4 factors in a fair use analysis. Despite a commercial intent weighing against fair use, there have been a number of cases in US copyright law where commercial uses have been ruled lawful fair use.

For example the US Supreme Court found a commercial use to be a lawful fair use in the famous “Pretty Woman” parody case.⁵ In this case, rappers 2 Live Crew recorded a parody of Roy Orbison’s well-known song “Pretty Woman” and called it “Harry Woman.” Not amused, Orbison’s Estate sued the 2 Live Crew for copyright infringement. Admittedly, the 2 Live Crew copied and distributed Orbison’s song entirely for commercial purposes. Nevertheless, the US Supreme Court ruled that the copying was lawful fair use despite the fact that it was done for a commercial purpose.

A more recent case that deals with digital entertainment also permitted copying for commercial purposes. In 2003 in *Kelly v. Arriba Soft*, the 9th Circuit Court of Appeals found a search engine’s copying of digital pictures to create thumbnail images for commercial purposes to be fair use.⁶

Courts will evaluate a number of factors to determine if copying is lawful fair use, so even though a commercial purpose will weigh against finding fair use, it is not decisive. Courts would likely conclude that KJ’s who copy their legally obtained CDG discs onto a computer or other device in order to provide added services to consumers or to back-up their collections, or to better manage their large CDG disc collections would still be protected by fair use.

However, karaoke businesses should not purchase 1 CDG disc and expect to copy it onto several computers for simultaneous use by different people. It is important that each person or computer have its own physical copy of a CDG disc to be protected by copyright law’s fair use privilege.

MYTH #3: A legal business owner can be liable for copyright infringement for hiring karaoke companies.

TRUTH: Only those businesses who knowingly hire karaoke companies to play illegal CDG discs could be considered liable for infringement.

Legal businesses pay a musical performance license fee, usually to collective societies like the American Society of Composers, Authors, and Publishers (ASCAP) for copyrighted songs to be lawfully performed on the premises. In the case of karaoke, the performance license fees can be paid by the bar or restaurant, or by the karaoke business, or by the individual KJ who plays the CDG discs.

Bars or restaurants that knowingly hire KJs or karaoke companies to play illegally obtained CDG discs could be liable for copyright infringement under “secondary liability” legal theories. Contributory and vicarious infringements are theories of secondary liability, where a third-party can be held liable for the infringing actions of another.

A bar or restaurant could be liable for contributory infringement if it intentionally induces or encourages direct copyright infringement by the KJs on its premises. And bars and restaurants could be found vicariously liable by profiting from a KJ's direct infringement and by refusing to prevent it. Businesses owners who know that the KJs they hire play illegal copies of CDG discs could be held liable for the infringement of the KJs on their premises. However, businesses that take steps to hire KJs who play only lawfully acquired and produced CDG discs and that pay the performance license fees will not risk liability under copyright.

MYTH #4: A KJ must only use original CDG discs in commercial performances, never a copy.

TRUTH: There is no requirement that the original CDG disc must be used in a commercial performance by a KJ. Unless the KJ has waived his ordinary fair use rights to use a lawful CDG disc (by signing a contract), then he could expect to legally copy the files to his computer.

As explained above, traditional fair use rights apply to karaoke CDG discs. No court has held that KJ's have less rights than other consumers to copy their CDG discs onto a computer or other hard drive. Indeed, it is very much industry practice to make such copies for archival purposes, and also provide a larger selection of music to customers than could be transported on many CDG discs. In today's digital world, the law would produce a silly result if it required KJ's to be limited to the number of physical CDG discs that they could carry at one time.

It is possible that a KJ could agree to not copy a CDG disc onto a computer (or waive his fair use rights), but in the absence of such an agreement, a KJ should expect to exercise fair use privileges and space-shift the CDG discs to his computer hard drive.

Particularly in a situation where the CDG discs were lawfully obtained and performance royalties are paid on the music, a court would be unlikely to rule a KJ is infringing on copyright simply because he copied his CDG collection to his computer. A court would likely rule such copying to be lawful "space-shifting" just as it was in the *Diamond Rio* case when the recording industry unsuccessfully tried to outlaw MP3 players. Since it makes little sense to sue your legal, paying customers, music publishers or karaoke producers who sue karaoke companies or KJs for space-shifting their lawful CDG discs onto a computer are unlikely to remain in business long — besides loosing in court.

The commercial use a KJ puts to his CDG disc collection is only 1 factor to be considered in a proper fair use analysis. The enhanced capabilities and greater efficiencies created by digitizing the CDG discs would likely override the commercial purpose in evaluating this 1st fair use factor. Also considering the fact that the digital KJ's create a large market for legal CDG discs in the first place, and the fact that space-shifting enables lawful archiving, the balance would likely tip in favor of finding fair use for a KJ to copy his CDG discs to his computer. Besides protecting First Amendment values of free speech, fair use is also designed to protect innovation, including commercial innovation. As in the cases of the copying by the 2 Live Crew and the online search engine, both of whom copied for commercial purposes, a KJ space-shifting his CDG discs would probably be found to be fair use also.

What Fair Use Would Not Privilege:

1. Copying CDG discs from friends or family and using those unpaid for and copied discs for commercial purposes.
2. Selling or otherwise distributing unlicensed copies of CDG discs.
3. Buying hard drives that contain unlicensed CDG songs (usually for pennies per song, such as have been sold on eBay with 35,000 songs in the range of \$400).
4. Downloading MP3+G or other digital format karaoke songs from an Internet site that does not have the right to digitally distribute the songs you purchase.
5. Knowingly performing karaoke songs that are not properly licensed by the copyright owners.
6. Space-shifting (format-shifting / importing) CDG discs onto a hard drive, then using both the original discs and one or more hard drive copies at the same time. A KJ must purchase a full set of CDG discs for each copy on a hard drive.

Civil and Criminal Penalties for Copyright Infringement:

The penalties for copyright infringement can be surprisingly steep and include both civil (or money damages) and additionally criminal penalties, including jail-time for commercial infringements. 17 United States Code Section 504 holds an infringer of copyright liable for either i) the owner's damages and any additional profits of the infringer; or ii) statutory damages as high as \$150,000 per act of willful infringement. Those found liable for copyright infringement can also be forced to pay the legal fees and court costs of the copyright owner for the litigation under Section 505.

And Section 506 makes it a crime to infringe copyright willfully either i) for purposes of commercial advantage or private financial gain, or ii) by copying or distributing a song or recording that has a value of more than \$1,000. A second offense for commercial copyright infringement carries a penalty of years in prison under 18 USC Section 2319.

Footnotes:1. Caveat: This article applies only to United States copyright law and does not address situations where Digital Rights Management (DRM) restrictions have been illegally circumvented.2. "Fair use" is a limitation on copyright owners' exclusive right "to reproduce the copyrighted work in copies." 17 U.S.C. § 106(1). It is codified at 17 U.S.C. § 107, which provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (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.3. *Recording Industry Association of America v. Diamond Multimedia Sys., Inc.* 180 F.3d 1072 (9th Cir. 1999)

4. *Sony v. Universal City Studios* 464 U.S. 417 (1984).

5. *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

6. *Kelly v. Arriba Soft Corp.* 336 F3d 811 (9C 2003).

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