by Tim Drummond

Understanding Copyright and Fair Use in the Music Classroom

Abstract: Many music educators do not sufficiently understand the complicated system of U.S. copyright law or what constitutes "fair use," resulting in both illegal and overly conservative practices. Increasingly accessible recording and distribution technology has also led to common practices such as posting performances on YouTube, creating rehearsal tracks, and student arranging projects for performance. Though current laws are not designed to address these practices, musicians and copyright holders alike seem to have moved on without legislation. This article offers a brief summary of copyright law as it pertains to music teachers, including discussions of fair use and the public domain and some legal alternatives to copyright infringement.

Keywords: arranging, copyright, fair use, infringement, performance, rehearsal track, YouTube

Knowing about copyright law can help you avoid problems in your music classes and rehearsals and also help you teach your students about intellectual property rights.

Have you ever had a student lose your only copy of the third clarinet part on the day of your spring concert? Ever made practice tracks for your students and posted them to the class website? Do you photocopy your music so that your students have the markings written in? What about making arrangements for a student a cappella group? Or posting your concert video to YouTube?

In these and countless other situations, music educators enter into the inconsistent, often confusing world of copyright law. In my experience, many teachers have a poor understanding of this world, other than a vague impression that "fair use" gives you some sort of leeway. Since they are not sure how much leeway that is, many people essentially make up their own rules. The results range from never making any copies of any kind for any reason to assuming that nearly any form of copying falls under fair use because it is "for school."

The biggest reasons for these misunderstandings are that (1) copyright law itself is not clear and (2) the law has not kept up with practice. Because copyright law is not clear, copyright holders and publishers often come up with their own guidelines, which are not necessarily consistent with copyright law (some of which I discuss in this article). Because the law hasn't kept up with common practice, entire forms of music-making, arranging, discovery, and distribution that happen every day could potentially violate copyright law, even when content creators themselves approve.

Some readers will realize their common practices are probably copyright infringement; for those, I will suggest legal (and often free) alternatives to breaking the law. Others will discover that they have more rights than they knew and can begin exercising them to the benefit of their students and to the relief of their budgets.[1]

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Copyright, in Brief

The purpose for our copyright laws, established in the United States Constitution,[2] is well summarized in a 1975 Supreme Court opinion: "The immediate effect of our copyright law is to serve a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[3]

For something to be copyrightable, it must be "fixed in a tangible medium,"[4] which is to say that you cannot simply copyright ideas. As soon as you write it down or record it, however, it is copyrighted—no need to publish or register it (though prior to 1989 a copyright notice was required in order to receive protection). Table 1 gives you an idea of how long that copyright lasts (and how complicated it is!). The work must also be original and display some level of creativity to be copyrightable. The landmark Supreme Court case for this, oddly enough, came from an attempt to copyright a phone book (*Feist v. Rural Telephone Service*, 1991). The ruling said a work made purely of facts (names, phone numbers, and addresses) merely organized in a conventional way (A–Z) is not original enough. The "sweat of the brow" that went into making the final product does not make it copyrightable.[5] By that same logic, a meticulously edited publication of Handel's *Messiah* also fails to qualify for a copyright, despite the work that goes into preparing it (though publishers would have you believe otherwise), because it is not creating anything new.

Rights of the Copyright Holder

Copyright holders are entitled to the right to reproduce, publicly perform (including sound recordings), distribute copies (sale, lease, rental, etc.), and create derivative works from their creation.[6] To do any of these things, you are generally required to get permission from the copyright holder (and usually pay a license fee). A derivative work is a new creation based on some existing material. Most venues that host live music or play recorded music pay a licensing fee (to ASCAP, BMI, or SESAC), but nonprofit schools are exempted from this licensing requirement when performances are an integral part of the curriculum.[7] Extra performances (e.g., singing at the grand opening of a new shopping center) are probably not exempted the same way and would require licensing, however. There are, of course, exceptions to these rules, including fair use.

Fair Use

A rigid and inflexible view of copyright law would do inordinate damage to its goal of enhancing the public good. To prevent that situation, Congress codified the doctrine of "fair use," a set of criteria by which limited copying of protected works is allowed. Fair use is determined using the following criteria:

1. purpose, including whether the use is for commercial or nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion being used in relation to the whole work;
4. the effect of the use on the potential market value of the copyrighted work.[8]

If you think those fair use criteria are vague and confusing, you're in good company.

Congress seems to have left them intentionally flexible to allow for new technologies and uses of copyrighted works. However, this flexibility makes it difficult for individuals to decide whether a given use is considered "fair." Alongside the 1976 Act, Congress put forth additional guidelines for nonprofit educational settings (Table 2),[9] in which they described instances of copying that need no special permission.[10]

Though not officially part of the law, these guidelines were intended to "state the minimum and not the maximum standards of educational fair use" of music.[11] However, as University of Illinois law professor Jason Mazzone explains, "[w]hile intending to state a *minimum* amount of copying that is permitted by fair use, the guidelines tend to be treated as establishing a fair use ceiling; rather than encourage fair use . . . they end up constraining it."[12] Vagueness in the law also leaves room for overreach on the part of copyright owners. As Mazzone said, "[w]hen ordinary users cannot themselves determine whether a proposed use would be fair, copyright owners are able to assert that *any* use would constitute infringement."[13]

The blunt notice, "Any photocopying of this publication is illegal," found at the bottom of many music scores, appears to be the publishing industry's standard attempt to ban all copying, fair or not. For example, the Music Publishers Association (MPA) maintains a Copyright FAQ page, where it states, "Permission for duplication, for any purpose whatsoever, must be secured from the copyright owner."[14] Clearly this is not true, as the official guidelines from Congress lay out several instances where copying is allowed. MPA asserts that even printing the words in your school concert program is infringement.[15] If the MPA position were the law (and many other publishers disseminate similar information),[16] there would be no such thing as fair use. The whole purpose of fair use is to be able to use works without obtaining permission!

Public Domain

Works that were never copyrighted or whose copyright has expired are available for anyone to use; the term *public domain* means that the work is not subject to copyright. Virtually everything published prior to 1923 is in the public domain (refer to Table 1 for others). Anyone can make an unlimited number of copies or recordings of public domain works, and derivative works based on public domain material are even eligible for their own copyright. There are many great resources that offer free access to public domain music scores—see Table 3 for examples.

Public Domain: What You Can Do

You *can* copy modern reprints of public domain music. Since no one owns

TABLE 1

Copyright Term Limits

Date of Publication	Copyright Term
Unpublished	Life of the author + 70 years
Unpublished, anonymous or corporate authorship	120 years after publication
Pre 1923	Public domain
1923–1977; published without copyright notice	Public domain
1923–1963; published with notice but not renewed	Public domain
1923–1963; published with notice and renewed	95 years after publication date
1964–1977; published with notice	95 years after publication date
1977–2002	Depending on date of creation and whether work was published with copyright notice, copyright term could be author's death + 70 years, 95 years from publication, or 120 years after creation, whichever is shortest
After 2002	Author's death + 70 years; for work made for hire, 95 years from publication or120 years after creation, whichever is shortest

TABLE 2

Basic Fair Use Guidelines

Single copies for teachers
A chapter from a book
An article from a newspaper, etc.
A short story, essay, or poem
A chart, graph, diagram, cartoon, or picture from a book, periodical, etc.
Multiple copies for classroom use (must include copyright notice on each copy)
Poem or excerpt of poem 250 words or less
2,500 words or less of an article or essay
1,000 words or 10 percent of any other prose writing
One illustration or picture
Not more than one work/two excerpts per author; not more than nine instances per class per term

Note. These fair use guidelines do not necessarily apply to private, for-profit, or studio teaching.

TABLE 3

Free Sources of Public Domain Music

Source	Website
Choral Public Domain Library	www.cpdl.org
International Music Score Library Project	www.imslp.org
Art Song Central	www.artsongcentral.com
MUSOPEN	www.musopen.org
The Mutopia Project	www.mutopiaproject.org
Project Gutenberg	https://www.gutenberg.org
Open Hymnal Project	www.openhymnal.org

the copyright to this work, publishers are free to sell it, but anyone else is free to *copy* it as well.[17] Some publishers compile, annotate, or translate public domain works, then affix copyright notice to the entire work, which deters many people from copying them. For example, Brahms's works are in the public domain, yet a 1973 copyright appears at the bottom of my copy of his *Zigeunerlieder*. A comparison of my Schirmer "copyrighted" edition[18] and an 1888 printing obtained from IMSLP[19] show no differences, yet the publisher still claims that "photocopying is illegal." *This is false.*[20] The only thing in the music that is eligible for copyright is the English translation (a certain amount of creativity is required for a translation, especially one that fits the music well enough to be singable).[21] However, all one must do to legally copy this sort of piece is mark out the translated text.

The effect of publishers affixing misleading copyright notices to public domain content is actually quite large. Published sheet music costs an average of $0.30 per page, while photocopies cost about $0.03 per page[22] and typically do not come out of the music teacher's budget. If each of America's 26,000 public high schools purchase a class set of just one piece of public domain music rather than legally copying it, publishers collect nearly $1 million in unnecessary

spending, and each school spends ten times what was needed.[23]

Publishers, who assert that editorial work is and must be protected by copyright, claim that these pieces would be lost without their hard work and without copyright protection it is not economically viable to continue printing music that is in the public domain. As the aforementioned Court case about the telephone book said, "sweat of the brow" does not earn a copyright.[24] Lawyer and writer Stephen Fishman said, "Often, editors who assemble a new edition of a public domain work will correct misprints in the original or later editions of the work. Although extremely helpful, such corrections are not 'original' in the copyright sense and are definitely not copyrightable."[25]

What You Cannot Do

Do Not Copy Anything *Added* to a Public Domain Work

This includes any editorial notes, background information, and translations. This does not include mechanical acts such as re-cleffing or re-barring a piece to modernize its notation, transposition, or correcting errors. Logic would also dictate that this does not include simple editorial addition of dynamics, articulation, tempo, and the like, although there is no definitive case law on copyright protection for such markings.[26] As mentioned before, if there is new material embedded in the original music, simply mark out the additions, and you are free to copy away. Many keyboard reductions *are* original enough to constitute a copyrighted work, but it is unclear what the standard of creativity is for this, and when in doubt, it is wise not to copy them.

Do Not Confuse a Derivative Work for Its Public Domain Original

As mentioned previously, derivative works are eligible for their own copyright, and teachers must be careful not to mistake them for public domain pieces. For example, an SSA arrangement of Mozart's *Dies Irae* would be copyrighted since it is a new, derivative arrangement of the SATB original. When in doubt, a quick Internet search will probably reveal the original voicing or arrangement for you.

Do Not Copy Recordings Just Because the Work Itself Is in the Public Domain

Each recording has its own copyright apart from the work being recorded, and there are very few public domain recordings that exist (how many pre-1923 recordings are out there?). While you can, for in-class use, include copyrighted sound recordings in a presentation, you could not distribute copies to your students. Uploading a copyrighted recording to your website for streaming or downloading may also constitute copyright infringement and is not allowed.

Arranging, Performing, and Sharing Copyrighted Music

Collegiate and high school a cappella groups are massively popular forms of music-making, and many student groups do their own arrangements of pop music (derivative works). Marching and pep bands similarly make use of popular music for performance at school events. You may be surprised to learn that in many cases, these practices could violate copyright law if they have not first obtained permission, even if they do not charge admission.

Arranging for Public Performance

Since the creation of derivative works is protected in the Copyright Act, you must obtain permission before creating one, even if you are not charging admission, even if it is a onetime thing, even if it is a student doing the arranging, and so on (a limited amount of simplifying is allowed and is not considered a new arrangement, as long as the underlying character of the work is unaffected). What is more, the copyright holder can refuse permission: unlike sound recordings, there is no "compulsory" licensing of derivative works or of public performances.

Since so many groups do their own arranging (typically without expressed permission), a strict enforcement of the law could essentially wipe out the practice of this sort of a cappella singing. It is not clear how student-arranged a cappella music does any damage to the copyright holders, especially when in many cases there is no official arrangement available for purchase or any plans to make one. What is clear, though, is that common practice and the law are at odds with one another, leading many to call for reform that includes compulsory arranging and performance licensing for this sort of situation. Musician and intellectual property lawyer Jonathan Minkoff has suggested this very thing and argues further that "the right to arrange for the purpose of performing under a venue's blanket license is IMPLIED [*sic*] by the blanket license itself"[27] because, he says, *any* deviation from the original piece is technically a new arrangement. While I do not think it realistic to consider mistakes or extremely minor variants a "new arrangement," his point is salient. Formal and informal arranging of copyrighted music for performance happens all the time, and the law does not seem to align with current practice.

Recordings: YouTube, Performance Recordings, and Rehearsal Tracks

While many are probably familiar with the famous *Metallica et al v. Napster* court case (2000) and know that unlimited sharing of song recordings is illegal,[28] there are myriad other ways in which we commonly "share" music today. Are we allowed to distribute or upload audio or video recordings of a school music ensemble's winter concert? Or sell a professionally recorded CD as a fundraiser? What about posting rehearsal tracks on a class website for students?

YouTube

When searching for new repertoire for my choir, I frequently visit YouTube and enter search terms like *All-State Chorus* to browse for new material. Since streaming services like YouTube are considered "broadcasts," each of the copyrighted songs I find would technically have needed a synchronization license in order to be legally uploaded. It is highly unlikely, however, that every mom in the audience with a cell phone camera obtained this permission. Is YouTube the next Napster, another pit of illegal activity?

This is another example of how the law has not kept up with practice. You Tube itself has actually created an efficient notice-and-takedown system that is beneficial to both copyright holders and the public. Using its "Content ID" system, YouTube scans uploads for copyrighted material and notifies the copyright holder of the infringement, offering several options: (1) mute the audio (for music), (2) block the whole video, (3) monetize the video by running ads with it, or (4) track the viewing stats, essentially leaving it alone.[29] In a recent study of U.S. number one hit songs uploaded to YouTube, 73 percent of the sample videos were monetized. Though that is a large number, it also shows that over one-fourth of copyright owners were happy to leave their music available for free without any sort of compensation and that those who chose to monetize were happy to circumvent the current licensing system.[30] In short, it is technically illegal to upload your students' performance of copyrighted music to YouTube, but if a copyright holder does not want your video online, it will simply be removed.

Performance Recordings

While fair use allows for "a single copy of recordings of performances by students . . . for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher,"[31] a mechanical license is required for any more copies to be made, even if they are given away for free; schools are not exempted from this requirement. Licensing is quite easy: the Harry Fox Agency acts as the intermediary for obtaining the license. The current rate is 9.1 cents per song, per copy (a 15-track album would cost only $1.37 per copy to license), and licensing can be done on the agency's website.[32]

Rehearsal Tracks

Many teachers create MIDI files or play/sing parts for practice tracks. Though the publishing industry would assert that you need a license to create practice tracks,[33] this is yet another legally murky situation. "Fair use" was meant to apply to face-to-face teaching (thus not applicable to what students access at home), but Congress could not have foreseen things like the Internet back in 1976. As society adapts to technologies, so too does the law, and I believe limiting the way rehearsal tracks are distributed can give you a strong case for fair use.[34] Rather than posting them on your website (where anyone can access them), you can email files to your students, post them in a password-protected space, or distribute physical CDs. If the publisher has rehearsal tracks available for purchase, creating your own probably does violate their copyright because you are "substituting for the purchase of music."[35]

Additional Scenarios

I Own a Single Copy and Distribute Photocopies to Students to See if the Piece Works

This is illegal, but it is also an easy problem to solve. Large music distributors often offer a no-risk trial period in which you can return any unwanted music for a refund. Consider purchasing a class set and simply return what doesn't work. Even easier: many sheet music distributors offer two- to three-page previews of the music on their websites, posted with permission from the publishers. These samples are not enough to perform, and my students recycle them after use. Though JW Pepper's (and likely many others') Legal Policy page has the familiar blanket ban on unauthorized copying,[36] conversations with company representatives have indicated that this practice is acceptable.[37]

I Own a Single Copy of a Piece—Can I Teach It to My Students by Rote?

Yes, though some would have you believe otherwise. According to Frankel's *The Teacher's Guide to Music, Media, and Copyright Law*, "[t]he right to perform a copyrighted work . . . is purchased when you buy an arrangement. . . . Teaching a song by rote . . . avoids paying the necessary licensing fees that would be required."[38] This claim has no legal foundation (it is perhaps worth noting that Frankel's book is published by one of the largest music publishing companies in America). If you are not making a copy of the music, you are not infringing on anyone's copyright. This also applies to sharing copies among students; you are not required to purchase one for every student in order to legally perform it in a not-for-profit setting.[39]

I Own Purchased Copies for All of My Students, but I Prefer to Distribute Photocopies and Keep the Originals in My Music Library

Teachers do this for many reasons: premarked "prepared" photocopies can save valuable rehearsal time and give clarity, purchased copies do not get lost or damaged, and so on. Many in the publishing industry assert that music has a "shelf life," and it is intended that with use, a piece will wear out and need to be replaced. University of Illinois Law Professor Paul Heald, himself a musician, thinks that "the fair use doctrine is flexible enough to support the practice [photocopying as described here] in a non-profit context," though, he notes, there are no specific legal cases on this

topic.[40] Following the logic of the "shelf life" defense, it would also be illegal to laminate copyrighted music or other materials because it would eliminate wear and tear. Of course, the law does not extend this far, and that reasoning is inadequate to prevent the practice. This form of copying likely falls under fair use as long as all of the photocopies are collected and destroyed after use. It does add a substantial burden of responsibility on collecting and destroying the copies, however, and my own binders from college are full of unreturned photocopies and attest to how often they can slip through the cracks.

Another School Owns a Piece of Music I Would Like to Perform. May I Borrow It?

Yes. I believe this is an all too infrequently used scenario and have recently begun a shared library project with colleagues in my area. Participating teachers will share a catalog of their school's musical holdings, and the details of each request to borrow are handled peer to peer. In this way, we are all able to choose from a significantly larger selection of music without needing to purchase additional scores.

Do the Right Thing . . .

Navigating copyright law is not always an intuitive process. The law itself is vague, leaving room for misinterpretation by users and exploitation by content distributors. Court cases involving music are rare and do not provide enough detail to be widely applied, and the resulting confusion harms both sides. Through a better understanding of what the law actually says, teachers can embrace practices that are both respectful of the law and flexible enough to do what is best for our students.

Notes

1. *Nota bene:* I am a music teacher, not a lawyer. This article does not substitute for legal advice, and due to issues I discuss in the following, you may still be censored or sued for copyright infringement even if you are technically correct. Consult your principal, supervisor, or legal counsel as needed. This article was additionally reviewed for accuracy by members of the NAfME legal team. However, as the author notes, readers hold legal responsibility for understanding and adhering to copyright law.
2. US Constitution, Article I, Section 8.
3. Twentieth Century Music Corp v. Aiken, 422 U.S. 151 (1975).
4. 17 USC section 102
5. Feist v. Rural Telephone Company, 499 U.S. 340 (1991).
6. 17 USC section 107.
7. Places of worship are another example of nonprofit organizations that are generally exempted from paying performance licensing fees.
8. 17 USC section 107.
9. Ibid.
10. For more on fair use guidelines, see Ken Schlager, "Copyright Law: What Music Teachers Need to Know," last modified April 2008, http://musiced.nafme.org/resources/copyright-center/copyright-law-what-music-teachers-need-to-know/.
11. U.S. House, Committee of the Judiciary. "Copyright Law Revision, Together with Additional Views," http://www.copyright.gov/history/law/clrev_94-1476.pdf.
12. Jason Mazzone, *Copyfraud and Other Abuses of Intellectual Property Law* (Palo Alto, CA: Stanford Law Books, 2011), 42.
13. Mazzone, *Copyfraud*, 38.
14. Music Publishers Association, "Copyright FAQ," http://www.mpa.org/content/copyright-faq.
15. Ibid.
16. See, for example, Hal Leonard's copyright FAQ page: http://www.halleonard.com/permissions/faq.jsp
17. Bridgeman Art Library v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999).
18. Johannes Brahms, "Zigeunerlieder," ed. Maynard Klein (New York: G. Schirmer, Inc., 1973).
19. Johannes Brahms, "Zigeunerlieder" (Berlin, Germany: Simrock'sche Musikhandlung, 1888).
20. Jason Mazzone, "Copyfraud," *New York University Law Review* 81, no. 3 (2006), 1040–44.
21. Translations are considered "derivative works" under 17 USC section 101.
22. Paul Heald, "Reviving the Rhetoric of the Public Interest," *Duke Law Journal* 46, no. 2 (1996), 244–45.
23. U.S. Department of Education: http://www2.ed.gov/about/offices/list/ovae/pi/hs/hsfacts.html.
24. Feist v. Rural Telephone Company, 499 U.S. 340 (1991).
25. Stephen Fishman, *The Public Domain: How to Find and Use Copyright-Free Writings, Music, Art and More* (Berkeley, CA: NOLO, 2012), 108.
26. Woods v. Bourne, 60 F. 3d 978 (2d Cir. 1995).
27. Jonathan Minkoff, "Permission to Arrange for Live Performance," http://www.acappella101.com/home/permission-to-arrange-for-live-performance.
28. Metallica et al. v. Napster, Inc., 239 F. 3d 1004 (9th Cir. 2001).
29. Google, Inc., "How Content ID Works," https://support.google.com/youtube/answer/2797370?hl=en.
30. Paul Heald, "How Notice-and-Takedown Regimes Create Markets for Music on YouTube: An Empirical Study," March 2014, SSRN, http://ssrn.com/abstract=2416519.
31. U.S. House, Committee of the Judiciary, "Copyright Law Revision," 71.
32. Harry Fox Agency, "Licensing FAQs," http://www.harryfox.com/public/FAQ.jsp.
33. Hal Leonard Corporation, "Frequently Asked Questions," http://www.halleonard.com/permissions/faq.jsp.
34. Paul Heald, e-mail conversation with University of Illinois Law Professor, July 27–October 30, 2014.
35. U.S. House of Representatives, Committee of the Judiciary, "Copyright Law Revision," 71.
36. J. W. Pepper & Son, Inc., "Legal Notice," http://www.jwpepper.com/sheet-music/services-legal.jsp.
37. Phone interview with J. W. Pepper sales representative, July15, 2014.
38. James Frankel, *The Teacher's Guide to Music, Media, and Copyright Law* (Milwaukee, WI: Hal Leonard Books, 2009), 101.
39. E-mail conversation with Paul Heald.
40. At least one court has frowned on copies made from scientific journals when done for profit, but that is as close as it gets so far. See 60 F.3d 913 (2 Cir. 1994).