Copyright Basics

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The Congress shall have Power…To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

United States Constitution, Article I, Section 8

Q1: What is a US copyright?

A1: A copyright is a legal device by which the United States government protects creators by giving them certain exclusive rights (these rights and the limitations on them are discussed in question 4 to 6 below) in their works for a limited period of time. Because these rights can be valuable, a copyright owner can obtain payment if someone else wishes to use their work. Moreover, these rights also include certain rights to stop a use to which the copyright owner objects.

In the US, copyright is exclusively a federal law and is uniform throughout the country. This contrasts with, for example, contract law, which varies from state to state.

Q2: Who is the original owner of a US copyright?

A2: The US copyright law presumes that the creator of a work is the original owner of the copyright in that work. The only exception is if the work is a "work made for hire," in which case the employer of the actual creator is the original owner.

For collaborative works, the US law gives joint ownership of the entire work to the creators.

The creator/owner can license others to use that work in various ways, such as perform or record. Or the creator/owner can enter into an arrangement with another party, such as a music publisher, who will promote, print, rent and/or license the work for use on behalf of the creator.

Q3: How does a creator get a US copyright?

A3: A creator does not have to do anything extra to obtain copyright protection. Copyright subsists in a work from the moment it is "fixed in a tangible medium of expression," that is, when it is embodied in a printed copy, phonorecord (i.e., an audio-only recording in any form, such as a compact disc or MP3 file), film, DVD, computer hard disc or flash memory device, or any other means by which it can be stored in a sufficiently stable form to allow it to be perceived, reproduced or otherwise communicated.

Q4: What are the exclusive rights of a copyright owner?

A4: There are six exclusive rights:

> **(1)** the right to reproduce the work in copies or "phonorecords" (which term includes all forms of audio-only recordings);
>
> **(2)** the right to prepare derivative works (e.g., songs or operas using texts by others, choral arrangements, marching band versions; sound recordings of performances of the work);
>
> **(3)** the right to distribute copies or phonorecords of a work by any means, including sale, rental, lease or loan;
>
> **(4)** the right to perform the copyrighted work publicly;
>
> **(5)** the right to display the work publicly; and
>
> **(6)** for sound recordings, the right to perform the work publicly by means of a digital transmission.

You should be aware that there are certain important limitations on these rights. Those limitations are discussed in question 6 below.

Q5: What is a "public" performance or display?

A5: In the Copyright Act, "publicly" means

(a) to perform or display a work in a place open to the public or where a substantial number of persons outside of a family and its normal circle of social acquaintances is gathered, such as a theatre or concert hall; or

(b) to transmit or otherwise communicate a performance or display to a place described in (a) above or to the public, by any device or process (including broadcasting, "cablecasting," satellite transmission and digital transmission via the Internet or otherwise), whether the public receives the performance at the same or different places, and at the same or different times. All television and radio broadcasting, as well as webcasting, is covered by this position.

Q6: What are the limitations on the exclusive rights?

A6: There are some significant limitations. The most important of these is the doctrine of "fair use." "Fair use" is a legal concept which means that an unauthorized use of a copyrighted work which otherwise would be an infringement of copyright will not be

considered infringement because it is a use to which the copyright owner should not object. This is either because the use does not impair the economic or artistic value of the work, or because it is one of overriding social value.

For example, the law suggests that certain limited uses of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, and research may be "fair uses". However, this does not mean that, for example, a teacher is free to copy anything he wants for classroom use.

Myth 1: Numerical and Percentage Guidelines

•***It is important to note that there are NO numerical or percentage guidelines in the law.***
•There is nothing in the law that says that the use of a 30-second clip, or a 50-word excerpt of a text, is always fair use, regardless of the reason for using it.
•Every situation has to be considered individually.

Myth 2: Non-Profit Organizations

•***It is important also to note that there is NO general fair use exemption for non-profit organizations.***
•For example, every organized orchestra, opera and ballet company in the U.S. is a non-profit organization, from the largest to the smallest. So is virtually every university and college, as well as many important theatre companies, presenters and venues.
•Obviously, composers and publishers would have had to stop creating and publishing concert music long ago if there were such an exemption.

Fair Use Factors

The US Copyright Law says that if the copyright owner claims that a use is unfair, a court is to consider the facts and circumstances, including the following four factors:
(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 upon the potential market for or value of the copyrighted work.

Although all four factors must be considered, most "fair use" cases are determined by answering the question posed by the fourth factor: is the use complained of one which the copyright owner justifiably expects to be paid for?

Examples:

- In the case of material published specifically for the educational market, a US court should be more willing to protect the copyright owner from large-scale photocopying of, say, a complete choral arrangement by a school than if the work in question were a few pages from a long symphonic score, but these cases are not always predictable.
- Similarly, uses of excerpts of copyrighted dramatic works, such as musical plays or operas, could be fair use if used in reviews of the performance, but not necessarily to sell tickets or DVDs.

Parody and Fair Use

- The US Supreme Court has ruled that parody use falls within "fair use."
- This means that one who wishes to make and exploit a parody of a song does not need to ask permission or pay any royalties, even if the parody is extremely successful commercially.
- However, satirical use does not fall within "fair use." One who wishes to make and exploit a satirical work that uses copyrighted music must get permission and pay any fees required.

How to tell the difference between a parody and a satire?

- Both parodies and satires use pre-existing works to comment on something.
- However, a parody must comment on the pre-existing work, whether or not it also comments on something else.
- A satire, by contrast, only uses a pre-existing work to comment on something else.

Other important limitations include:

- compulsory licenses for the making of commercial phonorecords for distribution to the public for private use and for certain educational television uses,
- limited rights to copy works for library and archival uses, and
- certain cable television uses.

In each case, Congress has tried to balance the rights of the copyright owner against the rights of the public to obtain access to copyrighted works on an economically reasonable basis.

Using Music Online

- Unlike the copyright laws in European Union member states and some other countries, the US Copyright Law does not contain a specific "making available right" covering Internet uses.
- Instead, online uses are considered to fall within one or more of the reproduction, distribution and public performance rights.

Webcasting:

- Composition. ASCAP, BMI and SESAC each offer performance licenses to websites performing music in a non-dramatic way. A license may also be sought directly from the copyright holder of the composition, generally the music publisher.
- If a use is dramatic in nature, the use would not be covered by a performing rights society license and the copyright holder should be contacted.
- It is not clear whether a separate mechanical license is also required.
- If the music is used in synchronization with moving images (e.g., video), a synchronization license is also required. This must be obtained from the publisher as The Harry Fox Agency does not offer synchronization licenses, and there are no blanket schemes other than for Public Broadcasting Service uses.

Sound Recording:

While there is no right of public performance in a sound recording for terrestrial broadcasting and venue performance, there is a right of public performance by digital transmission. Sound Exchange has been formed by the RIAA to offer licensing for non-interactive services for many labels.

For other uses, permission to use a particular recording of a composition should be sought from the copyright holder, generally the record company.

Downloads

- Downloads clearly involve the reproduction right, and thus require a mechanical license.
- Less clear is whether they also involve a performance right. This is the subject of ongoing litigation.

Q7: How long do copyrights last?

A7: In the U.S., for newly created works, the term of copyright is the lifetime of the composer (or her longest-lived collaborator) and an additional seventy (70) years. For works first registered for copyright under the 1909 Copyright Act on or before December 31, 1977, the old U.S. system of two terms of copyright continues, so that the total term of protection is ninety-five (95) years from date of first publication or, if the work was registered as an unpublished work, from first registration. This system was revised in 1992 to eliminate the possibility of loss of protection through failure to file a copyright renewal application starting with works first protected in 1964. In 1996, certain works of non-US origin were "restored" to protection for the balance of the term they otherwise would have had, but a pending court case may limit this protection.

Q8: What is copyright infringement?

A8: Copyright infringement is the violation of any of the exclusive rights of the copyright owner which is not a fair use or for which no other exception exists (discussed in questions 4-6 above).

Q9: If someone is infringing a copyright, what remedies are available to the owner?

A9: Remedies for copyright infringement include:

a) injunctions (a court order stopping the infringement activity);
b) seizure of infringing materials;
c) the owner's damages and the infringer's profits, or statutory damages of between $200 and $150,000, depending on the circumstances; and
d) court costs and attorneys' fees.

Not all remedies are available in all cases. Also, be aware that statutory damages and attorney's fees generally are not available unless the work was registered before the infringement occurred.

Q10: Is there a uniform system of copyright protection throughout the world?

A10: Sort of. This is because each country applies its own copyright law within its own borders. However, most countries, including the U.S., are signatories to international copyright treaties. The most important of these are the Berne Convention and the Universal Copyright Convention. These treaties obligate the countries that signed them to provide certain minimum standards of protection to works published in other countries. The minimum term of protection under the Berne Convention is the life of the author plus fifty (50) years.

In 1995, the European Community countries increased the term of copyright in their countries to the lifetime of the composer plus seventy (70) years. Certain other countries, including Switzerland and Australia, have also extended the term of copyright beyond life plus fifty years, as has the US.

It is possible for a work to be out of copyright (i.e., in the "public domain") in the U.S. but not in most other countries, or vice versa. This is because in many foreign countries, if an old-law U.S. work loses copyright protection because the 95-year term expires before the end of the "life-plus" term which otherwise applies, the work will lose protection in the foreign country at the same time. This is true even though the work would have continued to be protected if it had originated in that foreign country. However, in the opposite situation, that is, where the U.S. 95-year term for a foreign work is longer than the life-plus protection given in the home country, the U.S. will continue to protect the foreign work in the U.S.

The difference in copyright terms is particularly important to note in connection with Internet uses. Just clearing rights outside the U.S. is NOT sufficient if the Internet transmission can be accessed inside the U.S., and vice versa. If in doubt, it is best to contact the copyright owner (usually the music publisher) for clarification.

Q11: Does the US Copyright Law protect moral rights

- Except in the case of works of visual art, the US Copyright Law does not explicitly protect moral rights (that is, the rights of integrity and attribution)
- The US expressly declined to adopt Article 6bis of the Berne Convention when it acceded to Berne in 1989
- Protection of the rights of integrity and attribution supposedly is given under other laws, such as the law of unfair competition. However, the Supreme Court has cast serious doubt on whether such protection exists under those laws, particularly for works for which the US copyright has expired.
- There is also no copyright in typography.

This material is a brief introduction to some major copyright topics. It is not intended to be a substitute for professional legal advice. Many factors will affect the applicability of the general principles stated above to a particular case. In case of doubt, you are strongly advised to consult a knowledgeable music copyright attorney.

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