



Use of Copyrighted Music on College and University Campuses



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Complying with copyright law as it impacts the varied uses of music on campus can be a struggle for colleges and universities. Music copyrights are not dealt with on a daily basis on most campuses, various departments or administrators may share responsibilities for this area, and staff turnover may leave a new person in charge with little information about the steps the institution needs to take to comply with copyright requirements. A college or university may also undertake new uses of music, such as the production of a video yearbook or uploading a snappy admissions video to YouTube, that are not covered by the blanket performing-rights agreements. To help fill this gap, this report provides general information about music copyrights, including excerpts from the United States Copyright Act; explains the exemptions available for educational use; and supplies general information on the various types of copyright licenses and the steps to take to secure them.

This report is intended as an overview and should not be used as a substitute for the advice of informed legal counsel. Readers are encouraged to distribute copies of the report to personnel who have responsibilities in this area or who are engaged in planning activities that involve the use of music.

This report was jointly prepared by the National Association of College and University Business Officers (NACUBO) and the American Council on Education (ACE) and reviewed by members of the Music Copyright Task Force. The task force, led by ACE and NACUBO, has represented the higher education community in negotiations with performing rights organizations. Its members include representatives from several institutions, the Association of College Unions International, EDUCAUSE, the National Association of Schools of Music, the Association of Performing Arts Presenters, the National Association of College and University Attorneys, NASPA: Student Affairs Administrators in Higher Education, and the National Association for Campus Activities.

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Complying with U.S. Copyright Law

One of the most important concepts to understand in music copyright is the distinction between a *musical work* (also known as a musical composition) and a *sound recording*.

- A “musical work” is the original song written by a composer/songwriter. The copyright in a musical work is typically held by the composer/songwriter and/or a music publisher such as Hal Leonard Corporation.
- A “sound recording” is the recording of a performance of the underlying musical work. For example, many artists have recorded their own renditions of the song “Imagine,” by John Lennon. In doing so, each artist created a copyrighted sound recording that he or she—or more often, his or her record label—own.

Obtaining a copyright license to a musical work does not authorize use of a sound recording containing that work, nor vice versa. Thus, for example, if a university were to use the Herbie Hancock, et al., cover of “Imagine” as background in a promotional video for prospective students, absent a fair use exception, it would have to obtain licenses both from the estate of John Lennon (as owner of the musical work) and Hancock Records (as owner of the sound recording).

Under the Copyright Act, the owner of a copyright in a musical work or sound recording has certain exclusive rights. The chart below describes the most relevant rights for our purposes, and to put them in concrete terms provides common examples of their application.

Copyright Owner Legal Right:	Common Example(s):
To reproduce the copyrighted work in copies or phonorecords;	Copying an MP3 of recorded music “Synching” background music into a video production
To prepare derivative works based upon the copyrighted work;	Creating a remix of a popular song
To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;	Making a promotional video that contains background music available for download from the university’s website Uploading that promotional video to YouTube
In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and	Live performance of popular songs by a university a capella group Recorded music played over a sound system at university dining hall or on broadcast radio
In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.	Webcast of a university radio station via the station’s website

Prior to 1978, colleges and universities were exempt from many of the requirements of the Copyright Act due to a provision that gave copyright owners control over the public performance of their musical compositions only if the performance was “for profit.” The Copyright Revision Act of 1976, which became effective on January 1, 1978, eliminated the not-for-profit exemption. Copyright owners were given more extensive control over the use of their music, although several specific exemptions are still available.

Accordingly, any use of a copyrighted musical work and/or sound recording requires an analysis of the licenses that may be necessary to authorize that use. This document will explore those licenses, a summary of which is provided below.

License/right:	Meaning:
Performance rights	Gives the right to publicly perform or display music. A “performance” can range from a live on-campus performance to a “music on hold” system for callers.
Grand rights	Gives the right to perform music as part of dramatic performances, such as operas, operettas, musical plays, ballets, and others. Concert versions of dramatic musical works also require grand rights.
Mechanical rights	The right to make copies of, or to reproduce mechanically, non-dramatic musical works for distribution.
Synchronization rights	The right to use musical works and/or sound recordings in combination with visual images such as movies, videos, or television.
Jukebox license	One paid license per jukebox instead of paying each performing rights organization separately. Typically, the vendor renting the jukebox acquires the license.

Fair Use

Under the statutory doctrine of fair use, in some cases use of a musical work and/or sound recording without the permission of the copyright owner(s) is lawful. Found in § 107 of the Copyright Act, fair use involves the use of a copyrighted work for such purposes as teaching, research, reporting, or criticism. This does not mean, however, that all such uses are “fair.” Four factors are outlined that should be used in determining whether a use falls under this doctrine. The factors relate to purpose, nature of the work, amount and proportion used, and the effect of the use on the value or market for the work.

§ 107. Limitations on exclusive rights: Fair use

The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

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.

Determining whether or not a particular use of music is a “fair use” can be difficult. As the U.S. Copyright Office has explained: “The distinction between what is fair use and what is infringement in a particular case will not always be clear or easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission.”

A number of colleges and universities have established online tools to aid in making a fair use analysis. We have listed some of those sites below:

- Stanford Copyright and Fair Use Center (fairuse.stanford.edu);
- Columbia University Copyright Advisor Office (copyright.columbia.edu/copyright/fair-use/fair-use-checklist); and
- University of Maryland University College Library Guidelines (www.umuc.edu/library/libhow/copyright.cfm).

We note also that under Section 108 of the Copyright Act, in certain cases libraries may make a single copy of a musical work and/or sound recording (among other copyrighted works) without permission of the copyright holder(s). The Copyright Clearance Center provides a helpful overview of these exceptions at www.copyright.com/Services/copyrighthoncampus/basics/fairuse_archive.html.

Public Domain

Overview. When the copyright on a musical work expires, the work is said to have passed into the “public domain.” These works can be used freely without the permission of the copyright holder. All works published in the United States before 1923 *are* in the public domain, while virtually all of those created after 1977 *are not* in the public domain. With respect to works created between 1923 and 1977, the copyright status of the work depends upon multiple factors, such as whether the copyright for the work was renewed and/or the author complied with certain statutory formalities. Cornell University (NY) has a helpful resource for determining whether a work is in the public domain, at copyright.cornell.edu/resources/publicdomain.cfm.

Due to a quirk in copyright law, sound recordings made prior to February 15, 1972, do not enjoy protection under federal copyright law and thus technically are in the public domain. We note, however, that there often are state law protections that apply to these works, so it should not be assumed that they may be used freely without a license in all cases. Keep in mind that even if a license to a pre-1972 sound recording is not necessary, the user may require a license from the owner of the underlying musical work.

Performance Rights

Overview. Purchasing music does not necessarily convey the right to publicly perform or display it. Composers and publishers who own copyrighted musical works have broad and exclusive “rights of public performance.” This means that unless some exception applies, whenever a college or university performs a musical work it must do so pursuant to a license. A “performance” can range from a live on-campus performance to online streaming to a “music on hold” system for callers.

According to the Copyright Act, to perform or display a work “publicly” means:

To perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

To transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public are capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times. (§ 101)

The law includes several exemptions, or limitations on the copyright owner’s rights, that are of interest to colleges and universities. These include § 110. Briefly, the § 110 exemptions include:

- Face-to-face teaching activities of a nonprofit institution in a classroom or similar place devoted to instruction;

- Broadcasting of nondramatic literary or musical works, when their use is directly related to the teaching content of the transmission, as a regular part of systematic instructional activities for reception in classrooms or by persons whose special circumstances prevent attendance in classrooms;
- Performances of works of a religious nature as a part of religious services or assemblies;
- Performance of nondramatic works without any commercial purpose, or compensation to performers or organizers, if there is no direct or indirect admission charge or the net proceeds are used exclusively for educational, religious, or charitable purposes unless the copyright owner formally objects; and
- Operation of an ordinary (home-type) radio or television receiver in public if no direct charge is made to see or hear the transmission and no further transmission to another place is made.

Any public performance of music that does not meet these exceptions requires the prior approval of the copyright holder. In assessing the permissions you may need for a musical performance, it is important to keep in mind the distinction between *musical compositions* and *sound recordings*.

Performance Rights for Musical Compositions

For musical compositions, permissions typically are obtained through one of three performing rights organizations. For nondramatic uses of music, a system has developed over the years to make obtaining copyright permissions easier. Dramatic uses of music, including concert versions of dramatic musical works, are licensed separately (see discussion of “grand rights” below). The three major performing rights organizations are the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC (originally the Society of European Stage Authors & Composers). ASCAP is an unincorporated membership association of copyright holders. BMI operates as a not-for-profit corporation. SESAC, which is considerably smaller than the other two, is a privately held company. The three organizations control the performance rights to about 97 percent of the music in the United States.

Copyright holders choose one of the three organizations to represent their rights. The organizations then issue licenses to users of music, collect royalty fees, and distribute the fees to copyright holders after deducting expenses. Royalties are distributed under various formulas based, for instance, on surveys of music use by radio stations and analyses of programs of live performances. Each organization controls the rights to a discrete repertory of music, so as a practical matter, to ensure complete copyright compliance, a music user should have licenses with each performing rights organization.

Model Licensing Agreements

For more than 30 years, all three performance rights organizations have offered blanket licenses for use by institutions of higher education, negotiated by ACE and NACUBO. Several dozen other industries have also negotiated licenses. The model licenses allow a college or university to pay an annual fee to cover public performances of music on its campus, as well as certain types of off-campus functions and ones organized by affiliated groups. Performances of music, either live or recorded, at the following types of functions are covered by the licenses:

- Concerts;
- Dances or mixers;
- Coffee houses, pubs, and student unions;
- Recorded music piped into bookstores or cafeteria;
- Music-on-hold telephone systems;
- Exercise classes;
- Parties at fraternities, sororities, or other student clubs; and
- Athletic events.

In recent years, the model licenses have been expanded to cover the playing of musical works/compositions over the Internet and on campus-run cable television (see Sound Recording Performances: Streaming).

The licenses are not intended to cover events or functions sponsored by organizations not affiliated with the college or university simply because they may be held on campus property. For instance, a community symphony orchestra that rents or is allowed to use a college auditorium for a performance would not be covered under the college's license. On the other hand, if the college invites or hires an orchestra to perform in a campus facility as part of a program sponsored by the college, the performance probably would be covered. Similarly, the licenses do not cover performances by college groups performing at off-campus locations not engaged by the college. For example, a university marching band invited to a parade would not be covered by the university license (the parade organizers would need to supply coverage). The three sets of negotiated model licenses have slightly varying provisions, so the contract license should be reviewed if questions arise concerning coverage.

The performing rights organizations encourage institutions with questions about the blanket licenses to contact them directly. The website addresses are:

- www.BMI.com;
- www.ASCAP.com; and
- www.SESAC.com.

These agreements are models, and colleges and universities are not obligated to accept them, but most do. Institutions are free to negotiate directly with ASCAP, BMI, and SESAC if they choose. Some institutions, including public institutions in certain states, find that they need to make a few modifications to the language in order to comport with state law.

Royalty rates are based on the institution's full-time equivalent (FTE) enrollment and are indexed annually according to increases in the Consumer Price Index (CPI). Under the one-tier licenses, the fee is based solely on the institution's FTE enrollment. The per-student assessment is less under the two-tier licenses offered by ASCAP and BMI, but the institution must pay an additional fee for any musical attractions held during the year at which entertainment costs total \$1,500 or more.

Broadcast Campus Radio and TV Stations

Section 118 of the Copyright Act contains special provisions for licensing noncommercial radio and television stations to use copyrighted music (and pictorial, graphic, and sculptural works). The Copyright Royalty Board is charged with setting rates for these licenses, except when voluntary agreements between parties are reached. New annual rates may be set every five years.

ACE, supported by NACUBO, has represented higher education in the Copyright Royalty Board's broadcast rate proceedings. ACE has submitted joint proposals, negotiated with the performing rights organizations, that must be ratified by that board rather than voluntary agreements that would supersede the rule-making process. Because ACE does not represent all institutions of higher education operating radio stations and it has no power to bind its members to an agreement, ACE cannot submit a voluntary agreement that would meet the requirements to bypass the board.

The Public Broadcasting Service (PBS) and National Public Radio (NPR) have negotiated voluntary license agreements with the three performing rights organizations. College and university stations affiliated with PBS or NPR are covered by those agreements.

Regulations issued by the Copyright Royalty Board under 37 CFR § 381.5 set rates for noncommercial radio stations licensed to colleges and universities and not affiliated with NPR and PBS. The royalty rate for an SESAC license in 2013 is \$140. Rates for future years will adjust according to year-over-year changes in the CPI or two percent, whichever is greater. The chart below explains the royalty rates for ASCAP and BMI licenses (each) at non-NPR-affiliated college and university radio stations.

Level	FTE Students	2013	2014	2015	2016	2017
1	<1,000	\$319	\$325	\$332	\$339	\$345
2	1,000–4,999	\$369	\$376	\$384	\$392	\$399
3	5,000–9,999	\$505	\$515	\$525	\$535	\$546
4	10,000–19,999	\$655	\$668	\$681	\$695	\$708
5	20,000+	\$882	\$838	\$855	\$872	\$890

Colleges and universities covered by these rules must comply with a request from ASCAP, BMI, or SESAC to submit a music-use report covering one week per calendar year. Each organization may request this report from no more than 10 stations in a calendar year, however.

Sound Recording Performances: Streaming

Historically, there has been no performance right in sound recordings. For example, if a disc jockey were to play Johnny Cash’s cover of the Nine Inch Nails song “Hurt” at a campus event, the university would not need a license from Cash’s estate and/or his record label. But the composer of the song (Trent Reznor) licenses the performance via the university’s blanket ASCAP license.

There are certain exceptions, however. The Digital Performance in Sound Recordings Act of 1995 and the Digital Millennium Copyright Act of 1998 granted a performance right in sound recordings in some kinds of digital media. As a result, copyright law now requires that certain users of music pay the copyright owner of the sound recording for the public performance of that music via certain digital transmissions, including satellite radio, non-interactive Internet radio, cable TV music channels, and similar platforms. SoundExchange (www.soundexchange.com), a nonprofit performing rights organization, is responsible for collecting and distributing these royalties on behalf of recording artists, master rights owners, and independent artists.

Grand Rights

The performing rights organizations (BMI, ASCAP, and SESAC) do not cover “grand rights”—the right to perform music as part of dramatic performances. Examples of dramatic musical works covered by grand rights include operas, operettas, musical plays, and ballets. Concert versions of dramatic musical works also require grand rights, as they are not covered in the agreements offered by the performing rights organizations. The point at which a piece becomes a dramatic musical work is not always perfectly clear; advice should be sought if a question arises.

Grand rights are generally negotiated individually with the copyright owner, usually the publisher or writer(s). The following agencies represent some copyright owners for negotiation and licensing of grand rights:

- Tams-Witmark Music Library, Inc. (www.tamswitmark.com);
- Rodgers & Hammerstein Organization (www.rnh.com);
- Music Theatre International (www.mtishows.com); and
- Samuel French, Inc. (www.samuel french.com).

Mechanical Rights

The copyright owner has the exclusive right to make copies of, or to reproduce mechanically, nondramatic musical works for distribution. These rights are known as “mechanical rights.” However, under § 115 of the Copyright Act, once a copyright owner has made recordings and distributed them to the public, or authorized someone else to do so, he or she must grant mechanical rights licenses to anyone else who wants to make a new recording and distribute it to the public. This type of license does not confer the right to make recordings of a particular performance or sound recording of a musical composition copyrighted by someone else.

License fees are set at a statutory “compulsory” rate that is adjusted every two years based on the CPI. The current rate is 9.10 cents per physical recording or permanent digital download five minutes or less, or 1.75 cents per minute or fraction thereof, per copy for songs over five minutes. Most mechanical licenses are issued with some variations from the statutory requirements for compulsory licenses, particularly with respect to accounting periods and reporting requirements, by the Harry Fox Agency.

The Harry Fox Agency was established by the National Music Publishers’ Association to serve as an information source, clearinghouse, and monitoring service for the licensing of mechanical rights. The agency represents almost 10,000 music publishers. The agency publishes on its website rates for services providing interactive streaming of compositions, as well as limited downloads. Its web address is www.harryfox.com.

The agency provides a great summary of when a license is needed:

“If you are manufacturing and distributing copies of a song which you did not write, and you have not already reached an agreement with the song’s publisher, you need to obtain a mechanical license. This is required under U.S. Copyright Law, regardless of whether or not you are selling the copies that you made.”

The following information is required by the Harry Fox Agency in order for a mechanical license to be issued:

- The name and address of the company or person to whom the license is to be issued;
- The title and writer(s) of the composition and the publisher(s), if known;
- The record number and configuration;
- The performing artist;
- The album (product) title;
- The playing time of the composition(s) in minutes and seconds; and
- The release date of the record (month and year).

Synchronization Rights

“Synchronization rights,” or “sync rights,” are the rights to use musical works and/or sound recordings in combination with visual images such as in movies, videos, or television. These rights are not covered under the compulsory licensing provisions for audio recordings and must be individually negotiated between the copyright owner(s) and the party that wishes to use the music. Whenever using music in a recorded production—e.g., a video made available on the university website—counsel should consider whether one or more sync licenses are needed.

Companies such as stockmusic.net, Getty Images (www.gettyimages.com/music), GreenLight Music (www.greenlightmusic.com), The Music Bed (www.themusicbed.com), and others allow users to purchase licensed music for use in advertisements or films as an alternative to contacting publishers and copyright holders.

Jukebox Licenses

The Jukebox Licensing Office was created to issue licenses so that jukebox owners could pay a single combined fee rather than pay each performing rights organization separately. Licensed jukeboxes should display a sticker on the front indicating that the license fee has been paid. Colleges and universities generally do not own and operate their own jukeboxes, but permit a vendor to use campus space in exchange for a share of the proceeds. In this case the vendor should be responsible for the license, although institutions should check to be sure that the fee has been paid. The institution will only be liable if it fails to disclose the identity of the vendor upon request. The web address of the Jukebox Licensing Office is www.jukeboxlicense.com.

Other Resources

The U.S. Copyright Office administers the Copyright Act and is a source of general information. Its web address is www.copyright.gov.

Digital copies of the Copyright Act (P.L. 94-553) as amended are available at www.copyright.gov/title17/.

A pamphlet, “The United States Copyright Law: A Guide for Music Educators,” was issued by the Music Educators National Conference, now the National Association for Music Education (NAfME); the Music Publishers’ Association of the United States; the Music Teachers National Association; the National Association of Schools of Music; and the National Music Publishers’ Association. The most current edition was revised in 2003 and can be found on the NAfME website, www.NAfME.org.

A useful reference about the music industry in general is *This Business of Music*, 10th edition, by Sidney Shemel and M. William Krasilovsky (Billboard Books, 2007).

Donald S. Passman’s *All You Need to Know About the Music Business*, eighth edition (Free Press, 2012), is another valuable resource.

Kohn on Music Licensing, fourth edition (Aspen Publishers, 2009), by Al Kohn and Bob Kohn, provides step-by-step instructions for the music licensing process.

Appendix A: Guidelines with Respect to Copyrighted Music Material

These guidelines were prepared in 1975 by a task force made up of representatives of the National Association for Music Education (formerly MENC), the Music Publishers Association of the United States, the Music Teachers National Association, the National Association of Schools of Music, and the National Music Publishers' Association.

The purpose of the following guidelines is to state the minimum and not the maximum 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 that does not fall within the guidelines stated below may nonetheless be permitted under the criteria of fair use.

A. Permissible uses:

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.
2. 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 percent of the whole work. The number of copies shall not exceed one copy per pupil.
3. Printed copies which have been purchased may be edited OR simplified provided that the fundamental character of the work is not distorted or the lyrics, if any, altered or lyrics added if none exist.
4. 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.
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 pertains only to the copyrights of the music itself and not to any copyright which may exist in the sound recording.)

B. Prohibitions:

1. Copying to create or replace or substitute for anthologies, compilations or collective works.
2. Copying of or from works intended to be "consumable" in the course of study or teaching, such as workbooks, exercises, standard tests and answer sheets, and like material.
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 2 above.
5. Copying without inclusion of the copyright notice which appears on the printed copy.

Appendix B: Links to External Sites

ASCAP

www.ASCAP.com

BMI

www.BMI.com

Getty Images

www.gettyimages.com/music

GreenLight Music

www.greenlightmusic.com

Harry Fox Agency

www.harryfox.com

Jukebox Licensing Office

www.jukeboxlicense.com

The Music Bed

www.themusicbed.com

Music Theatre International

www.mtishows.com

National Association for Music Education

www.NAfME.org

Rodgers & Hammerstein Organization

www.rnh.com

Samuel French, Inc.

www.samuelfrench.com

SESAC

www.SESAC.com

Stockmusic.net

www.stockmusic.net

Tams-Witmark Music Library, Inc.

www.tamswitmark.com

United States Copyright Office

www.copyright.gov