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Copyright Concerns

By Scott Watson

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The word *copyright* means just what it implies: the right to copy. Copyright laws try to keep up with the constantly changing technology that is used to make copies of protected material — whether it's produced by a mimeograph machine, a photocopier, a computer, or an audio recorder. But recent strides made in technology (Web downloads, ubiquitous CD/DVD burning, sampling, and the like) have stretched existing laws and prompted the creation of new ones.



FIG. 1: The Bands of America copyright Web page contains lots of useful information and links.

In this article, I'll share some general principles and relevant anecdotes that illustrate some of the problems. I'm a music educator, however, and not an attorney, so for more-specific information and the particulars of copyright law as it relates to teaching music, I've provided a list of helpful agencies and organizations (see the sidebar "Copyright Law Resources").

WHAT IS FAIR USE?

Many music teachers incorrectly rationalize their actions by saying they fall under the category of either *fair use* or *public domain*. Fair use, which allows people to use protected material in a very limited way and without a fee, is an idea that is often misunderstood. The mere fact that the music you'll be appropriating is for educational use, for example, doesn't automatically make its use "fair" from a legal standpoint.

To qualify as fair use, your use of the material must not substitute for or discourage normal sales. In other words, if what you want to do would circumvent you or your students having to make a purchase, it's suspect. Second, you can use only a brief excerpt, not a complete work or movement. Third, the use must be noncommercial in nature.

Even if the way you plan to use the music qualifies as fair use, you must cite the original material appropriately. For instance, if a student uses a 30-second excerpt of Michael Torke's "Javelin" in a PowerPoint presentation about music and sports, he or she should provide information about the recording, including the composer, title, performers, record label, and publication date.

IN THE PUBLIC DOMAIN

Music that has not been protected by copyright is said to be in the *public domain* and can be used for free. In those cases, either the copyright has expired, the material belongs to the federal government, or the composer failed to legally protect the work. In general, a piece of music enters the public domain 70 years after the death of its composer. Recent arrangements, however, of music by long-departed masters such as Bach, Beethoven, and Mozart can be protected, even though the compositions are in the public domain. Most arrangements written for school ensembles are commercial products, and you can't use them for free.

The first time you encounter what you believe is a fair-use situation, you should check it out with either the copyright holder (which could be the publisher, the composer, or some third party) or an agency that represents the holder. Sometimes your due diligence will pay off in unexpected ways. After seeing the Tony Award-winning Broadway musical *Titanic*, I wanted to arrange a medley of composer Maury Yeston's themes for my 5th- and 6th-grade band. The publisher, Cherry Lane Music, not only allowed me to make and perform the arrangement but also put me in email contact with the composer. Since we record our concerts, I had to pay a reasonable mechanical license (pennies per CD), but the experience was worthwhile.

ARRANGING AND PERFORMING

Each year, hundreds of high-school band directors arrange, or pay to have arranged, protected music for their marching bands, indoor drumlines, and other music programs. Although using that music without contacting the copyright holders has been fairly easy to do, some states and competition organizations are very diligent about encouraging their members to acquire permission properly. Note that obtaining permission to make an arrangement is not the same as receiving permission to perform the arrangement. In some cases, a composer's royalty is based on the size of the venue and whether admission is charged. When you seek permission, you may be asked for those details.

In 2005, a high-school director from the Midwest contacted my publisher about adapting one of my percussion-ensemble works for an indoor-drumline performance at the Bands of America competition. I was tickled at the prospect and convinced my publisher to make it happen inexpensively, since it would be free advertising.

Many tech-savvy band directors use notation software to create custom parts for published music. Say, for instance, you have no tuba in your elementary school band. You can scan the tuba part into MakeMusic's Finale or Sibelius Software's Sibelius notation program and change the clef and key so that a baritone saxophone, or even an alto sax (with the part transposed an octave or two), can play the part. According to the permissions department at Alfred Publishing, that sort of use is permissible most of the time.

Say, however, that the piece in question lacks a clarinet part that challenges your best players, so you write your own advanced clarinet part. That constitutes adding creative content, so you have to get permission from the publisher to do it.

TRUTH OR CONSEQUENCES

Using email or fax, it's simple to chase down a contact and request permission to use a copyrighted piece. To get contact information for a publisher's permissions department, visit the publisher's Web site (see Fig. 1).

Remember, however, that technology has made it easier for copyright holders to discover illegal copyright violations, including violations by music educators. I met a high-school band director who, along with his district, was threatened with a suit for including protected music in his marching band's field show. His use of the piece was discovered because an attorney for the law firm saw the information on the marching band's Web site while *trolling* the Web for violations. The technique of trolling is used not with the intent to prosecute but rather to achieve an out-of-court settlement, which, in this case, the band director's district was reluctantly going to pay.

RECORDING AND BROADCASTING

Before you record and sell a CD of your high-school choir's next concert, you must resolve several mechanical-license questions. Is any of the music you plan to perform under copyright protection? Unless all of the music is in the public domain, the answer to that question is probably yes. If you or your school are also doing the actual recording of the project, you must obtain a mechanical license from each publisher of copyrighted music on the program. This is not expensive (for instance, Alfred Publishing charges \$0.085 per unit for one of its band pieces), but getting the licenses takes some time.

If you don't mind paying a little more, you can get the mechanicals through the Harry Fox Agency (see the sidebar "Performing Rights Societies and Agencies"). If you use a professional recording service, find out if it will obtain the licenses for you; if not, you must get them yourself.

School ensembles occasionally perform for television or radio broadcast. In those instances, you should get permission well before the performance. In addition, if you want to post a performance of protected music on a Web site, you must first get permission from one of the music-licensing agencies or directly from the publisher.

POSTING ON THE WEB

The ease of creating Web pages and the proliferation of such resources to augment music courses raises many issues related to fair use of copyrighted material. Posting recorded excerpts of protected music involves many variables, including the following:

- **Length**

Is the recording an entire section or piece, or is it just a brief passage?

- **Production**

Did you record the piece, or did a recording service do it? Is it a commercial recording that you purchased, such as the CD that came with your music-appreciation text, or is it a professional orchestral recording?

- **Web-site access**

Is the site open to all visitors, or is it open only to certain users by means of a password (as with the Blackboard system at www.blackboard.com)?

MIDI files present a further complication when posting music online. I encountered that fact when I tried to post MIDI-file realizations (sequences) of concert selections on a Web site for my first- and second-year band students. I had students play along with these accompaniments during school lessons in the weeks before our full-band rehearsals started, and I wanted them to be able to do the same from home.

Even though I created the MIDI files, they were of published compositions. Furthermore, I wanted to post entire selections, not just excerpts. So I needed to contact the publishers (using email and fax) to supply them with the vitals (title, composer, arranger, copyright date). I've done that for years and have received permission at no cost from every publisher except one.

U.S. copyright law states that you must receive the copyright owner's permission prior to publishing or posting music on the Web. In practice, if you do violate a copyright on the Web, you will usually be contacted and given the opportunity to comply or remove the protected material before legal action is taken. That doesn't mean it's okay to post something on the Web until someone tells you to desist; it's not okay, so get the permission first.

COPYING PARTS

Publishers of ensemble music must perform a balancing act when they have the instrumental parts that they want to include in a set. The standard size of a band or of a section within a band, varies greatly according to school, district, and state or region. Because of these variants and despite the publishers' best efforts to get it right, they will inevitably not send enough copies of some instrument's part for your ensemble. Or sometimes the set you receive has enough of everything, but you want more copies because you aren't certain if your students will return the music in good condition when the concert is over. Although copying music in those cases would be convenient and is often done, it is still wrong.

The same applies to out-of-print music that you can't find and are therefore unable to purchase. You are not entitled to make extra copies of a piece of music in your library, for example, just because the work is no longer in print. Instead, you must contact the publisher, who will grant you a license to make the number of copies you need, usually for a reasonable, one-time fee.

Fortunately, more music for schools is increasingly being published electronically. This music is generally less expensive than print music and allows for an unlimited number of copies to be printed. Visit Jon Ross Music at www.pdfband.com for an example of such an electronic publisher.

FILE SHARING

I teach a high-school AP music-theory class. The Apple iTunes Store has bailed me out many times when I've needed some listening examples. I can download a wide variety of music to use for examples in class for just 99 cents each. There are legal limitations, however, on how you can copy downloaded music.

You and your students are doubtless aware of the high-profile intellectual-property lawsuits launched in recent years by recording companies against thousands of people (many of them students) who downloaded music from Web sites such as Napster and Kazaa, which facilitated file sharing. You might think that that problem involves only kids, but if you download, for example, Diana Krall's latest CD from the iTunes Store and burn copies for your entire jazz band, you're doing the same thing.

Similarly, if a trumpeter in your section brings in his new Rick Braun CD for you to listen to, it is not okay to rip a few tracks for your collection. Instead, why not get your school or parent organization to purchase a subscription to an MP3 download site such as emusic.com (see Fig. 2) and use the ample number of monthly downloads allotted to start a slammin' band-room library?

COPY RIGHT

As technology continues to evolve, it also keeps presenting new means of copying as well as causing untested and legally unclear copyright scenarios. Many school districts, in an attempt to keep pace with this shift, have implemented new policies and in-service training regarding working with copyrighted material.

Those efforts, however, are often geared toward classroom teachers of academic rather than artistic subjects. In many cases, that leaves music teachers to fend for themselves, sometimes making copyright decisions that seem reasonable but are, in fact, illegal. The next time you need to make a decision involving copyright that you are unclear about, you should take the following steps:

Check it out

The answers to most music teachers' everyday copyright questions can be obtained quickly and easily by visiting a Web site or two.

Ask around

You may have a colleague who has already encountered a similar scenario. Using information found on the Web, it's fairly easy to contact publishers and their permissions departments by email and fax. If you have serious concerns, however, your best source is an intellectual-property attorney. By drawing on your personal and professional network, you might be able to find an attorney who will donate a few minutes of his or her time to advise you.

Err on the side of the artist

When music teachers circumvent copyright law, it's usually done more as a matter of convenience than as an attempt to save money. This is easy to understand, given that our personal and professional schedules are usually full and our ability to multitask is often stretched to the limit. Keep in mind, however, that we teach our students an important lesson about the worth of art and creativity when they observe our attitude toward copyright.

In many cases, our school districts are willing to pay for the right to use music in its many forms, but we haven't pursued that avenue, because it can take a little time. Don't underestimate your role as a teacher of music (and therefore also as a consumer of music) in communicating the importance of copyright ethics in these challenging times for the arts.

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Copyright Law Resources

It's best not to assume anything when it comes to fair use, public domain, and other copyright issues that crop up in music education scenarios. There are dozens, if not hundreds, of Web resources that explain the copyright law as it pertains to educators. Here are a few that I have found useful.

Bands of America "Copyright Resource" on www.bands.org/Public/resourceroom/copyright

MENC Music Education Copyright Center www.menc.org/information/copyright.html

Missouri Dept. of Education "Copyright and Schools" on <http://dese.mo.gov/divimprove/curriculum/copyright>

Music Publishers Association Copyright Resource Center "Frequently Asked Questions" on www.mpa.org/copyright_resource_center/faq

U.S. Copyright Office www.copyright.gov

University of Maryland "Copyright and Fair Use in the Classroom, on the Internet, and the World Wide Web" on www.umuc.edu/library/copy.html

University of North Carolina "When U.S. Works Pass into the Public Domain" on www.unc.edu/~uncclng/public-d.htm

University of Texas "Fair Use of Copyrighted Materials" on www.utsystem.edu/OGC/IntellectualProperty/copypol2.htm

Whatiscopyright.org "What Is Copyright Protection?" on www.whatiscopyright.org

I also highly recommend Jay Althouse's book *Copyright: The Complete Guide for Music Educators*, 2nd Edition (Alfred Publishing, 1997).



FIG. 2: Sites such as emusic.com facilitate searching for and legally downloading music of all styles.

Performing-Rights Societies and Agencies

If you want to obtain copyright information regarding a piece of music, you can always start with the publisher. Composers in the United States, however, are usually affiliated with one of three major performing-rights agencies. In exchange for a percentage of fees paid to license protected music, these groups monitor performances and broadcasts and return a royalty to the composer. Each organization has an online searchable database that you can use to obtain copyright information about a piece:

ASCAP (www.ascap.com)

BMI (www.bmi.com)

SESAC (www.sesac.com)

If you want to make a recording of protected music, you should consult with the Harry Fox Agency (www.harryfox.com). The Harry Fox Agency represents more than 27,000 music publishers and is the primary place to turn for a mechanical-use license (that is, permission to use music reproduced in any media, such as CD).

Finally, if you want to post recorded protected music (such as a CD produced by a record label) on a Web site, you need a sound-recording license. SoundExchange (www.soundexchange.com) is a nonprofit performance-rights organization designated by the U.S. Copyright Office to collect and distribute statutory royalties to sound-recording copyright owners and artists. Visit this site to obtain a license and to get general information on sound-recording licenses and music copyright issues (see Fig. A).



FIG. A: The Licensing 101 page of SoundExchange's Web site presents frequently asked questions and answers about sound-recording licenses.

Find this article at:

http://www.metmagazine.com/tutorials/copyright_concerns_music_programs/index.html

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