

# FASTBACK

## Music Copyright Law In Education

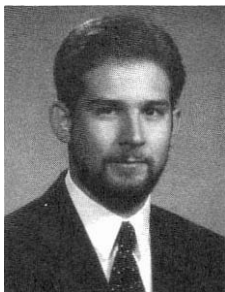
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# **Music Copyright Law in Education**

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## The Nature of Copyright Law

It is doubtful that any profession is more involved with copyright law than is education. As communicators of ideas, concepts, and information, educators rely extensively on the tangible works of others for the messages that they transmit to students. Much of this information is copyrighted.

Every educator must have a reasonable understanding of copyright law. Educators routinely use materials bearing a copyright imprint, though they may scarcely give the imprint a second thought. Severe penalties can be imposed for violation of copyright.

The term *copyright* refers to a system of property rights for the creator of a work and governs the right of others to make copies of the work. Copyright is not solely for the creator's benefit. In terms of public policy, the primary beneficiary is our society. Copyright brings the public the benefit of the labors of persons generating artistic, literary, and musical works, and more recently, computer software and databases. (Information about copyright for general education is available in fastback 233 *What Educators Should Know About Copyright* by Virginia M. Helms.)

This fastback focuses on how copyright applies to music in education. However, the information is not restricted to the music specialist. Instrumental and vocal music specialists must, of course, rely on copyrighted material; without sheet music, an ensemble could not rehearse or perform. But classroom teachers also use music, such as

singing songs with or playing recordings for students. In all likelihood, music used in the classroom will be copyrighted.

What a teacher does with copyrighted materials is of legal concern to administrators. Principals, superintendents, board members, and the school system have potential legal liability for the actions of an employee. To exercise effective leadership, school administrators must cultivate an awareness of and adherence to copyright law by every school employee.

Beyond avoiding the financial penalties that can be imposed by copyright litigation, the nature of education calls on all educators to promote positive values. In the event that a teacher openly violates copyright law by making unauthorized photocopies of sheet music, and the administration passively condones this action (perhaps because it saves money for the school budget), the message to students is a lack of respect for the law by those who should be role models for legal and ethical behavior. Thus educators cannot sanction infringement of copyright.

## Basic Principles of Copyright Law

**T**he United States Congress passed a copyright act in 1790 and made several revisions over the years. In 1909 it passed the cornerstone of today's copyright law. However, for many years the United States was excluded from joining the Berne Convention, which governs international copyright concerns. After numerous revisions to its copyright laws, the United States adopted the Copyright Act of 1976 (17 U.S.C.). Amendments enacted in 1980, 1988, and 1990 included adherence to the Berne Convention.

### Jurisdiction

All copyrights are governed at the federal level. That is, the Copyright Act of 1976, with its subsequent amendments, preempts state statutes and common (or case) law on the subject. However, a state may pass complementary statutes. For example, a Florida statute addresses the unauthorized copying of phonograph records, disks, wires, tapes, films, or other articles on which sounds are recorded, thereby establishing a state-level criminal action against a violator. The statute appropriately acknowledges that: "This section shall neither enlarge nor diminish the right of parties in private litigation." This means that the civil penalties provided by the federal law still are available.

Educators must not limit their understanding of copyright law to only the federal or only the state level; they must be aware of and

adhere to the laws at both levels. Since this fastback focuses only on the federal copyright laws, the reader is advised to seek information from a qualified source on the laws for a particular state.

## Criteria for Receiving Copyright Protection

The owner of a copyright has certain exclusive rights in creative works and can exploit those works economically. A copyright can be issued for literary works; musical works, including words; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; and sound recordings. In 1980, Congress amended the Copyright Act to include computer software and databases.

To justify a copyright, the work must satisfy two criteria. First, there must be originality. While the standard is rather minimal, the product must differ from a prior work so as to reflect creative accomplishment. In the case of *Feist Publications, Inc. v. Rural Telephone Service Co.* (1991), the court defined *original* as follows:

Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be. (p. 1287)

Once the work has satisfied the originality test, the creator must meet the second criterion, *fixation*. To become "fixed" in the legal sense, the work must be:

Embodied in a copy or phonorecord (tangible medium of expression), by or under the authority of the author, in a medium sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds or images, or both, that are being



transmitted is “fixed” for purposes of Title 17 if a fixation of the work is being made simultaneously with its transmission. (Gorman 1991, p. 122)

It is important to note that an original work that is not “fixed” by federal definition and is not protected by federal law may be protected by state statutory or common law rules.

The Copyright Act no longer requires formal registration of a work, though formal registration can and should be done with the Copyright Office. With or without formal registration, federal copyright protects a work immediately upon its being fixed. For example, if a musician improvises a song in a “live” performance, the musician can use only state law to secure relief against a person making an unauthorized tape recording. But once the musician “fixes” that work by writing the words or notes on paper or by recording the song, a person making an unauthorized copy or recording of the poem or song may be sued for that act under the federal statute (Gorman 1991, pp. 13-14).

Another important point is that no copyright protection is given to “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work” (Section 102[b]). In other words, when an author or creator releases an idea, he or she can control only the form in which the idea appears. Clearly, this principle is in keeping with the educational mission of building new knowledge from the works of others: yet it allows the creator credit and benefit from his or her unique expression of it.

## **Derivative Works**

Though a derivative work has a distinct connection to a previous work, it may be copyrighted. Under the Copyright Act, a derivative work is defined as:

. . . 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, 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." (Section 101)

The derivative work must add original elements to the previous work, and the copyright for the derivative work applies only to the new aspects.

## **Public Domain and Fair Use**

The owner of a copyright holds certain exclusive rights. These include the right to: 1) reproduce the copyrighted work, 2) prepare derivative works based on the copyrighted work, 3) distribute copies of the copyrighted work, and 4) perform or display the copyrighted work publicly (Section 106). However, there are a few exceptions or exemptions to these exclusive rights. Two exemptions that may be of particular interest to educators are "public domain" and "fair use."

Legal protection for creative rights ceases for a particular work after a period of time. The work then comes into the public domain, meaning that no one may claim ownership of it. There are three ways by which a work becomes public domain: 1) it may be published or distributed without a copyright notice, 2) the copyright may terminate due to a time limitation, or 3) a work copyrighted prior to 1 January 1978 may not have a renewal.

For works prior to 1 January 1978, copyright was for 28 years and could be renewed for an additional 28 years. The Copyright Act of 1976 extended protection to a total of 75 years. For works created after 1 January 1978, copyright exists for 50 years after the death of the author or the last surviving co-author.

Fair use is a privilege granted to someone other than the copyright holder for a special purpose. The Copyright Act refers to fair use

as being “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.” It sets four criteria for determining fair use: 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 on the potential market for or value of the copyrighted work (Section 107).

While fair use is not restricted to nonprofit sources, nonprofit uses receive considerable latitude. However, fair use in that context presumes that the audience of the work is not charged for the performance. Also taken into consideration is whether the decision to use the copyrighted materials was spontaneous. For example, if a last-minute decision were made to photocopy a sheet of music, fair use potentially would be applicable. However, if there is ample time to seek permission from the copyright holder, fair use would be inapplicable.

## **Penalties**

If there is a violation of copyright, the owner may gain relief, including injunctions, impounding, destruction of infringing articles, damages, and profits. Section 502 provides that: “The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.”

Statutory damages can be greater. Section 504(c)(1) provides an alternative to the award of actual damages and profits, giving the copyright holder the right to “elect, at any time before final judgment is rendered, to recover . . . an award of statutory damages for all infringements involved in the action, with respect to any one work . . . in a sum of not less than \$500 or more than \$20,000 as the court considers just.” Without proof of actual damages or lost profits, the

court has the discretion of entering a judgment of up to \$20,000 per infringement.

If the court determines that there is willful infringement, Section 504(c)(2) allows for a discretionary award of up to \$100,000.

Consider an unlicensed recording of a concert of 10 copyrighted compositions. Marketing such a concert recording could result in a lawsuit with a damage award of \$1,000,000, as well as actual damages and lost profits incurred by the copyright holder.

In the event that the infringer can prove that he or she had no reason to believe that there was infringement, “the court at its discretion may reduce the award of statutory damages to a sum of not less than \$200.” This is known as the “innocent infringer” doctrine.

As if the foregoing penalties were not enough, Section 506 allows for a criminal action against the willful infringer who sought commercial advantage or private financial gain through wrongful use of a copyrighted work. Major criminal infringements may result in a maximum fine of \$250,000 and imprisonment for up to five years.

## Exemption for Educational Musical Performances

There are two limited exemptions of the Copyright Act specifically for educators. Section 110(1) of the Copyright Act provides an exemption for a “performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made.” Section 110(2) exempts transmission, such as a videotape, of a nondramatic literary or musical work if “the performance or display is directly related and of material assistance to the teaching content of the transmission,” and the “reception [is] in classrooms or similar places normally devoted to instruction”; or the “reception [is] by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction.”

The Congress and the courts have been rather strict in interpreting Sections 110(1) and (2). The educational use must be by instructors or pupils in the course of face-to-face teaching activities and be in a classroom or similar place devoted to instruction.

The exemption is not applicable to recreational or entertainment performances or displays. Thus, "instructors or pupils" does not embrace performers from outside the school brought in to present a program, except guest lecturers brought in for instructional activities. The term "classrooms or similar places normally devoted to instruction" does not apply to gymnasiums, stadiums, or other sites, unless the site truly is used as a classroom for systematic instruction. The exemption is not available to audiences that include persons who are not instructors or pupils.

There are several situations that commonly occur in the school that usually do not qualify for an educational exemption. For example, virtually all exemptions granted to educators for the fair use of music are limited to *nondramatic* musical works. This means that, while classroom performances and school concerts usually do not require any payment of performance royalties, school productions of Broadway-style musicals, operas or operettas, and ballets are not exempt from such fees and always must be licensed by the copyright owner. The exclusion of dramatic musical works from educational fair use is firm and consistent.

A bit more complex is the exemption for performance of a musical work without any direct or indirect commercial purpose and without payment of any fee or other compensation for the performance to any of the performers, promoters, or organizers. To meet this exemption, there must be no admission charge and any proceeds (after deducting the reasonable costs) must be used solely for educational, religious, or charitable purposes and not for private financial gain. However, under certain conditions the copyright owner still can object to such performances.

There are other exemptions of lesser relevance to educators. For instance, using the transmission of a musical performance over a single receiving apparatus (for example, a radio) is potentially exempt unless a charge is made or the transmission is further extended to the public.

The House Committee Report on the 1976 Copyright Bill embraced a position statement titled, "Guidelines for Educational Uses of Music," which was developed by various representatives of the music industry. Familiarity with these guidelines is vital for using music in education.

## Music Copyright Case Law

It is important to understand how the courts apply copyright law to music and other materials. Consideration of sample legal cases will promote better understanding of the extent of copyright protection. The legal cases reveal several critical principles, such as subconscious influences, the test for substantial similarity, and the like.

Though an educator may decide to avoid copyright issues by creating a new work, there have been several cases that have found copyright infringement even though the composer thought the new work was unique. Two such principles are subconscious influences and substantial similarity.

For example, in *Bright Tunes Music Corp. v. Harrison Music Ltd.* (1976) the defendant, George Harrison (the former Beatle), wrote and recorded a highly popular song, "My Sweet Lord," which used the same motif used in the plaintiff's song, "He's So Fine." The harmonies of both songs were identical. The analysis of the two songs even considered how a grace note was included. Harrison knew of "He's So Fine" (it had been on the *Billboard* charts), but claimed that his creation of "My Sweet Lord" came about independently through spontaneous vamping on his guitar.

The court accepted that Harrison was not conscious of the fact that he was using the theme from "He's So Fine" but concluded that the two works were, for the listener, "virtually identical except for one phrase." The court added that Harrison found the combination of sounds for



his “My Sweet Lord” appealing since “his subconscious knew it already had worked in a song his conscious mind did not remember.” The court concluded: “This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished.”

It is not necessary that the new work be identical to the copyrighted work. In *Krofft Television Productions, Inc. v. McDonald’s Corp.* (1977), the court indicated that it was necessary only that the two works have “substantial similarity.” Consideration was given to whether the original work was “adopted, imitated, transferred, or reproduced, with more or less colorable alterations to disguise the piracy.”

The educator must be aware that making adaptations of a copyrighted work does not offer protection from copyright infringement. When an educator relies on a copyrighted work, perhaps the most important question to ask is: Is my version substantially similar? Since the subjectivity inherent to human nature might lead the educator to make a self-serving determination, it would be wise to get an opinion from a more objective source, such as a copyright attorney.

Substantial similarity alone is not enough for a plaintiff to win a suit for copyright infringement. The defendant also must have been able to learn about the plaintiff’s song.

For example, in *Selle v. Gibb* (1984), the plaintiff was a part-time musician and a composer of popular and religious music. He composed a song, titled “Let It End,” and obtained a copyright and performed the song at local engagements. A tape recording was made and mailed to 11 music recording and publishing companies, of which eight returned his materials and three did not respond. No other recording or publication was ever made. The popular group, the Bee Gees, later recorded “How Deep Is Your Love,” which was part of the soundtrack for the movie *Saturday Night Fever*. Selle sued for infringement.

The trial included testimony from various witnesses and several types of evidence, including a tape recording of the Gibb brothers

and others involved in the initial creation of their song while at a French chateau. The plaintiff had an expert, Arrand Parsons, Professor of Music at Northwestern University, conduct a comparative analysis of the two songs. The professor testified that “the two songs could not have been independently created; that they were ‘strikingly similar’.”

Regardless of the professor’s opinion, the court held for the defendants, ruling that the plaintiff did not prove “striking similarity” and did not “establish a basis from which [the] jury could reasonably infer that defendants had access to his song.”

The educator is not expected to know every copyrighted work that is in existence. On the other hand, a reasonable awareness is necessary. It is unwise to claim ignorance of a copyrighted work, especially when the work has been communicated in such a manner that the educator should have known of it. On the “should have known” issue, the alleged infringer would have to prove nonawareness, which in the case of a well-communicated song would be difficult, if not impossible, to establish.

For example, in *Gaste v. Kaiserman* (1988), the plaintiff, a French citizen, composed a song, titled “Pour Toi,” which was subsequently included in the movie, “Le Feu aux Poudres.” In 1973, a Brazilian singer and composer, Morris Kaiserman, composed and recorded the song “Feelings.” Gaste claimed that Kaiserman gained access to his song through a publisher. He based his assertion on the fact that, when first trying to market his song, he had sent a copy of it to a particular publisher.

The court accepted that “access through third parties connected to both a plaintiff and a defendant may be sufficient to prove a defendant’s access to the plaintiff’s work,” and that the appropriate standard would be “reasonable opportunity” for access. Of interest, the court stated: “The lapse of time between the original publication of ‘Pour Toi’ and the alleged infringement and the distance between the locations of the two events may make copying less likely but not an

unreasonable conclusion. Indeed, a copier may be more likely to plagiarize an obscure song from the distant past and a faraway land than a recent well-known hit." The court ruled for the plaintiff.

While there is a fair-use exemption from copyright protection for education, various uses do not fall under these exemptions. It is not enough that the recorded material is for educational purposes. If there is a commercial element, such as selling recordings of a high school band, it is likely to be infringement. Keep in mind that special use of music, such as distributing lyrics to an audience for a sing-along, might be authorized by the publisher at little or no cost. The next case clarifies this matter.

In *Marcus v. Rowley* (1983), the plaintiff, Eloise Toby Marcus, a former home economics teacher, copyrighted a booklet on cake decorating in which 29 of the 35 pages were her original creation. The other six pages were included with permission of the authors, and credit was given to them. The defendant, Shirley Rowley, taught food service career classes in the same school district in which Marcus had been employed. For her teaching, Rowley made a "learning activity package" (LAP), wherein she copied (without the authorization of Marcus) 11 pages from the Marcus booklet. Multiple copies of the LAP were made available to students; no copies were sold.

The court reasoned that the booklet and the LAP had the common purpose of teaching cake decorating, which weighed against allowing fair use. To qualify for the educational exemption, the excerpt must adhere to "brevity"; while there are various criteria, the portion used must be a minor part of the total work. In addition, a "special work" must be spontaneous, that is, "the copying is at the instance and inspiration of the individual teacher" and intended for "maximum teaching effectiveness," with the inspiration and teaching objective being formulated "so close in time that it would be unreasonable to expect a timely reply to a request for permission." The "cumulative effect" requires that the copied material be for only one course in the school, and there are limits on the number of pieces copied from the

same author and the number of times that multiple copies are used for one course during one term. Each copy must have a notice of copyright.

In this particular case, the court ruled in favor of the plaintiff. The fair use doctrine did not apply, because “neither the fact that the defendant used the plaintiff’s booklet for nonprofit educational purposes nor the fact that plaintiff suffered no pecuniary damage as a result of Rowley’s copying supports a finding of fair use.”

The next two cases deal with making copies for educational uses. In *Encyclopaedia Britannica Educational Corp. v. Crooks* (1982), the defendants, the Board of Educational Services in Erie County, New York, videotaped and made multiple copies for classroom use of programs that were broadcast over local public educational and instructional television. The defendants did not obtain permission to make master or derivative videotaped copies, nor to distribute the copies to schools or to rebroadcast them on closed-circuit or cable television. The plaintiffs, three profit-motivated production companies of educational works marketed to educational institutions, alleged infringement.

The court ruled that voluntary licensing of copyrighted works for broadcast by instructional television stations created neither an unlimited fair use nor abandonment of copyright protection.

In *Basic Books, Inc. v. Kinko’s Graphics Corp.* (1991), several book publishers sued a duplicating business for making copies of excerpts from copyrighted books. For instructional purposes, a professor or teacher would bring excerpts from copyrighted books or journals to Kinko’s to compile in course packets, which would be given or sold to students. Fair use was asserted as a defense.

While the legal reasoning was complex and addressed numerous legal issues, in essence the court ruled that “the excerpts copied by defendant Kinko’s are not a fair use of plaintiffs’ copyrights and, therefore, constitute infringement.” The court granted the plaintiffs “statutory damages, injunctive relief and attorneys’ fees and costs.”

The fact that a teacher may not be able to locate a compilation of music, be it printed or recorded, that meets an educational objective

does not justify the disregard of the copyright protection vested with each of the expressions. Remember: Permission to use can be obtained from the copyright holder. There may be a fee, but the fee for licensed usage is certainly likely to be less than damages imposed by a court.

## **Guidelines to Music Copyright**

**W**hen the Copyright Act of 1976 was becoming law, representatives of the music education profession met with those of the music publishing industry to discuss how the new legislation would affect each of them. The product of this discussion was a statement called “Guidelines for Educational Uses of Music.” Its purpose is “to state the minimum and not the maximum standards for educational fair use.” These publishers and educators wanted to agree on some ground rules in advance of the legislation, rather than allow rules to emerge from costly legal battles.

The guidelines were included only within the legislative history of the Copyright Act of 1976; it is not part of the law *per se*. However, even though the guidelines lack clear-cut legal authority, they remain the standard resource for considering educational fair uses of music.

The guidelines include permissible and prohibited uses of copyrighted music, covering both printed music and sound recordings.

### **Permitted Photocopying of Music**

The “rules” for photocopying, like those for other areas of copyright law, are rather inexact and at best provide only informed guidance. Most of the principles set forth in the guidelines pertain to photocopying printed music and have never faced a legal challenge. The permissible uses designated in Section A are:

*1. Emergency copying to replace purchased copies which for any reason are not available for an imminent performance provided purchased replacement copies shall be substituted in due course.*

This is very straightforward. A student who loses his or her music on the day of the concert may use a photocopied substitute. However, an emergency copy must be replaced with newly purchased music, even if the concert or lesson is over and the music is no longer needed.

*2. (a) For academic purposes other than performance, multiple copies of an excerpt may be made, provided that the excerpts do not comprise a part of the whole which would constitute a performable unit such as a section, movement, or aria, but in no case more than ten percent of the whole work. The number of copies shall not exceed one copy per student.*

There are several important points mentioned in this fair use. First, the purpose of the use must not be performance. A teacher will not find legitimate grounds for making photocopied parts for all students in the class. Also, any copied portion cannot make up an entire unit, such as a song or even a complete section of a song. This greatly limits the usage of such copying. It does, however, allow for some classroom uses. A music teacher analyzing a particular musical element could provide printed musical examples for each student.

*2. (b) For academic purposes other than performance, a single copy of an entire performable unit such as a section, movement, or aria, that is (1) confirmed by the copyright proprietor to be out of print, or (2) unavailable except in a larger work, may be made by or for a teacher solely for the purpose of his or her scholarly research or in preparation to teach a class.*

This permissible use also bans performance situations. It also is limited to a single copy. The important conditions deal mainly with the availability of a particular piece of music. If the sheet music is no longer in print, a single copy may be made for research or teach-

ing purposes. And if a teacher wants the sheet music of a song that is published only in a larger collection of music, making one photocopy is allowed.

## **Prohibited Photocopying of Music**

All of the prohibitions listed in Section B of the guidelines pertain to photocopying printed music. There are no conditions included in these prohibited uses. It does not matter how short the copied excerpts are, whether only a single copy is made, or whether it is for research or teaching purposes. The prohibited uses are:

- 1. Copying to create or replace or substitute for anthologies, compilations, or collective works.*
- 2. Copying from works intended to be "consumable" in the course of study or teaching, such as workbooks, exercises, standardized tests and answer sheets and like material.*

It is easy to understand why these types of copying are not permitted. They directly deny financial profit to the creator of such materials. Teachers wanting a kind of music collection that does not exist cannot just make their own.

- 3. Copying for the purpose of performance, except as in A(1) above.*
- 4. Copying for the purpose of substituting for the purchase of music; except as in A(1) and A(2) above.*

These prohibitions emphasize that photocopying music must truly serve an educational purpose if it is to qualify as educational fair use. The exceptions mentioned are emergency copying and small excerpts for classroom teaching. Otherwise, this prohibition serves as a blanket rule against photocopying music. The safest policy is simple: If the music is for sale, buy it.

## **Sound Recordings**

Most published recordings carry two different copyrights. The first one is for the musical works on the recording. This protects the ex-



pression of the composer. The other copyright is for the record, tape, or compact disc (CD). This protects the captured expression of the performers. These two distinct copyrights affect several common teaching practices involving sound recordings.

The first copyright, the one on the written music, entitles the copyright holder to royalty payments for any recording of the music. The Compulsory Mechanical License in the Act of 1976 states that after the first recording of a musical work, the copyright owner cannot prohibit more recordings of the work – provided the proper royalties are paid.

These guidelines fully apply to educators who produce multiple tapes of school performances that include copyrighted music. The only exceptions granted teachers are the fourth and fifth permissible uses in the guidelines. These exceptions allow a teacher to make only a single recording.

*4. A single copy of performances by students may be made for evaluation or rehearsal purposes and may be retained by the educational institution or individual teacher.*

This pertains only to the copyright of the music itself and not to any copyright that may exist in the sound recording. Teachers may make a recording of their classes in order to assess the students' musical progress. However, a school cannot sell or even give away tapes of a concert performance containing copyrighted music unless royalties are paid for producing the recordings. In 1994, the rate was 6.25¢ per recording or 1.2¢ per minute of playing time, whichever is greater. The royalty rate increases every two years according to the Consumer Price Index.

*5. A single copy of a sound recording (such as a tape, disc or cassette) of copyrighted music may be made from sound recordings owned by an educational institution or an individual teacher for the purpose of constructing aural exercises or examinations and may be retained by the educational institution or individual teacher.*

This permissible use addresses the second copyright mentioned above — copyright applied to sound recordings. This regulates copying or “dubbing” records, tapes, or CD’s. The prohibitions that were discussed with regard to photocopying sheet music also would be applicable to the copying of sound recordings.

## **Musical Performances**

A copyright owner has exclusive rights to public performance. This refers not only to live performances but also to the broadcasting of recorded or live music in public. However, the Copyright Act of 1976 includes several relevant exemptions. For instance, “live performances without commercial advantage to anyone” are not a violation of copyright law; this exemption applies to nondramatic musical performances only.

More important to teachers, Congress decided that performances of copyrighted music done in “face-to-face teaching activities in a non-profit educational institution” are not infringement. Although this certainly gives educators freedom in choosing classroom teaching materials, this allowance must not be interpreted too generally. The only performances exempt are those directly related to instruction. There are common performance situations in schools that are an infringement if licensing fees are not paid. For example, school dances with live musical performances and the musical performances of bands or orchestras on tour are not exempted performances.

## **Arrangements of Music**

Music teachers often customize music materials and arrangements for their classes. For instance, a school band director may want to furnish the school pep band with a version of a popular song or a catchy commercial theme. To prepare an arrangement of music created by another person, the teacher-arranger must have permission from the copyright owner.

However, teachers are permitted to make minor revisions to purchased copies of music. This is considered fair use as long as the fundamental character of the work is not changed and lyrics are not added or altered.

## **Audiovisual Materials**

The regulation of the use of videotaped materials is based on copyright owners having an exclusive right to display or perform a work publicly, and this right extends to videotapes. However, the Copyright Act exempts some teaching activities.

The videotape can be shown only “by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction.” In addition, the videotape of the musical performance must be a legal copy.

This provision exempts a teacher from having to seek permission and pay a fee for showing a copyrighted videotape. However, teachers are not allowed to make copies of audiovisual materials that are marketed. For educators who are using audiovisual materials in some way other than typical classroom instruction, legal counsel is advised.

## **Computers in Music**

The Computer Amendment of 1980 acknowledged only two types of software copying that are not infringement: 1) the copying a computer does to put a program into its memory, and 2) the creation of a backup (or “archival”) copy of a program. The first kind of copying is necessary for the use of any computer program. The second kind of copying is granted to the purchaser of software as a safety precaution.

Computer uses in music education can be divided into two areas. First, music editing programs exist for producing printed copies of music. The same rules apply to this form of copying as apply to photocopying music.

Second, computer programs for the production of sound — such as digital sampling (using a computer to copy and store sound recordings), sound synthesis (programming to create computer-generated sounds), and the creation of MIDI files (precise computer-stored versions of songs' musical performance information) — are subject to the same copyright protection as traditional sound recordings. Whether the music exists on a computer screen, is produced from a computer printer, or exists as a computer file, a copy is a copy.

## Questions and Answers About Music Copyright

**F**ollowing is a series of questions that often are asked by teachers. The answers are generalizations; every situation may present facts that would alter a legal answer. Whenever there is any doubt, it is advisable to consult with an attorney knowledgeable about the laws in a particular jurisdiction.

*Question:* My school's library has a collection of phonograph records containing music that I would like to use in class. While the library buys music on phonorecords because it has several turntables, I prefer to use cassette tapes when I teach. Since the school buys the records, can I make audiocassette copies for my teaching?

*Answer:* Generally, copying a work onto a new format is considered to be infringement. Thus, in order to convert records to cassette tapes, one must have an appropriate license, or at least have permission from all the copyright owners.

*Question:* The trumpet players in my middle school band really need to improve their tone quality. Since I am not a trumpet player and cannot demonstrate a good sound for them, I want to give each of them a dubbed tape of a recording of a famous trumpeter playing one movement of a concerto. Can I do this?

*Answer:* Multiple copies of sound recordings are never allowed through fair use. Further, making a single copy of a sound recording is permissible only for aural exercises and examinations. Also, the

dubbing of such a large portion of a work — an entire performable unit like a movement of a concerto — is prohibited.

*Question:* I make audiotape recordings of the rehearsals and performances of my high school's marching, concert, and jazz ensembles. Listening to the tapes of the marching band's music rehearsals helps the students when they are learning the drill and maneuvers for the first time. I often play the tapes of the concert band and jazz ensembles in class so that the students can assess for themselves how their playing sounds. Is this type of recording permitted?

*Answer:* Yes, a single copy of student performances may be made for evaluation and rehearsal purposes. It may be kept by the educational institution or an individual teacher.

*Question:* My elementary music students are learning about different kinds of performing groups. I want to show videotaped performances of a choir, concert band, jazz combo, reggae band, and orchestra, which I recorded from broadcasts on public and network television. Is it okay to show these to a class?

*Answer:* As long as the videotaped material is being used in face-to-face instruction, this practice probably cannot be questioned. However, some important limitations may apply. Tapes of commercial broadcasts can be kept by teachers for only 45 calendar days, after which time they must be erased or destroyed. Tapes must be shown within the first 10 consecutive school days of that period. Video recordings of a public television broadcast can be retained for only seven days.

*Question:* I am teaching my first-grade class to discriminate between fast and slow musical styles. To facilitate movement activities for the children, I want to dub numerous musical excerpts onto a single audiotape to be played in class. Is this considered fair use?

*Answer:* This use seems proper because the excerpts are used for face-to-face instruction, only a single copy is being made, and the music being recorded consists of short selections. If the selections

were long, there might be a problem; likewise, care should be taken to avoid what might be considered to be a recorded “anthology.”

*Question:* My drama students are preparing a musical skit to be performed in class and at the spring variety show. The skit consists of funny lyrics set to the tunes of popular songs. Must I do anything for them to perform such a musical parody legally?

*Answer:* Parody lyrics are a significant change to a musical work and generally are considered a derivative work. Thus permission from the copyright holder probably is necessary.

*Question:* I have two talented musicians in my senior band who can listen to a recording and play the music on their instruments by ear. They have written down a trumpet and saxophone jazz duet that apparently was improvised on the recording. If this is true, then it has never existed in print. Can these students legally perform their transcription in public, and are they free to send their printed version to music publishers?

*Answer:* Improvised music on a copyrighted sound recording enjoys all the protections of printed music. A transcription of a recording would be considered a derivative work and would require the permission of the copyright holder. Also, a reasonable effort is necessary to verify whether a transcription already has been done.

*Question:* I have several high school choir arrangements that are good, but I would like to change them a little. One of them has some passages that are too difficult for my choir to handle. In another one, there are sections in the vocal and piano accompaniment parts that I really dislike. Am I allowed to rewrite or revise some of the music?

*Answer:* Printed copies that have been purchased may be edited or simplified; but the fundamental character of the work must not be changed, and lyrics cannot be altered or added to. If a piece is changed too much, the result might qualify as a derivative work and would require permission from the copyright holder.

*Question:* When I began as a band director, I found a file drawer in the band room full of old arrangements. Certain instrument parts are down to the last copy. I suspect that most of these pieces are out of print. In order for all of my band students to play, can I make photocopies of the existing parts to distribute to the whole band?

*Answer:* Unless the pieces are so old that their copyright terms have expired, their protection remains despite being out-of-print. In such a situation, it is likely that the copyright owners will grant permission to photocopy, perhaps even without charging a fee. Nonetheless, a request to photocopy should be submitted to the copyright holder.

*Question:* It is often a struggle to keep my junior high students interested in the general music class. Occasionally I would like to show some popular movies, rented from the local video store, that have good music soundtracks. It seems like a great way to expose the students to styles of music to which they might not otherwise pay attention. For both the students and myself, this would be a nice break from the usual instructional format. Is this activity all right?

*Answer:* The showing of a videotape must be a part of systematic instructional activities. Although showing a popular movie in class may entertain students, it might not qualify under the educational exemption unless there is a distinct instructional purpose.

*Question:* A few students in my high school jazz band have formed their own band, and I am acting as their unofficial agent and manager. They are quite good, so I have arranged for them to be the entertainment for an upcoming school dance. Can I assume that nothing else is required to avoid copyright problems?

*Answer:* A school dance does not qualify for the performing rights exemption for face-to-face teaching activities. However, there is another exemption for live performances without commercial advantage to anyone. If the members of a student band (or anyone else involved) are not paid for a performance located in a school, they likely will not need to obtain a license to play copyrighted music.



*Question:* The parents of my chorus students have been very supportive in our fundraising drive to buy choir robes. I have considered producing cassette tape recordings of our Christmas concert, giving away recordings to the parents to thank them for their help, and selling copies of the recordings to come up with the rest of the money for the robes. Since all aspects of this plan are essentially non-profit, is it fair use?

*Answer:* Regardless of whether recordings are made for profit, a mechanical license (or waiver) from the copyright owner is necessary. Generally, such payments are required not only for recordings being sold, but for all that are made and distributed.

*Question:* I am a high school journalism teacher and the sponsor for an extracurricular "Broadcasters' Club," made up of students interested in careers in radio. They want to broadcast a disc jockey program over the school's public address system during the lunch hour. Student DJ's will be playing popular songs. Do any special arrangements have to be made?

*Answer:* The only way such a "broadcast" would be exempt from performance licensing would be if the music played were somehow directly involved in a teacher's instruction to students. Also, Section 110 requires that the performance be in a "classroom or similar place devoted to instruction." It seems questionable that transmission to a cafeteria (or similar noninstructional site) for the purpose of recreation or entertainment would justify the educational exemption. Whenever there is doubt, it is best to obtain legal counsel or send an inquiry to the copyright holder.

## Obtaining Permission to Use Copyrighted Music

There are important and frequently used practices in the teaching of music that are not covered by the educational exemptions for fair use. To legally incorporate these teaching activities into a school's curriculum, teachers and administrators must meet the requirements of the law.

Administrators can encourage legal teaching practices by providing teachers with information about copyright law and by making the budget allocations necessary to meet copyright laws. Often teachers feel that they have no choice but to violate music copyright restrictions because of budgetary constraints. If the money is not available for teachers to purchase their chosen materials, administrators can help by supplying teachers with alternative ideas for appropriate and meaningful instruction.

Fortunately for educators, several private associations and public agencies can assist them in complying with music copyright. The Resources section includes a list of addresses for such organizations. Some of these groups represent the publishing industry, while others work on behalf of teachers using music materials in their classrooms.

A teacher having difficulty tracking down a copyright owner from the information on the copyright notice has several resources to explore. The Music Publishers' Association (MPA) of the United States and the National Music Publishers Association (NMPA) will assist

in locating a copyright holder. The MPA deals mainly with published popular music, and the NMPA deals more with education-oriented music materials.

Many copyright notices refer to the American Society of Composers, Authors, and Publishers (ASCAP) or Broadcast Music, Inc. (BMI). As performing rights organizations, ASCAP and BMI are the licensing agencies for the performance of much popular music in the United States. The inclusion of one of these groups in a copyright notice indicates that the copyright holder is a member. Therefore, ASCAP and BMI usually can supply addresses for contacting publishers.

Finally, the Copyright Office at the Library of Congress occasionally publishes catalogues of copyright registrations. This office can conduct a search for the current owner of a copyrighted work. Since this service carries a fee, it probably should be used only as a last resort.

It is important to make the initial contact with a publisher well in advance of the proposed use. Some publishers' permission-granting procedures are time-consuming because they review many requests. A self-addressed, stamped envelope will facilitate a response.

Teachers should emphasize the educational nature of their requests. Some publishers will give special consideration to a proposed educational use. However, if the proposed use clearly denies the copyright owner a legitimate financial profit, permission is unlikely to be granted without a fee.

When requesting permission to photocopy music, the following information should be included in a letter:

1. Title, author, and edition of the work.
2. The exact portion of the work that will be copied.
3. The number of copies that will be made.
4. The exact situation and nature in which the copies will be used.
5. The way in which the copies will be distributed.

As with every type of copying, publishers are particularly interested in plans to sell the copied material and the approximate sales price, as well as any other revenue-generating issues.

Music teachers who want to produce recordings of school performing groups usually need not request permission ahead of time. However, they must be prepared to pay the royalty fees. Once a piece of music has been recorded for the first time, the copyright holder cannot prevent subsequent recordings of the work – provided royalties are paid. So, when contacting the copyright holder in this case, teachers should ask to be sent a mechanical license for the music to be recorded. In addition to including the standard identifying information for each work, teachers should specify how many records, cassettes, or compact discs will be manufactured. The Harry Fox Agency (see Resources) is the recording licensing agency most used by publishers and is a good starting point for school recording projects.

Finally, if schools are going to produce some kind of noneducational or profit-oriented performance of music, they should contact ASCAP or BMI to obtain the appropriate performing rights license.

All educators should honor copyright law. Certainly, the possible penalties for infringement emphasize the seriousness of copyright violations. However, the ethical reasons for obeying copyright laws should be of equal interest to educators. Teachers and administrators alike have the responsibility of rearing the next generation, thereby casting the mold for our society's integrity and lawfulness. By honoring the rights of copyright owners, educators can model for their students respect for the law and respect for the personal and property rights of others.

## Resources

### Books

- Althouse, J. *Copyright: The Complete Guide for Music Educators*. Van Nuys, Calif.: Music in Action (Alfred), 1984.
- Gorman, R.A. *Copyright Law*. Washington, D.C.: Federal Judicial Center, 1991.
- Helm, V.M. *What Educators Should Know About Copyright*. Fastback 233. Bloomington, Ind.: Phi Delta Kappa Educational Foundation, 1986.
- Leaffler, M. *Understanding Copyright Law*. New York: Matthew Bender, 1989.
- Palab, R.F. *Commonsense Copyright: A Guide to the New Technologies*. Jefferson, N.C.: McFarland & Company, 1986.
- Reed, M.H. *The Copyright Primer for Librarians and Educators*. Chicago: American Library Association, 1987.
- Seltzer, L.E. *Exemptions and Fair Use in Copyright*. Cambridge, Mass.: Harvard University Press, 1978.
- Steinhilber, A.W. *Copyright Law: A Guide for Public Schools*. Alexandria, Va.: National School Boards Association, 1986.

### Selected Court Cases

- Basic Books, Inc. v. Kinko's Graphics Corp., 758 F.Supp 1522 (S.D.N.Y. 1991).
- Bright Tunes Music Corp. v. Harrison Music Ltd., 420 F.Supp. 177 (1976).
- Encyclopaedia Britannica Educational Corp. v. Crooks, 542 F.Supp. 1156 (W.D.N.Y. 1982), and 558 F.Supp. 1247 (W.D.N.Y. 1983).

Gaste v. Kaiserman, 863 F.2d 1061 (2d Cir. 1988).

Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977).

Marcus v. Rowley, 695 F.2d. 1171 (9th Cir. 1983).

Selle v. Gibb, 567 F.Supp. 1173 (N.D. Ill. 1983), *Aff'd*, 741 F.2d 896 (7th Cir. 1984).

## **Important Addresses**

American Society of Composers, Authors, and Publishers (ASCAP)

One Lincoln Plaza

New York, NY 10023

(212) 595-3050

Broadcast Music, Inc. (BMI)

40 West 57th Street

New York, NY 10019

(212) 586-2000

Copyright Information Services

P. O. Box 1460

Friday Harbor, WA 98250

(206) 378-5128

Harry Fox Agency

110 East 59th Street

New York, NY 10022

(212) 370-5330

Music Educators National Conference

1806 Robert Fulton Drive

Reston, VA 22091-4348

(703) 860-4000

Music Publishers' Association of the United States

Third Floor

130 West 57th Street

New York, NY 10019

(212) 582-1122

National Music Publishers' Association, Inc.  
110 East 59th Street  
New York, NY 10022  
(212) 751-1930

Society of European Songwriters, Authors and Composers, Inc  
10 Columbus Circle  
New York, NY 10019  
(212) 586-3450

U.S. Copyright Office  
Reference and Bibliography Section, LM-450  
Library of Congress  
Washington, DC 20559  
(202) 287-6850 (to search for a copyright holder)

U.S. Copyright Office  
Information and Publications Section, LM-455  
Library of Congress  
Washington, DC 20559  
(202) 287-9100 or (202) 287-8700 (to register a work)

## Phi Delta Kappa Fastbacks

Two annual series, published each spring and fall, offer fastbacks on a wide range of educational topics. Each fastback is intended to be a focused, authoritative treatment of a topic of current interest to educators and other readers. Several hundred fastbacks have been published since the program began in 1972, many of which are still in print. Among the topics are:

Administration	Mainstreaming
Adult Education	Multiculturalism
The Arts	Nutrition
At-Risk Students	Parent Involvement
Careers	School Choice
Censorship	School Safety
Community Involvement	Special Education
Computers	Staff Development
Curriculum	Teacher Training
Decision Making	Teaching Methods
Dropout Prevention	Urban Education
Foreign Study	Values
Gifted and Talented	Vocational Education
Legal Issues	Writing

For a current listing of available fastbacks and other publications of the Educational Foundation, please contact Phi Delta Kappa, 408 N. Union, P.O. Box 789, Bloomington, IN 47402-0789, or (812) 339-1156.



## Phi Delta Kappa Educational Foundation

The Phi Delta Kappa Educational Foundation was established on 13 October 1966 with the signing, by Dr. George H. Reavis, of the irrevocable trust agreement creating the Phi Delta Kappa Educational Foundation Trust.

George H. Reavis (1883-1970) entered the education profession after graduating from Warrensburg Missouri State Teachers College in 1906 and the University of Missouri in 1911. He went on to earn an M.A. and a Ph.D. at Columbia University. Dr. Reavis served as assistant superintendent of schools in Maryland and dean of the College of Arts and Sciences and the School of Education at the University of Pittsburgh. In 1929 he was appointed director of instruction for the Ohio State Department of Education. But it was as assistant superintendent for curriculum and instruction in the Cincinnati public schools (1939-48) that he rose to national prominence.

Dr. Reavis' dream for the Educational Foundation was to make it possible for seasoned educators to write and publish the wisdom they had acquired over a lifetime of professional activity. He wanted educators and the general public to "better understand (1) the nature of the educative process and (2) the relation of education to human welfare."

The Phi Delta Kappa fastbacks were begun in 1972. These publications, along with monographs and books on a wide range of topics related to education, are the realization of that dream.