

Copyright Primer: A Music Librarian's Perspective¹

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Is the work copyrighted or in the public domain?

Copyright on the composition and publication if author known, first published before 1923

Author's Death	United States	Canada Life +50 Countries	EU, Russia Life +70 Countries
<1942	Public Domain	Public Domain	Public Domain
1942-1961			Copyrighted
>1961		Copyrighted	

Copyright on the composition and publication if author known, first published after 1923

Author's Death	United States	Canada Life +50 Countries	EU, Russia Life +70 Countries
<1942	Copyrighted unless proof of non-renewal is provided	Public Domain	Public Domain
1942-1961			Copyrighted
>1961		Copyrighted	

US: Proof of non-renewal and NIE status applies only to works published 1923-1963. All works published 1964-1977 have been renewed automatically and enjoy a full term of 95 years after first publication. Those published 1978 and later are under copyright for life-plus-70.)

Corporate copyright on the publication, no author identified

Year Published	United States	Canada Life +50 Countries	EU, Russia Life +70 Countries
<1923	Public Domain	Public Domain	Public Domain
1923-1941	Copyrighted		
1942-1961	(+95 generally)		Copyrighted
>1961		Copyrighted	

After establishing a work is copyrighted, it is necessary to determine what rights need to be paid and to whom. If the work is in the public domain, use as you like!

¹ Any views or opinions expressed here are solely those of the authors and do not necessarily reflect those of Major Orchestra Librarians' Association.

Small Rights & Grand Rights

Small rights fees constitute composer and publisher royalties on everything from a 30-second solo piccolo etude to a 90-minute symphony. This includes everything from live performances to radio broadcasts and even cell phone ringtones. Payments of small rights, which allow the right of public performance, are made to a licensing agency like The American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and Society of European Stage Authors and Composers (SESAC).

ASCAP and BMI Definition of Grand Rights:

A dramatic performance shall include, but not be limited to the following: performance of a dramatico-musical work (as hereinafter defined) in its entirety; performance of one or more compositions from a dramatico-musical work (as hereinafter defined) accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work from which the music is taken; performance of one or more musical compositions as part of a story or plot, whether accompanied or unaccompanied by dialogue, pantomime, dance, stage action, or visual representation; performance of a concert version of a "dramatico-musical work" (as hereinafter defined).

"The term 'dramatico-musical' work as used in this agreement, shall include, but not be limited to, a musical comedy, opera, play with music, revue, or ballet."

BMI's agreement is very similar:

BMI only licenses non-dramatic performing rights in the music it controls. A dramatic performing right can involve either music which was originally part of a "dramatic or dramatico-musical work" (the term generally used to describe operas, operettas, musical shows, ballets, movies and other similar productions), or it can involve the dramatic use of music which may not have been originally a part of such a dramatic or dramatico-musical work.

Grand rights payments are made to the publisher, acting as agent for the composer. Outside of the United States it is common that the publisher will act as agent for small rights as well.

Apart from a staged opera or ballet, what if I'm adding other elements to the music?

*Additional elements can be added to a work (copyrighted or public domain) resulting in additional and/or individual rights.
Often adding such elements will result in Grand Rights.*

Additional Copyrightable Elements

- Translation: printed in program notes, projected onstage as surtitles
- Transliteration: used during rehearsal process
- Dance: copyrighted to choreographer
- Media/Film, Projections of Photographs & Art, Visual Aids
- Props, Scenery & Costume: particularly if they dramatically further the storyline²

² There is significant debate as to what and how such elements further the storyline. With no court case precedent, this is very much a gray area often discussed.

Recording & Broadcasting Rights

Rights and permissions are required to record, broadcast, and stream copyrighted works.

Mechanical License: allows for copyrighted works to be manufactured and distributed in their original state³

Master Recording License: allows for an existing recording to be rebroadcast

Synchronization License: right to synchronize the musical composition in timed relation with audio-visual images on film or videotape

Example: An orchestra wishes to record a recent work by John Adams for an independent record label. The orchestra wishes to stream that recording on their website to promote an upcoming concert: The orchestra must get a mechanical license to allow for the digital download (distribution) and a master recording license from the record label as they are the legitimate owners of the recording for the streaming alone. This is in addition to rental fees paid to the publisher for use of materials and for the mechanical license to initially create the recording.

The Harry Fox Agency (<http://www.harryfox.com>) handles the majority of mechanical licenses, with following rates as:

9.10 Cents per copy for songs 5 minutes or less

- or -

1.75 Cents per minute or fraction thereof, per copy for songs over 5 minutes.

Example:

5:01 to 6:00 = \$.105 (6 x \$.0175 = \$.105)

6:01 to 7:00 = \$.1225 (7 x \$.0175 = \$.1225)

7:01 to 8:00 = \$.14 (8 x \$.0175 = \$.14)

Example: Suppose you are making 2,000 copies of a CD containing Aaron Kernis's *Too Hot Toccata*, timed at 6:00 minutes. The mechanical rights for this work will be 6 minutes x 1.75 cents x 2,000 copies: \$210.00, which is paid to the Harry Fox Agency. Of course, you must also pay the publisher for the music rental, plus permission to record the work. If the work is also performed in public, you must also pay small rights to one of the licensing agencies (ASCAP or BMI). You must pay mechanical rights for every work recorded that is not in the public domain. Thus, a 65-minute CD of modern works will cost around \$2,275 for mechanical rights.

*My orchestra owns something that is now copyrighted.
How is that possible? What rights should I consider?*

'GATT Works' Summary

As evidenced previously, copyright law differs widely from one country to the next and there have been several major agreements intended to rectify and codify policies to create copyright fairness. The Berne Convention for the Protection of Literary and Artistic Works requires its signatories to recognize the copyright of works of authors from other signatory countries (known as members of the *Berne Union*) in the same way as it recognizes the copyright of its own nationals. In addition to establishing a system of equal treatment that internationalized copyright amongst signatories, the agreement also required member states to provide strong minimum standards for copyright law. When the United States signed the Uruguay Rounds Agreement Act (URAA) in 1994, the action thus implemented the General Agreement on Tariffs and Trade (GATT) provisions which institutes

³ Per 17 USC § 115, the recording must reflect the original intentions of the work and cannot be used to create a derivative work.

copyright restoration⁴ of certain foreign nationals. Though the United States joined the Berne Convention in 1989, not all restorations had been observed and many copyrighted works had been reprinted or published in the United States. As those works were legally purchased at that time, organizations that own a work that has been restored may continue to use it in its original form free without paying fees for use. Librarians refer to such works simply as ‘GATT Works’ and a comprehensive listing of such works can be found on the ASCAP website (ACE Title Search: Works Restored to Copyright Protection).

Additional copyrighted elements added to a GATT restored work will require rights even if your organization owns the materials. Note that by U.S. standards, these works are afforded the same protection that should have been afforded at the time of publication.

Example: The orchestra is performing a concert including Sergei Prokofiev’s *Peter and the Wolf* from a legally purchased set, with narration and dance. The original narration is not subject to rights as it was part of the published work; however rights would need to be obtained from the copyright holder of the music to add dance.

PRACTICAL APPLICATIONS OF COPYRIGHT⁵

Works in the public domain (not protected by copyright) do not require a license. Apart from performance licenses, there are a myriad of dos and don’ts with regard to the actual printed parts your orchestra will be using. For performances in the US, the following charts and commentary are a summary of the issues involved.

Materials in the Public Domain and available for purchase

Acquire	Duplicate	Perform	Broadcast	Record
From your preferred music dealer	no restrictions	no license required	no license required	no license required

Materials protected by copyright and available for purchase

Acquire	Duplicate	Perform	Broadcast	Record
From your preferred music dealer [see Note 1]	not permitted [see Note 2]	license required	Often an additional rental fee; broadcasting stations require license from your performing rights organization	Often an additional rental fee; recording company must have license from copyright owner

Note 1: In the United States, the vast bulk of works with restored copyright protection by the GATT treaty fall into this category. Most of them are not longer available for purchase, but if your orchestra had purchased them while they were in the public domain they would be in this category.

Note 2: The U.S. copyright law does permit the duplication of materials protected by copyright if one is replacing worn-out materials and the copyright owner will not make replacement materials available at a reasonable cost. This does not

⁴ The ruling in *Golan v. Holder*, 565 U.S. ___ (2012) upheld that the government does have authority to restore works that have passed into the public domain.

⁵ ‘Practical Applications of Copyright’ from *The Music We Perform: An Overview of Royalties, Rentals, & Rights* reprinted with permission from L. Tarlow and R. Sutherland, © 1998/2003, rev. 2004.

change the copyright status of the work, and licenses are still required to perform, broadcast, or record. This is a fine point of law. You would be advised to check the applicable law in your own country.

Materials protected by copyright, and available only on rental

Acquire	Duplicate	Perform	Broadcast	Record
From your preferred music dealer [see Note]	not permitted	license required	Often an additional rental fee; broadcasting stations require license from your performing rights organization	Often an additional rental fee; recording company must have license from copyright owner or agent

Note: Certain protected works have at one time been available for purchase and are now rental-only works. In some case these works can be obtained from a dealer who acquired these materials when they were available for purchase and now rents them. In those cases, the chart for materials protected by copyright and available for purchase would apply, except for the acquisition column.

Materials in the public domain, but available only on rental

Acquire	Duplicate	Perform	Broadcast	Record
From whomever has them	not permitted [see Note 1]	no license required	no license required [see Note 2]	no license required [see Note 2]

Note 1: Duplication of materials in the public domain is permitted unless the rental agreement contains a prohibition against duplication or distribution.

Note 2: Broadcast or recording of works in the public domain is permitted unless the rental agreement contains a prohibition against broadcast or recording. An additional rental fee could be charged, but this is not a licensing fee.

If I'm touring internationally, whose copyright laws do I follow?

Rights Required When Touring

If your orchestra is touring in another country there are some other issues to consider. Certain works that are clearly in the public domain in one country may be protected in other countries. These are generally works whose US copyrights lapsed naturally after the old 56 year term, but whose authors lived into the middle the 20th century, making their works protected by a "life-plus" term still protected in other countries. The typical example of this is Richard Strauss's famous tone poems. His most popular orchestral works were all written in the 1890's, and their US copyrights ran out long ago. Reprint editions of these works are generally used by American orchestras. However, Strauss died only in 1949, so his works are still protected for the time being in other countries. For this reason, the use of American reprint editions is not permitted outside the US. In general, when performing such works, a US orchestra notifies the US agency of the foreign copyright owner of the performances and pays a fee in order to use these materials in a country where they would normally be prohibited. If your orchestra can perform from the actual original European-published parts for such a work, there is no fee payable.

Another issue with regard to touring is the acquisition of the proper performance licenses. Performance licenses from ASCAP, BMI, or SESAC are valid only in the US. Orchestras touring outside their own country should include in their contract with the presenter language that makes the presenter responsible for the performance licenses and the orchestra responsible for rental fees.

Conversely, if your orchestra is presenting a foreign orchestra on tour in your country, your blanket performing license may cover all of your presentations. If you do not have such a license, it is possible that the venue has its own license which will cover all performances in that venue. Again, the foreign orchestra should be responsible for all rental fees, and the presenter should be responsible for licenses.

Are there instances in which I can use copyrighted materials without permission?

Fair Use

Fair Use is an exception in which there are circumstances and conditions that allow for the use of copyrighted material without permission, with similar laws throughout the world. United States copyright law (17 U.S.C. § 107) defines Fair Use as:

Notwithstanding the provisions of sections 17 U.S.C. § 106 and 17 U.S.C. § 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The first three factors are generally weighted the most in court cases; though do note that there is no fixed percentage of a work that can be used. In 1985, *The Nation* magazine printed about 13% of the then unpublished memoir by former U.S. President Gerald Ford. Even with a small excerpt such as that, it was found to be in violation of Fair Use.⁶ A further unlisted factor often used in court decisions is the moral intention: did the person employing Fair Use intend harm?

It is a fine line in determining whether use of copyrighted material is Fair Use or a Derivative Work. The transformative nature of the copyrighted materials is the key.

Derivative works are defined under the United States Copyright Act of 1976 as follows:

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast,

⁶ *Harper & Row v. Nation Enters*, 471 U.S. 539 (1985)

transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”⁷.

Most notably, if the original work is under copyright, permission is required to create a derivative work and if granted assumes the copyright protection of a new work. The heart of Fair Use is to ‘promote’ and build upon for the betterment of science and the arts, as stated below in a United States Supreme Court finding:

Although [a finding of] transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use. The central purpose of this investigation is to see...whether the new work merely [supersedes] the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message; it asks, in other words, whether and to what extent the new work is transformative.⁸

Example: Using M.P. Moussorgsky’s original piano score of *Pictures at an Exhibition* to create a new arrangement for chorus would be legal and could be done without any permission as the work is in the public domain. However, if the Ashkenazy orchestration, composed in 1982, is the basis for the new arrangement, permission would be required from the Ashkenazy estate. If an excerpt of the Ashkenazy orchestration were to be used in a research paper discussing various composition techniques, depending on the usage this could qualify for Fair use.

Are there any other special considerations for copyright that haven’t been mentioned?

Anomalies

Each territory will likely encounter various copyright anomalies not applicable to the masses, such as different copyright terms for posthumous works.

- United Kingdom: Graphical layout of published works can be copyrighted by 25 years from publication date even if the content is copyrighted to another individual.
- Czech Republic: Like many countries, works published by the government are automatically in the public domain, affecting Suprahon works from 1948-1989.
- France: To compensate for both World Wars, French composers that died before 1995 with works published within various confines enjoy an extended copyright period.
- Russia: Due to the drastic change in government, there have been many changes to copyright protection since 1917. One in particular is that publications Muzyka are generally in the public domain, having been a government establishment.

Critical Editions

The copyright of Critical Editions, Urtext, and Scientific Editions vary widely depending on territory and type of work. Article 5 of the Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights for the European Union (‘Term Directive’) states:

⁷ 17 U.S.C. § 101

⁸ *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569 (1994)

Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be 30 years from the time when the publication was first lawfully published.

Surprisingly this is rather vague and in effect disharmonizes copyright laws between the European Union, allowing each country to decide what copyright duration, if any, to impose on such editions: Germany has a term of 25 years, Poland maintains 30 years and Italy maintains 20, for example, with this article contradicting previous ideals of the Berne Convention. Further, works with text are treated as a separate matter entirely; a critical edition with a new translation constitutes a modification that qualifies for autonomous copyright protection as a derivative work. Most European countries adhere to laws of indivisibility, meaning the one cannot simply opt not to use the translation or only use orchestral parts which do not contain said translation, avoiding copyright.

A major difference between United States/Canadian and European copyright law is the acknowledgement of critical editions as either a derivative work or copyrightable if the original material is in the public domain.

Example: A new translation of a *Die Zauberflöte* has been added to the Bärenreiter critical edition. In European territories, this will become a new work, with the copyright term of life +70 of the editor. As the text cannot be divided from the work and regardless if the translation is used, the work is under protection and if staged would necessitate payment of Grand Rights.

Final Words

Successfully navigating through copyright law is a complicated endeavor, with little case law to outline the nebulous parts. Knowing the copyright laws of your country, what rights ought to be paid, and determining policies for one's organization on which both management and librarian agree are a step in the right direction. And of course, be sure to always read the rental contracts!

Further Reading

Crews, Kenneth D., *Copyright Law for Librarians and Educators*. 3rd edition. Chicago: American Library Association, 2012. [Contains an extensive guide to further reading. Appendix A reproduces selected provisions of the U.S. Copyright Act. Several chapters deal with Fair Use.]

Heald, Paul J., "Payment Demands for Spurious Copyrights: Four Causes of Action" (1994), *Journal of Intellectual Property Law*, Vol. 1, No. 2 (Spring 1994), pp. 259-292. [Argues that spurious copyrights induce the unwary to pay for p.d. material.]
http://digitalcommons.law.uga.edu/fac_artchop/344

Heald, Paul, J., "Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music" (1996), *Duke Law Journal*, Vol. 46, No. 2 (November 1996), pp. 241-290. [Argues that new editions of p.d. music do not deserve copyright protection in the US because they lack originality; cites cost to public if p.d. works are placed in copyright.]
http://digitalcommons.law.uga.edu/fac_artchop/375

Lauterstein, Henry W., "Copyright Concerns with 'Critical Editions' of Operatic Scores" (1987) *Entertainment and Sports Lawyer* Vol. 5, No. 4, pp. 3-26. [Argues that critical editions of p.d. operas are not protected by copyright.]

Margoni, Thomas, and Mark Perry, "Scientific and Critical Editions of Public Domain Works: An Example of European Copyright Law (Dis) harmonization" (2011), *Canadian Intellectual Property Review* Vol. 27, pp. 157-170. [Discusses European law regarding critical editions.]
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961535

Mazzone, Jason, "Copyfraud" (2006) *New York University Law Review*, Vol. 81, pp. 1026-1100. [Argues that copyright is falsely claimed on modern editions of Shakespeare, Beethoven, Monet, the US Constitution, and etc. Claims lack of civil penalty for falsely claiming ownership of p.d. materials has led to "copyfraud" on massive scale. Suggests Congress amend Copyright Act to allow civil penalties, and establish registry of p.d. works, with new symbol to designate p.d. materials.]
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=787244

Standler, Ronald B., "Copyright for New Editions of Public Domain Music in the USA" (2009) [Argues that while critical editions are not protected under current US copyright law, new laws should be added to protect them.]
<http://www.rbs2.com/cmusic2.pdf>