

12

Music Copyright and Libraries

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Libraries play a broad range of functional roles in managing music collections, including acquiring and providing access to music and recordings for entertainment, education, or performance purposes; administering and preserving performances; and maintaining archival records of our musical heritage. Fulfilling these roles requires librarians to understand music copyright and the complicated system of music licensing that has developed in the United States.

Music copyright is no different than any other kind of copyright—except when it is. While it can sometimes seem like music copyright means navigating a foreign language, once you understand the basics of how music is produced and distributed, you can rely on basic copyright knowledge to navigate these issues. While copyright provides the basic structure, the music industry has developed a complex system of music licensing over the past century.

One important thing to remember when assessing issues around music copyright and licensing is that it's a good practice to think in plural terms. You are often dealing with more than one copyright: the copyright in musical works, as well as a separate copyright in any sound recordings of them.¹

In addition to copyrights in the musical work and sound recording, there may also be additional copyrights in any lyrics or words incorporated into the musical work. These can be written by the composer, contributed to the work by an independent lyricist or librettist, or licensed by the composer. This plurality of copyrights is the reason that the original copyrights to Taylor Swift's early sound recordings can be sold, and she can also rerecord those albums, making new sound recordings, with new copyrights separate from the copyrights to the music and lyrics of her songs.²

A successful music copyright analysis depends on understanding and addressing each of the copyrights involved. Knowing the basics is important when you are making collection preservation decisions, providing reserves, and assessing collections for digital access. In addition, working with music copyright requires an understanding of the kinds of licenses involved with different uses of musical works. These questions implicate what issues libraries and their patrons need to address in their work, including any rights they may have under the law.

TYPES OF MUSICAL LICENSES

Much like the academic library publishing landscape, it is rare for performers or composers to retain rights to their works. Sound recording rights are typically owned by a recording label and musical work rights are typically owned by a publisher or managed by a publishing company. Familiarity with applicable licenses is essential to such things as live streaming, nontraditional performances, or supporting curricular or creative activities.

Mechanical licenses govern reproducing musical works on sound recordings to sell as physical items, digital downloads, or to access as repeated streams on demand. In the United States, these licenses are compulsory after first publication: anyone can buy a license to make and distribute a cover of their favorite Beyoncé song. Traditionally, these licenses were managed by the Harry Fox Agency³ where labels and independent musicians could easily secure licenses for the copies they wanted to distribute or sell. In 2020, a new blanket mechanical license became available, managed by the Mechanical Licensing Collective.⁴ Now all digital service providers like Spotify, Google, Soundcloud, or Apple Music pay for these licenses for all users on the platform, so in most instances, libraries who own the rights to sound recordings in their collection do not need to secure a mechanical license for the musical composition to upload these recordings to online services. However, Harry Fox still provides the necessary mechanical licenses that you need to sell CDs, permanent digital downloads, cassettes, or LPs.⁵

Synchronization licenses are required when using copyrighted music in film or video. Synchronization licenses are a common stumbling block on social platforms like YouTube, Facebook, or Instagram where there may be licenses in place to perform the music, but there isn't a license for subsequent viewing of a recording after an event.

Public performance licenses and statutory exceptions to the public performance right govern public performances of musical works. In most cases, public performance licenses are administered by performing rights organizations, such as ASCAP, BMI, SESAC, and GMR.⁶ Many institutions purchase blanket licenses from one or more of the performing rights organizations, which cover the *nondramatic* performance of music registered with those licensing

organizations. Depending on the license, blanket licenses might cover live performances, live streams, or subsequent playback of live concerts, as well as ambient music in public places such as a student union or stadium.

Libraries can be directly or indirectly involved in organizing or helping to administer public performances of music by their organization or institution, or even in their own spaces. Some library staff may even be responsible for administering those licenses for their institutions. Any librarian involved in helping to administer music concerts or programming would benefit from being acquainted with the requirements of their institution's public performance licenses and having copies on hand to refer to when questions arise.

Because the performing rights societies can only license nondramatic performances, dramatic performances of music or musical works must be licensed separately with the copyright owner or their authorized representative. In licensing dramatic performances of musical works, a distinction is made between *grand rights licenses* and *dramatic performance licenses*. The former is a license to perform "dramatico-musical works," such as musicals or operas, or parts of them; the latter is a license or permission to perform a song or other musical composition dramatically. For example, Benjamin Britten's *Peter Grimes* is a dramatico-musical work and requires a grand rights license whenever it is performed; Britten's *War Requiem* is a nondramatic work but would require a dramatic performance license if it were performed with interpretive dance.⁷

As to what constitutes a dramatic performance of an otherwise nondramatic musical composition, as a practical matter, more than minimal acting by the performers, along with the use of props, costumes, sets, and other aspects of dramatic performances could signal the need for a dramatic performance license. However, the real indicator of a dramatic performance is the use of music to aid in storytelling, to advance the plot or heighten the action, suspense, tension, or other aspects of a narrative plot. The key test is the use of music in a way that is integral to and in support of the plot of a story and its associated action.⁸

EXCEPTIONS TO THE PUBLIC PERFORMANCE RIGHT

The U.S. Copyright Act includes several limitations on the public performance right, two of which can be useful to libraries in fulfilling their functional roles.

Face-to-Face Teaching Activities

Section 110(1) permits the public performance or display of a copyrighted musical work for educational purposes, so long as the performance or display is by students or teachers, for educational purposes, at a nonprofit educational institution.⁹ The statute applies to face-to-face teaching in classrooms as well as "place[s] devoted to instruction," such as library instructional spaces.¹⁰

Nonprofit Performances of Nondramatic Musical Works

Section 110(4) of the U.S. Copyright Act establishes an exemption for nonprofit performances of nondramatic literary and musical works that could serve as the basis for programming music concerts and recitals in libraries and other venues, subject to four conditions established by the statute: (1) the performance, whether of live or recorded music, must be for a physically present audience and not transmitted; (2) the performance must be for nonprofit purposes; (3) with no payments to performers, promoters, or organizers; and (4) any proceeds from direct or indirect admission charges must be “used exclusively for educational, religious, or charitable purposes.” Copyright owners can still prevent such performances if their objection is stated in writing at least seven days before the performance.

In addition to the musical works, licenses are also required for performances of sound recordings “by means of digital audio transmission.”¹¹ For “noninteractive” internet or satellite radio transmissions, which are not listener driven, licenses are exclusively managed by the nonprofit SoundExchange.¹² For example, librarians working with a college radio station broadcasting on the internet should be aware of the need for a SoundExchange license. For “interactive” or on-demand streams through digital platforms, like YouTube Music or Spotify, those licenses are negotiated with the sound recording copyright owners (typically record labels).

ACQUIRING MUSIC

Purchase in Print and Digital Formats

Libraries potentially acquire music in multiple formats, including traditional sheet music, print scores and parts, and—increasingly—digital files such as PDFs. While print music can be managed according to traditional practices for physical materials, nonprint digital files of music raise not only practical questions about storage and circulation but also legal issues raised by access and display on local computer networks, and the reproduction and distribution of scores and parts. When purchasing a digital musical score from a publisher or self-publishing composer, the terms of use for the digital file will, ideally, be stated, but libraries will more typically need to express their own desired terms for use or seek additional permission or licensing for copying and distribution for uses that exceed fair use or other limitations on copyright.

Renting Music

The “first sale doctrine” (also known as “exhaustion”) provides that the first authorized distribution of a copy of a work exhausts the rights holder’s distribution rights in that copy. The rule allows the purchaser of a copy of a work to

further distribute (sell, rent, lend, etc.) or dispose of that copy without authorization from the rights holder. However, that principle has important exceptions in the context of music.

Many publishers of nondramatic concert repertoire—as well as dramatic works such as ballets, operas, and musicals—distribute some or all the works in their catalogs exclusively on the basis of rented parts and scores. This avoids triggering the first sale rule and enables a music publisher or self-published composer to regulate more tightly performances and other uses of their works, such as recordings and broadcasts, for which additional fees may be charged for the use of the music. Such rentals are usually accompanied by a rental agreement that specifies the permitted uses of the music, including the number of performances, whether it will be used in recordings or broadcasts, and the date the music is due to be returned. These rental agreements are contracts with terms and provisions that can potentially preempt or exceed what is required by copyright law.

In addition, the first sale rule does not apply to copies of works whose copyright was “restored” in 1994 by the Uruguay Round Agreement Act.¹³ Provided that the owner of the copyright has filed a notice of intent to enforce with the Copyright Office,¹⁴ any use of such a copy is not protected by the first sale exception. Many libraries contain copies of restored works for which lending would not be permitted by Section 109.¹⁵

Though Section 109 excludes all pre-1994 copies of restored works, lending copies of works available for purchase may be more likely to constitute a fair use than lending copies of works whose access the rights holder has intentionally restricted to licensees. Libraries should use caution lending copies of rental-only restored works that were manufactured prior to December 8, 1994.

Custom Musical Arrangements

Sheet music, parts, and scores are not always published for the available instruments or voices in an ensemble, especially in K-12 educational programs, where special versions for students may be required. These arrangements are considered “derivative works,” for which a license or permission is generally required. However, in the case of *Tresóna Multimedia, LLC v. Burbank High School Vocal Music Association*, the U.S. Court of Appeals for the 9th Circuit held that the use of a small portion of a song in a medley of four musical works was a fair use on the grounds that it was transformative and for nonprofit educational purposes.¹⁶ Arrangements of full musical compositions, especially for commercial purposes, generally require a license from the music publisher, except in the case of a musical arrangement made for the purposes of an audio recording for which a mechanical license has been secured. Such arrangements are not eligible for copyright protection as a derivative work without the permission of the copyright owner.¹⁷

INSTITUTIONAL ARCHIVAL RECORDINGS

Libraries at institutions with music departments frequently produce and maintain collections of institutional archival recordings of musical performances by their students, faculty, and guest artists. The recordings are normally made primarily as a pedagogical tool, to aid faculty and students in evaluating their performances and educational progress, and to document the rich musical life and history of their professional training programs. Many of these recordings, especially earlier recordings, are made without any mechanical or synchronization licensing. They are produced as documentary artifacts, usually in a single copy, and stored in various formats in a school's library, archives, or computer networks. Access to the recordings has traditionally been confined to affiliated faculty, staff, and students, with occasional limited distribution of copies to those same groups.

The advent of digital recording and streaming technology and the rapid deterioration of historical recordings and increasing obsolescence of playback devices have raised widespread questions about the legal status of institutional recordings and their possible uses. To what extent can they be produced, preserved, and made accessible, given the requirements of copyright law and music licensing? For music in copyright, contemporary developments in the law of fair use provide numerous arguments that can be adduced to support the creation, preservation, and limited access to collections of institutional archival recordings without permission from copyright owners.

Since the codification of fair use in Section 107 of the Copyright Act, judges and legal scholars have expanded our conception of fair use and extended its application considering new technologies for the preservation and use of copyrighted works, especially for research and education. So long as access is restricted and tailored to the needs of current students, it is increasingly regarded as a fair use to provide access to institutional archival recordings for other pedagogical purposes.¹⁸ Music schools also have an interest in recording performances as a means of documenting their history, and in turn preserving those recordings. To the extent that such recordings are of research or scholarly value, providing them to musicologists and other researchers may also be a fair use.¹⁹

Sound Recordings

Copyright in sound recordings is independent of the copyright in any underlying copyrightable works, such as musical works or literary works (as in audiobooks). Though many of the same copyright rules apply equally to sound recordings, there are some variations. In addition, special rules apply to sound recordings fixed prior to 1972.

Exclusive Rights

Unlike other classes of works, the exclusive right to publicly perform a sound recording is limited to performances through digital audio transmissions. Performances of sound recordings through nondigital means—even commercially, as in the case of terrestrial radio—require no authorization from a rights holder (the performance of the underlying work must still be authorized).²⁰

The other exclusive rights to sound recordings are also somewhat narrower than those for other classes of works in that the exclusive rights to sound recordings apply only to the actual sounds. An independently created recording that mimics an earlier recording, even if it is indistinguishable from the original, is noninfringing.²¹ A derivative work that is created using independently created sounds is noninfringing. There are also special limitations allowing for transmissions by public broadcasting entities.

Performers must give consent before recordings of their musical (but not literary) performances may be made, transmitted, or distributed.²² Unlike other exclusive rights, prohibitions on making or using unauthorized recordings of live performances are likely not subject to expiration or to any exceptions.²³

Exceptions

Though in most classes of works copying amounts so trivial as to be unrecognizable by an average audience is not actionable, courts are divided as to the extent of application of the “*de minimis* use” exception with respect to copying of sound recordings. Two cases involving sound sampling are illustrative.

Bridgeport Music v. Dimension Films concerned a two-second sample from a copyrighted sound recording by George Clinton and Funkadelic, which was looped and used for a total of seven seconds in a track by rap artist N.W.A.²⁴ The court held that there is no *de minimis* use of a sound recording when there is no dispute that the recording was sampled. The court noted that the sample at issue was *de minimis* as to the underlying musical work but determined that a different analysis was necessary for sound recordings, reasoning that, unlike a musical composition, each of the sounds in a sound recording is something of value and sampling is always purposeful. The court argued a bright line rule also provides ease of enforcement, creating a simple rule of “get a license or do not sample.” The *Bridgeport* ruling was criticized but remained the only circuit court case to consider the issue for more than a decade.

The 9th Circuit considered sound sampling in a case involving a fraction of a second sound sample—a single horn hit—from a recording by Shep Pettibone later used in a song by Madonna. In *VMG Salsoul v. Ciccone*, the court held the *de minimis* test does, in fact, apply to sound recordings just as it does to musical works.²⁵ Finding that Madonna’s use was not actionable, the court reasoned

that a sound sample is *de minimis* if an average listener could not distinguish the sampled performance from a “generic rendition of the same composition.”

Most exceptions to copyright apply equally to sound recordings. Case law on fair use is thin in this context but seems to support its equal application to sound recordings at least in principle.²⁶ Note that many digital copies of sound recordings are constrained by licensing terms that further restrict the available exceptions.

Unlike musical works, the library exceptions contained in Section 108 fully apply to sound recordings. Though Section 108(i) restricts libraries’ ability to provide interlibrary loan copies of musical works, that restriction does not apply to sound recordings themselves, with the effect that libraries may provide such copies when the underlying works are either literary works or public domain musical works.

The law contains two important exceptions specifically for recordings fixed prior to February 15, 1972. First, the provisions in Section 108(h) are expanded so as to apply to domestic pre-1972 sound recordings during their entire term of protection, not just the past twenty years.²⁷ Second, pre-1972 sound recordings are subject to a safe harbor provision allowing noncommercial use after a “good faith, reasonable search” to determine the recording is not commercially available.²⁸ Prospective users under this provision must provide public notice of intent (with a fee) as prescribed by the U.S. Copyright Office.²⁹

CONCLUSION

Librarians and archivists who administer music or sound recording collections to meet the current needs of educators, researchers, performers, and creators must often navigate multiple rights in copyright distributed among different rights holders. The framework for music copyright is a function not only of law but also of a complicated system of music licensing that has developed since the beginning of the twentieth century. Working in this area accordingly requires practical knowledge of music copyright and the music industry’s licensing network composed of creators, publishers, recording companies, and agencies.

Librarians and archivists can be important actors, and even activists, in response to the legal and practical uncertainty that exists in music copyright. Depending on the type of organization, institution, or activity involved—commercial or not-for-profit, professional, or educational—fair use and other limitations on the exclusive rights of a copyright owner often have to be balanced against music industry expectations and practices. Case law from judges, who are themselves typically not musicians or experts on the music industry, sometimes provides only limited or contradictory guidance. As professionals, librarians endeavor to serve their communities of practice while balancing the rights of copyright owners and the users of copyrighted works, including new

creators. While challenging, the results can be rewarding and beneficial for the entire field of music.

NOTES

1. It's also important to understand that a musical work does not need to be expressed in written form to be copyrighted. Electronic music, pop, hip-hop, and improvised pieces that are fixed as sound recordings still have a copyright in the musical work.
2. Shirley Halperin, "Scooter Braun Sells Taylor Swift's Big Machine Masters for Big Payday," *Variety* (blog), November 16, 2020, <https://variety.com/2020/music/news/scooter-braun-sells-taylor-swift-big-machine-masters-1234832080/>.
3. "Power Your Business with Rumblefish," Harry Fox Agency, accessed January 28, 2023, <https://www.harryfox.com/license-music>.
4. "About the MLC," The Music Licensing Collective, accessed January 28, 2023, <https://www.themlc.com/>.
5. "Compulsory License for Making and Distributing Phonorecords Other Than Digital Phonorecord Deliveries," U.S. Copyright Office, Washington, DC, United States, September 2022, accessed January 29, 2023, <https://www.copyright.gov/circs/circ73a.pdf>.
6. Respectively, the American Society of Composers and Performers, Broadcast Music International, the Society of European Stage Authors and Composers, and Global Music Rights.
7. Adding to the confusion, the term "grand rights" is sometimes used as a shorthand for dramatic performance licenses, causing the terms to sometimes be deployed interchangeably.
8. Kohn and Kohn, *Kohn on Music Licensing*, fourth edition (Frederick, MD: Aspen Publishers, 2010), 370, 1303-5, 1310.
9. When the work in question is an audiovisual work (such as a motion picture), the copy being used must also be lawfully acquired.
10. U.S. Copyright Act, 17 U.S.C. § 110(2) makes similar provisions for remote teaching, but only for "reasonable and limited portions" of a work, not the whole work as permitted in face-to-face settings.
11. U.S. Copyright Act, 17 U.S.C. § 106(6).
12. "FAQ: What We Do," SoundExchange, accessed January 30, 2023, <https://www.soundexchange.com/frequently-asked-questions/>.
13. U.S. Copyright Act, 17 U.S.C. § 109(a). The Uruguay Round Agreements Act (URAA) extended copyright to foreign works that were at the time under copyright in their source country but were in the public domain in the United States due either to failure to comply with formalities (such as renewal or notice) or to lack of national eligibility. The latter category notably included works of Soviet/Russian origin due to the lack of bilateral treaty with the Soviet Union. Many celebrated, formerly public domain works—including works by composers such as Prokofiev, Shostakovich, and Stravinsky—were now automatically subject to copyright. The term of the new copyright is the same as if the work had never entered the public domain (that is, ninety-five years from the date of first publication).

14. The notices may be searched "Notice of Restored Rights," U.S. Copyright Office, accessed January 23, 2023, <https://www.copyright.gov/gatt.html>.
15. For example, prior to its restoration the score to Kabalevsky's *Colas Breugnon* could be readily purchased; since restoration (and as of January 2023) it can be obtained in the United States only as a rental.
16. *Tresóna Multimedia, LLC v. Burbank High School Vocal Music Association*, 953 F.3d 638 (9th Cir. 2020), accessed January 29, 2023, https://scholar.google.com/scholar_case?case=9866865877365102364&q.
17. U.S. Copyright Act, 17 U.S.C. §115(a)(2).
18. See "Guidelines with Respect to Music," in U.S. Copyright Office, *Circular 21: Reproduction of Copyrighted Works by Educators and Librarians* (2014), 7-8, accessed January 30, 2023, <https://www.copyright.gov/circs/circ21.pdf>; Association of Research Libraries, *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012), 14, 18.
19. Uses that exceed fair use can, of course, still be permitted by securing the requisite licenses.
20. U.S. Copyright Act, 17 U.S.C. §§ 106(6), 114(a).
21. U.S. Copyright Act, 17 U.S.C. § 114(b).
22. U.S. Copyright Act, 17 U.S.C. § 1101, 18 U.S.C. § 2319A.
23. See *U.S. v. Martignon*, 492 F.3d 140 (2d Cir. 2007), accessed January 30, 2023, https://scholar.google.com/scholar_case?case=1095868825989785907.
24. *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), accessed January 28, 2023, https://scholar.google.com/scholar_case?case=2589269115679339204.
25. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir. 2016), accessed January 30, 2023, https://scholar.google.com/scholar_case?case=2622425068073736501.
26. For example, *Swatch Group Mgt. Services Ltd. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014), accessed January 30, 2023, https://scholar.google.com/scholar_case?case=12594316535246745664; *Est. of Barre v. Carter*, 272 F. Supp. 3d 906, 930 (E.D. La. 2017), accessed January 30, 2023, https://scholar.google.com/scholar_case?case=8266138511510488110.
27. U.S. Copyright Act, 17 U.S.C. § 1401(f). Since pre-1972 recordings were already protected by federal copyright prior to the Orrin Hatch-Bob Goodlatte Music Modernization Act, the applicability of Sec. 1401(f) to foreign pre-1972 sound recordings is uncertain.
28. U.S. Copyright Act, 17 U.S.C. § 1401(c).
29. "Requirements and Instructions for Completing and Submitting Notices of Non-commercial Use," U.S. Copyright Office, accessed January 30, 2023, <https://www.copyright.gov/music-modernization/pre1972-soundrecordings/NNUfiling-instructions.html>.