The Use of Protected Materials in an Educational Setting

By Alan S. Bergman

Music ignites the creative exchange between student and teacher. It also has commercial value, as educational sales are a major market for music publishers. But the law also recognizes that there are circumstances where it is reasonable for protected works to be used without permission. In order to guide the teacher or student towards deciding whether permission is needed to use the music in the manner intended, I will explore this balance between the creative and proprietary aspects of copyright.

First, how do you determine whether the work is actually protected? If it is, is your proposed use one of the exclusive rights reserved to the copyright owner under the copyright law? Are there instances where otherwise-prohibited uses are exempted from liability? Finally, what guidelines have been adopted by university systems and other groups to identify minimum uses generally accepted as not requiring permission?

Although most of this information has much broader applicability, I will concentrate primarily on music and illustrate with jazz-related examples. Become familiar with the actual sections of the Copyright Act and their identifying section numbers as I cite them: they provide a good shorthand way to identify areas of the law - and, of course, they make you look like you know what you're talking about.

Unprotected Ideas, Protected Works, & the Public Domain

The first step is to look at the music example being used to determine if it is entitled to copyright protection. Works that lack the requisite degree of originality, are in the public domain, or which are not fixed in tangible form are not protected by copyright. As I pointed out in my July/August column, since chord progressions are for the most part unprotected, songs that share similar chord patterns - such as **Makin' Whoopie** and **The Glory of Love** or **Love Me Or Leave Me** and **Lullaby of Birdland** - each have their own, separate, enforceable copyrights because each song has its own unique melody and lyrics. So though **Autumn Leaves** and **Opus de Funk** are protected, you are free to create your own composition based on the cycle of fourths or standard blues progression.

The law does not protect works that are in the public domain: works for which the copyright has expired or which were never protected by copyright in the first place. In the United States it is safe to say that almost any work published on or before December 31, 1922 is now in the Public Domain. The rules for determining whether a later copyright is still valid are complex; but a very excellent chart created by Lolly Gasaway of the University of North Carolina presents these rules in a graphic way. A good summary of the rules appears within the very excellent site created and supervised by Georgia Harper at the University of Texas. I will refer to this "U.T. site" often as an excellent source of information on Public Domain and also as a comprehensive guide to copyright.

The "copyright notice" is the legend at the bottom of the title page of a work containing the © copyright symbol, the year of first publication, and the name of the copyright owner. Note that the presence or absence of this copyright notice is no longer of much significance in determining whether a work is protected. While older works may still require a notice, a notice is recommended but not required for works created after March 1, 1989.

Let's assume the work is protected. If your intended use encompasses any of the exclusive rights granted to the copyright owner by the law, you need permission. These rights are set forth in Section 106 as six categories:

To reproduce the copyrighted work in copies or phonograph records;

To use the work as a basis for a new work, "a derivative work" (like an arrangement);

To distribute or publish copies to the public by sale, rental, lease, or lending;

To publicly perform the work (noting that the old requirement that the public performance be "for profit" is eliminated in the current law);

To public display of an image; and

To digital transmission of sound recordings.

In summary, the rights are reproduction, adaptation, publication or dissemination, performance, display, and digital transmission. If you plan to do any of these things or a combination of several, you'll need permission from the copyright owner - unless your use falls within one of the exemptions.

Exemptions to Exclusive Rights

Even if the work and the use are protected, The Copyright Act has several sections creating exemptions by which your use may be exempt from liability and the work may be used without permission. I will discuss those most relevant to the jazz educator and student.

Educational institutions (and by this I mean "nonprofit" educational institutions) and governmental agencies are authorized to publicly display and perform works in the course of face-to-face teaching activities at the institution and, to a limited degree, using broadcasts. These rights are described in Sections 110 (1) and (2).

Sec. 110. - Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of Section 106, the following are not infringements of copyright: 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 it was not lawfully made; performance of a nondramatic literary or musical work or display of a work, by or in the course of a transmission, if the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and the performance or display is directly related and of material assistance to the teaching content of the transmission; and the transmission is made primarily for reception in classrooms or similar places normally devoted to instruction, or reception 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, or reception by officers or employees of governmental bodies as a part of their official duties or employment.

Note that Section 110 does not mention making copies. It deals only with performances and displays: live, in the classroom, and to a more limited extent through transmissions-the latter being the part of the law most relevant to distance-learning (which I hope to cover in a future column).

Section 108 of the law authorizes special exemptions for libraries, including archiving lost, stolen, damaged, or deteriorating works; making copies for library patrons; and making copies for other libraries' patrons (interlibrary loan).

Fair Use

The third and-for our purposes-most important limitation on exclusive rights is Section 107, which sets out the four fair use factors to be considered in evaluating a particular use. The following analysis is based on the very useful chart available at the U.T. site.

The first of the four factors is the purpose and character of the use. A nonprofit, educational, or personal use would more likely be a fair use than a commercial use. However, that doesn't mean that a teacher could legally make ten copies of a choral arrangement for distribution to choir members in order to present a paid performance where the proceeds go to the school. A counterbalancing element here is whether the use is for criticism, commentary, or other "transformative" use (like parody)-or whether it is an exact copy of the original. In other words, incorporation of an excerpt from a play in a criticism or commentary is more of a fair use than reproducing it verbatim for wider distribution. This would apply to a use of the chords and part of the melody in a jazz version that includes improvisation.

The second factor is the nature of the original work to be used. A factual work that has been published is more likely to be a fair use than a creative unpublished work. If a work is unpublished, the law favors the creator having the right to make the decision about how the work will initially be disseminated; and many lesser-known original jazz compositions may very well be unpublished.

The third factor is how much of the work will be used. In music, a lot of classroom copying is of the entire work; but I am often asked if the teacher could make copies of just the bridge of a tune to distribute to the students, while at the same time asking them to transcribe the rest of the composition by ear. Even though only part of the work is used, I think this would probably not constitute a fair use. The quantity of copies could also inversely relate to the use: a teacher could copy an entire article from a journal for students in a class; but if this were done in a commercial copy shop, permission would be required. Similarly, commercial publishers offer much less latitude in using quotations than a student might in writing a paper.

The fourth factor is the effect of the use on the market for the original. Although this would appear to be the most important use, the Supreme Court took great care to point out in the 2 Live Crew case that all four factors should be weighed equally and that it is indeed possible for a fair use to be made for purely commercial purposes.

Guidelines

One problem with the fair use criteria established by the Act is that they are vague and subject to different interpretations because of the many factors to be considered. Some have described it as a no-man's-land that you enter at your own risk.

How then are we to provide effective guidance for the users of protected works? One answer has been the various sets of minimum guidelines that provide a "safe harbor" within fair use. Different guidelines cover different uses. For example, U.T.'s "Rules" cover uses of copyrighted works in course packs, distance-learning, image archive (like art history slide collections), multimedia works (such as incorporating others' works in a multimedia work), research copies, and reserves.

The Music Guidelines were promulgated in 1976 and have remained intact since that time, adopted by the National Association for Music Education (MENC), the Music Publishers Association (MPA), The Music Teachers National Association (MTNA), The National Association of Schools of Music (NASM), and the National Music Publishers Association (NMPA). Most institutions at the secondary and college levels have also adopted them. In fact, they are so generally accepted that some educators and administrators think that this is the law, which it is not. If you stick to the Guidelines however, you can be reasonably sure you're on safe ground. The Music Guidelines read as follows:

Guidelines For Educational Uses of Music

The purpose of the following guidelines is to state the minimum standards of educational fair use under Section 107 of H.R. 2223. The parties agree that the conditions determining the extent of permissible copying for educational purposes may change in the future; that certain types of copying permitted under these guidelines may not be permissible in the future, and conversely that in the future other types of copying not permitted under these guidelines may be permissible under revised guidelines.

Moreover, the following statement of guidelines is not intended to limit the types of copying permitted under the standards of fair use under judicial decision and which are stated in Section 107 of the Copyright Revision Bill. There may be instances in which copying which does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

A. Permissible Uses

Emergency copying to replace purchased copies that for any reason are not available for an imminent performance, provided purchased replacement copies are substituted in due course.

For academic purposes other than performance, multiple copies of excerpts of works 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 10% of the whole work. The number of copies may not exceed one copy per student.

For academic purposes other than performance, a single copy of an entire performable unit (section, movement, aria, etc.) that is confirmed by the copyright proprietor to be out of print, or 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.

Printed copies that have been purchased may be edited or simplified, provided that the fundamental character of the work is not distorted, that the lyrics (if any) are not altered, and that no lyrics are added, if none exist.

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

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 permitted copying pertains only to the copyright of the music itself and not to any copyright which may exist in the sound recording.)

B. Prohibitions

Copying to create or to replace or substitute for anthologies, compilations, or collective works.

Copying of or from works intended to be "consumable" in the course of study or of teaching such as workbooks, exercises, standardized tests, and answer sheets and like material.

Copying for the purpose of performance, except as in A.1 above.

Copying for the purpose of substituting for the purchase of music, except as in A.1 and A.2 above.

Copying without inclusion of the copyright notice which appears on the printed copy.

I copied these Guidelines from the MENC site. It is interesting to note that the same Guidelines appear on the MPA site, but on that site the prohibitions come first. This contrast in approach should not come as a surprise. There is still a huge gap between the publishing industry and the educational community on these issues; and despite frequent discussions, these differences have continued from 1976 to the present. But do not confuse opposition with defiance. Educational institutions and industry organizations take these Guidelines very seriously. For example, the U.T. System Policy states as follows: "It is U.T. System policy that an immediate order for the purchase of replacement copies is to be placed on a one-for-one basis, and all reproduced copies of a musical work are to be destroyed upon receipt of the ordered copies. Any other method of calculating the number of replacement copies to be ordered, such as an inventory taken after the performance, is unacceptable. It is expected that staff and faculty routinely involved with performances will emphasize planning procedures so as to avoid use of emergency copying on a routine basis."

But because the Guidelines are minimums - not maximums - restrictions come along with the comparative safety of the Guidelines. Under the Guidelines, the copying of an entire work is only for performances and only in emergencies. Copies of music from performable units, "movements, sections, arias, etc." can only be made if the music is out of print. Student's performances can be recorded only for a teacher or an institutional evaluation of the student's portfolio; and recordings can be made, but only one copy for a classroom or reserve use.

Putting it into Practice

Can copies be made for your own personal use? This is not usually of serious concern to publishers, although technically it may be an infringement. However, disseminating the results of the personal-use

copies is another matter. Suppose you bought sheet music and want to make a copy for your accompanist. According to the Guidelines, copying for the purpose of performance is prohibited. Emergency copying for a performance is allowed, so long as a purchased copy replaces the photocopy in due course. According to the Guidelines, a copy can be made only if it is not a "performable unit," not more than 10% of the whole work, and the number of copies not exceeding more than one per pupil. Thus the New York State School Music Association (NYSSMA) has a policy that an accompanist must have a separately purchased copy for a recital-or the performance will not be authorized.

Acquisition of a copy does not include the transfer of any copyrights in the work. In other words, the purchase of printed or recorded music does not give you the right to copy that music. Someone can arrange a copyrighted work for his or her own education, but before that arrangement is performed in public or it is published or duplicated, permission must be obtained unless that performance falls within one of the exceptions to the exclusive-rights sections of the law. In educational circles, performances take place every day without prompting lawsuits against students, directors, or the school. An argument could be made that these performances are in the course of face-to-face teaching-even if they take place in the school's concert hall or on an educational jazz festival stage. Such locales and occasions are an integral part of the academic jazz experience (perhaps even of the school band's syllabus); and the director would seem to be involved in "face-to-face" instruction during that concert.

In addition, most venues -whether educational or not-have indeed obtained a license for educational use of music from the relevant performing rights societies (ASCAP, BMI, and SESAC) that would permit this performance provided it is not dramatic in nature. Therefore, even if the performance is not sufficiently "face-to-face" to make it exempt, it may actually be licensed through existing agreements with societies. Note, however, that these minimum-fee licenses would exclude fully professional performances-which would then require that an individual performing rights license be negotiated with the promoter.

What about the arrangement made for this performance? Though the law provides an express right to make a reasonable arrangement for a recording, it is silent about performances. I would think, though, that a reasonable arrangement for this type of educational performance could fall within the fair use exemptions.

What about copying by students? Many professionals in the field think that the Guidelines are too restrictive, that student use of material for strictly educational projects of any kind is fair use. But that would be limited to purely educational uses - excluding things like the school play, which may well have educational value but is simple entertainment.

Most educators want to do the right thing and are not consciously attempting to break the law. There is a special section of the copyright law, Section 504 (c)(2), that takes this into consideration. It is called the good faith, fair use defense. It only applies if the person who copied material is an employee of a nonprofit institution and reasonably believed that what he or she did was fair use - as would be the case if you followed the Guidelines. If you qualify for this defense, it makes you a very poor prospect for a lawsuit. On the other hand, if you disregard sound advice about fair use, a court would be free to award the highest level of damages available; and the penalties for infringement are very harsh. A court can award up to $150,000 for each separate act of willful infringement. Even if the plaintiff can't show that you knew you were willfully infringing, you could still be liable for damages of up to $30,000 per work infringed, plus very substantial attorney's fees and court costs.

Another very compelling reason to stay within the Guidelines and not exceed them is that your institution may not defend you against a charge of copyright infringement if you exceed their Guidelines. The U.T. site says such a defense would actually be in violation of the Texas State Constitution. If your school does not defend you, you will be on your own.

Conclusion

How then is the educator or student to determine whether permission is required to make a specific educational use of music? Initially, unless it is obvious that the work is in the public domain, assume that the work is protected by copyright. If your institution or organization has adopted a set of Guidelines for the use of music, obtain a copy of them. They are probably on the institution's web site as well as being available in printed form. If they are on a web site, then its administrator should be able to answer questions. Find out how you can quickly obtain a ruling or permission.

If you feel confident enough that your use, though it may exceed the Guidelines, is permitted under the fair use statutory language, use it sparingly; make sure that you have a legal copy of the work; make sure that any copyright notice or attribution on the copy is reproduced on your copy and that the appropriate citations and attributions to the source are also indicated. Limit access to the students

enrolled in the class and administrative staff as needed, and terminate the access as soon as you have made the use.

Finally, obtaining permission is not as difficult as it sounds. Many of our most important jazz works are published by major publishers, as is the repertoire of standards so often played and recorded. These publishers are best located through the ASCAP, BMI, or NMPA sites; and most publishers also have sophisticated, interactive web sites of their own. The MPA site provides downloadable request forms for permission to arrange and an inquiry form on out-of-print music, as well as a complete listing of all the Guidelines. Of course, responses may not come as you would like: you may meet with resistance, delay, or no response at all. Do not interpret any publisher's failure to respond to your request as some sort of tacit approval: it is not. The first word of "no answer" is the operative word.

Copyright and Fair Use are rapidly changing areas; and new uses are continually being created that keep users, owners, and lawyers scratching their puzzled heads as they try to devise workable alternatives. Stay tuned to the JEJ and the IAJE Conference and save your questions. We are planning a workshop on this very topic at next year's Conference in Toronto, where we will have experts on both sides debating the issues; and we'll save plenty of time for questions. If you want to send questions to me at my Resource Team address, I'll certainly add them to my collection.

One View

Lastly, I'll allow myself a little space for a personal opinion-which I must strongly caution should not be confused with the facts I have tried to carefully outline.

Jazz is by its nature creative, building on and in some ways transforming the creative work of others. It takes a protected tune, alters the chords, perhaps writes a new melody, and spends most of the performance improvising. The improvisation is for the most part on the unprotected chords, not on the protected melody. Many entirely new compositions have been created by using these chord changes with new titles, yielding new owners. The original publishers have rarely sought to enforce these rights, even though the titles are sometimes as thinly veiled as was the performer name "Charlie Chan" on the Massey Hall recording. But there are also thousands of jazz recordings of standards which pay full royalties, despite the fact that they may be altered from the original as much as **Koko** or **Donna Lee**.

Where does this fit in with fair use and our basic examination in this column of the balance between creative and economic benefits? I can only raise the question: I can't answer it, though maybe a court one day will. This history of "part licensing" and "part new works" has existed in jazz from before the days of Charlie Parker and without the rancor, litigation, and legislative involvement that characterizes the relationship between publishers and the educational community. One could argue that the unchallenged existence of **Donna Lee** is some sort of acknowledgment by the publisher of Indiana of a fair use - although I would argue that it's probably more due to the long-standing practice of ignoring the importance of jazz rather than any legal statement of non-liability.

Maybe there's a lesson here. Publishers and jazz composers seem to have developed a workable system in which licensing of standards on the one hand can coexist with original works being created on those standards for which no payment is made to the publisher. We should then be able to hope that the educational community and the publishing world could also be able to find a way to coexist. **Donna Lee** far exceeds any Music Guidelines I have seen, yet it has been around for 50 years or more; and it and Indiana are each still going strong. And (to finish on an educational note), I'm sure that the comparison of the two tunes has been made countless times in jazz classes.

Perhaps in this manner, jazz can show the way.

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