

Copyright Law: What Music Teachers Need to Know

By Ken Schlager

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Intellectual property has emerged from the legal backwater to become major news, with frequent high-profile cases of individuals and companies being prosecuted for the illegal use and distribution of copyrighted material. While teachers enjoy many exemptions under copyright law, the classroom does not shelter all uses. As teachers choose materials for their students, it is essential that they know where the legal lines are drawn.

The principle of copyright protection in the United States can be traced back to the Constitution. Over the years, Congress has codified these protections in succeeding versions of the Copyright Act. Acknowledging that education is a unique case, the 1976 act went out of its way to address teachers' pedagogical needs, creating exceptions to the law that allow certain uses of copyrighted material in a classroom setting. These exceptions were clarified in a set of voluntary guidelines jointly hammered out by parties representing the copyright holders and the educators, including MENC.

Here's the bottom line: Before using any printed or prerecorded material in the classroom or for any type of school performance, educators must evaluate whether the use falls under one of the Copyright Act's specific exemptions or those described in the voluntary guidelines.

Deciphering 'Fair Use'

For teachers, a key problem is deciphering the exceptions provided for them under the Copyright Act's "fair use" provision. "Fair use is the teachers' and the performers' and the lawyers' nightmare, because there are no clear answers to almost anything," says Jim Kendrick, outside counsel for the Music Publishers' Association (MPA), which represents the interests of print music companies and other publishers.

The voluntary guidelines are a great help in understanding fair use, but to avoid confusion, attorneys recommend looking at other classroom exemptions in the Copyright Act. Rob Kasunic, principal legal advisor for the U.S. Copyright Office, cites Section 110, which allows for "performance or display" of copyrighted works "in the course of face-to-face teaching activities of a nonprofit educational

institution.” This exemption, for example, makes it permissible for teachers to play prerecorded music in their classrooms as part of the teaching activity.

Teachers must be conscious of six different types of copyright uses in the classroom: reproducing, recording, preparing derivative works (such as a new arrangement), distribution, performance, and display. Each of these uses can raise different points of law and different methods for licensing copyrighted works, when necessary. Here’s a glimpse at how the law applies to each type of use.

Reproducing: If a teacher wants to reproduce copies of a piece of sheet music for classroom use, he or she must first determine the relevant guidelines. Typically, to create multiple copies, teachers must rely on fair use. The fair use provision (found in Section 107 of the Copyright Act) sets out four factors for judging whether a use is permissible without a license: purpose and character of the use, nature of the work, amount and substantiality of the portion used, and effect on the potential market for or value of the work.

That’s all pretty vague, but the voluntary guidelines help us interpret what a teacher is allowed to do without seeking permission of the copyright owner. The exceptions include making “one copy per student of up to 10 percent of a musical work for class study as long as that 10 percent does not constitute a single performable unit.”

“If you are giving out 30 copies of a complete piece, even if it’s only 10 percent of the book it came from, that doesn’t constitute fair use,” Kendrick explains. “You would need to give them less than the whole piece.” In other words, you would have to provide a small enough amount of the whole work that it would not affect a potential sale of that work.

Recording: The voluntary guidelines allow teachers to make a single recording of a student performance of copyrighted material for educational or archival purposes. Similarly, you can make a single copy of an aural exercise or test. Beyond that, a license is required. This part is simple. If the piece already has been legally distributed, the copyright owner is required to license it to anyone who wants to record it. This is called a compulsory license. However, licensees have to pay a fee, set by law, to the copyright holder. (The current statutory rate is 9.1 cents for songs five minutes or less or 1.75 cents per minute or fraction thereof over five minutes.) To make between 500 and 2,500 copies, you can obtain a license through the Harry Fox Agency website; below 500 copies, you must contact the publisher directly.

Derivative Works: You can rearrange, edit, or simplify a copyrighted work for educational purposes, provided you do not change “the fundamental character” of the composition or alter or add lyrics. For more significant alterations, you must

contact the publisher in advance for permission. However, there is one other exception: Under the compulsory license, you can create a new arrangement of a composition for the purpose of recording that work for distribution.

Distribution: Again, the guidelines generally allow for classroom distribution of fragments of copyrighted works or a single copy of a recording for educational purposes. Additionally, you can distribute new recordings made under the compulsory license.

Performance: Most performances of copyrighted songs require a license from ASCAP, BMI, or SESAC (depending on which performing rights organization the writer has joined). However, Section 110 provides that “face-to-face” teaching exemption. “Performing a song live to demonstrate technique during a music class or playing a song on CD as part of a music history class, for example, would fall under this exception,” says Sam Mosenkis, vice president of legal affairs for ASCAP.

When it comes to performances of longer “dramatico-musical” works—an opera, ballet, or musical, for example—it is generally necessary to license the full work from the publisher or one of several licensing agencies, such as Tams-Witmark Music Library or Rodgers & Hammerstein Library.

Display: Section 110 also allows for teachers to display in the classroom—using a Powerpoint presentation, for example—any materials they have legally acquired.

Ask For Permission

In situations where a desired educational use falls outside of the available exemptions, teachers must request permission. Who do you contact for permission? Again, it depends. For a performance license, check in with the relevant performing rights organization (see “Licensing Resources” box, previous page). For recording rights, you’ll need that license from the Harry Fox Agency. For print material, such as sheet music, you must deal with individual print publishers.

How do you find the publisher? “The easiest thing is to look at the music. The copyright notice is always on the inside title page,” says MPA president Lauren Keiser, who is also president of print publishing giant Carl Fischer. Once you have determined the print publisher, you can search the MPA website for contact information.

Assuming that you reach the publisher (email and faxes are preferred), permission will typically be granted. What will it cost? There is no industry-standard fee schedule, but you can expect the publishers to be reasonable. “Publishers are very cognizant of the economics involved in [educational] situations,” Kendrick says. “I

have no doubt they take them into consideration in deciding what fee to charge, if any.”

If the music you require is out of print, and therefore unavailable from a retailer, you must contact the print publisher to acquire the original music and any copies that you need. However, “out of print” is not synonymous with “public domain.” Works in the public domain (PD) are those whose copyright protection has expired. Duration of copyright has changed over the years, so this too can require some checking. Most pre-1910 works are PD, but even for PD works, there is a catch. Publishers can get a new copyright on an edited or rearranged version of a PD composition. Further, a publisher’s unique collection or “folio” of PD material can itself be copyrighted.

Naturally, the Internet has clouded the copyright situation in numerous ways, not the least of which is creating an impression for many that downloadable songs and even sheet music are “free.” In this context, it is important to remember that the classroom exemptions under copyright law apply only to legally acquired material. Download the material illegally, and you are in violation no matter how you use it.

Will copyright owners seriously go after teachers and schools that are in violation of copyright law? “We do send cease-and-desist letters on behalf of our members, which we have to a number of school districts and teachers,” says the MPA’s Keiser. In such situations, “Our general counsel sends a letter, generally copying the superintendent of schools. The fines can be exorbitant. We have found that boards of education, principals, and superintendents of schools are very sensitive to liability issues.”

Indeed, penalties for infringement in simple cases can run \$750–\$30,000. More serious infringements can mean fines up to \$250,000 and up to five years’ imprisonment.

Penalties aside, teachers should be setting the right example for their students when it comes to the use of copyrighted material.

“Even beyond what a teacher is saying, what a teacher is doing and why a teacher is doing certain things can be significant to students understanding what you can and can’t do under copyright,” says Kasunic. “I don’t think it’s possible for all sorts of teachers to become copyright experts and actually provide the full scope of the information. But certainly [they can make students] aware that copyright is a real issue.” Adds Kendrick: “I would hope that the educators and parents and society in general would find a way to again recognize the value of creative effort in entertainment and cultural enrichment. Anything that the schools can do to help that would be great.”

Licensing Resources

Every individual piece of music is a complex entity with multiple copyright interests. Here are key contacts for discovering ownership and attaining any necessary licenses:

Publishers: The National Music Publishers' Association (NMPA) and the Music Publishers' Association of the United States (MPA) represent most of the U.S. music publishers and can help identify copyright holders when the ownership situation is cloudy (when publishing companies change owners, for example). The MPA's membership includes most print music publishers; the organization's Web site has a database with contact information for all of its members.

NMPA: 202-393-NMPA 202-393-NMPA (6672); www.nmpa.org

MPA: 212-327-4044 212-327-4044; www.mpa.org

Performing Rights: The three U.S. performing rights organizations collect fees for performances licenses and distribute them to their publisher and writer members. Generally, you can apply for the license right on the relevant organization's Web site.

ASCAP: 212-621-6000 212-621-6000; www.ascap.com

BMI: 212-220-3000 212-220-3000; www.bmi.com

SESAC: 212-586-3450 212-586-3450; www.sesac.com

Recording Rights: The Harry Fox Agency provides recording (or "mechanical") licenses on behalf of most U.S. music publishers. Licenses for 500-2,500 copies can be obtained on the HFA Web site. The Harry Fox Agency: 212-370-5330 212-370-5330; www.harryfox.com

General Information: The U.S. Copyright Office, which is part of the Library of Congress, can help you understand licensing needs as well as providing copyright ownership information on specific works.

U.S. Copyright Office: 202-707-3000 202-707-3000; www.copyright.gov

* More information about copyright can be found at www.nafme.org under "My Classroom/Copyright."