Music Copyright Law in the USA

Keywords
cases, composer, composers, copying, copyright, copyrights, copyrighted, infringement, law, legal, music, musical, performance, performing, phonorecords, recording, recordings, sound, statute, students, teachers, USA, work, works

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Introduction

Most contemporary copyright law textbooks focus on text and computer programs, and ignore the special problems of copyrighting music. In Nov/Dec 2008, I wrote this essay for music students, music teachers, composers, and law students who want a terse description of copyright law for music. This essay focuses on special problems of copyright of published sheet music, and includes a brief sketch of copyright for recordings of performances of music.

I am an attorney in Massachusetts who concentrates in copyright law — among other areas of law — especially in the contexts of teaching, scholarly research, the Internet, and protecting authors. Moreover, I have some knowledge of baroque and classical instrumental music: in the mid-1960s, I taught myself to read orchestral scores, and, since May 1992, I have arranged baroque and classical music for my personal enjoyment, using Finale software and a 16-channel computer-controlled synthesizer.

scope and disclaimer

This essay does *not* include either: (1) broadcasts of music on the radio, television, Internet, etc., (2) playing recorded music in public places, either with or without charging admission fees to those places, or (3) music in motion pictures.

This essay presents general information about an interesting topic in law, but is *not* legal advice for your specific problem. See my disclaimer at http://www.rbs2.com/disclaim.htm .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook.*

Readers who are unfamiliar with sources of law and legal citation style may find my handout at http://www.rbs0.com/lawcite.htm useful.

Copyright for Sheet Music

Since the Copyright Act of 1976, copyright on music in the USA initially belongs to the composer. Copyright is automatically created the moment that the composition is "fixed in any tangible medium of expression"[1], which conventionally means writing on paper or entering music into a file on a computer disk drive.

The composer should include a copyright notice, either on the title page of the music or on the first page of the music. The notice consists of three items: (1) the word "Copyright" or the symbol ©, (2) the year the composition was first published, and (3) the composer's name.[2] While a copyright notice is optional since 1989 (when the U.S.A. joined the Berne Convention), there are some benefits of including the notice[3] and there are no disadvantages to including the notice.

Before the first public display of a composition (e.g., posting the sheet music on the Internet) or *before* the first public performance of a composition, the copyright should be registered at the U.S. Copyright Office. While registration is optional[4] since 1 Jan 1978, registration puts the copyright owner in a stronger legal position when the composition is plagiarized. If the copyright is registered *before* the copyright is infringed, then:

1. the registration is prima facie evidence of the validity of the copyright in litigation for copyright infringement, if the copyright was registered before five years after the date of first publication. 17 U.S.C. § 410(c). In such cases, the defendant in copyright infringement litigation has the burden of proving invalidity of copyright.

2. the copyright owner may file suit for infringement of the copyright. 17 USC § 411(a).

3. the copyright owner may seek an award of statutory damages between US$ 750 and US$ 30 000 (i.e., the copyright owner is entitled to money from the infringer, without the plaintiff needing to show financial loss from the infringement). If the infringement was "willful", the statutory damages can go as high as US$ 150 000. 17 USC §§ 412, 504(c).

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[1] 17 U.S.C. § 102.

[2] 17 U.S.C. § 401(b); 37 C.F.R. § 201.20.

[3] 17 U.S.C. § 401(d) (defeats infringer's claim of "innocent infringement").

[4] 17 U.S.C. § 408(a).

4. a court may require the infringer to pay all of the attorney's fees of the copyright owner. 17 USC §§ 412, 505. Attorney's fees for copyright litigation case that goes to trial routinely exceed US$ 100,000, so this is an important benefit.

The composer typically sells either half or all of his/her copyright to a sheet music publisher, as part of a written contract to publish the composition. The publisher will then register the copyright with the Copyright Office. If the composer already registered the copyright, then the publisher will file papers at the Copyright Office to record the assignment of copyright ownership.

need permission

When you purchase sheet music, you own *only* the paper and ink, *not* the music itself.[5] For any work protected by copyright, you need written permission of the copyright owner *before* you can legally do any one, or more, of the following:[6]

- make a photocopy of the work
- post a copy on the Internet (known in copyright law as a "public display")
- make an arrangement of the work (known in copyright law as creating a "derivative work")
- publicly perform the copyrighted music
- make a recording of copyrighted music

There are three common exemptions from the requirement for written permission:

1. Performance of copyrighted music in a *classroom* of a nonprofit school or college is not an infringement of copyright.[7] This first exemption does *not* apply if the public is invited to the performance.[8]
2. There is a more complicated exemption for performances at a nonprofit institution (e.g., school, college, church, or charitable organization), if the performers, promoters, and/or organizers are *not* paid.[9] In the second exemption, the audience may be required to pay an admission fee, but the fee — "after deducting the reasonable costs of producing the

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[5] 17 U.S.C. § 202.

[6] 17 U.S.C. § 106.

[7] 17 U.S.C. § 110(1).

[8] U.S. House of Representatives Report Nr. 94-1476, at p. 82, reprinted in U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, 5659, 5696.

[9] 17 U.S.C. § 110(4).

performance" — can be used *only* for educational, religious, or charitable purposes (e.g., to fund the school band or orchestra).[10]

3. Performance of musical works "in the course of services at a place of worship" is not copyright infringement.[11]

The treatise on copyright law by Nimmer says:

> Composers and publishers usually delegate to a performing rights society (ASCAP and BMI are the two principal societies in the United States) the right to license non-dramatic performing rights in their musical compositions.

NIMMER ON COPYRIGHT § 30.02 [F] [1] (April 2004).

Several associations have websites with a collection of information to assist in finding the copyright owner and forms for requesting permission. See the links in my webpage at http://www.rbs2.com/copyrm.htm . Most large foreign publishers of music have an agent in the USA who is authorized to grant licenses for reproduction of copyrighted works.

duration of copyright for sheet music

Copyright law in the USA currently gives protection during the life of the author plus 70 years.[12] Beethoven died in 1827, so one might expect his copyrights to end in the year 1897 and all of his music to be in the public domain (i.e., *not* protected by copyright).

This simplistic view of copyright can be misleading. If you find in a library some work that was published before 1923, you can assume that it is in the public domain (i.e., no longer protected by copyright in the USA). However, a modern edition of Beethoven's works (e.g., the critical edition of Beethoven's Symphonies published by Bärenreiter) *may be* protected by copyright, as a derivative work. Copyright protection for modern editorial changes in public-domain works is a complicated topic, which is discussed in my separate essay at http://www.rbs2.com/cmusic2.pdf .

In 2001, Dr. Lionel Sawkins, a musicologist, prepared new editions of three works by the French composer Lalande (who died in the year 1726) for recording by Hyperion Records, Ltd. Although Hyperion paid Sawkins a fee, they did not pay royalties to him on his copyrighted editions. Dr. Sawkins sued Hyperion and a court in England held that Sawkins had a valid copyright, which Hyperion infringed.[13] It is uncertain whether a court in the USA would reach the

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[10] *Ibid.*

[11] 17 U.S.C. § 110(3).

[12] 17 U.S.C. § 302(a) (amended in 1998, still current Nov 2008).

[13] *Sawkins v. Hyperion Records, Ltd.,* EWHC 1530 (Ch. 1 July 2004), *appeal dismissed,* EWCA Civ 565 (Ct.App. 19 May 2005).
trial court opinion: http://www.hmcourts-service.gov.uk/judgmentsfiles/j2636/sawkins-v-hyperion.htm

same result, because of weak copyright for editorial revisions in the USA[14] and nonexistent moral rights in the USA.[15]

It is possible that a copyright could expire in the USA, but the copyright could still be valid in some other country with a longer duration of copyright protection. In that situation, one could post public domain material in the USA on a website hosted in the USA, and violate copyright laws in some foreign nation with a longer duration of copyright protection. This anomalous result comes from the fact that the Internet is an international medium, while copyright law is purely national. The Berne Convention only sets *minimum* standards for national laws of nations that are members of the Berne Convention.

In the USA, there are five rules for when copyrights expire and the work enters the public domain:

1. all works published before the year 1923 are now in the public domain.

2. works published, or copyright registered, between 1923 and 1977: duration of copyright depends on whether the copyright was renewed by application to the U.S Copyright Office.

3. all works created before 1 Jan 1978 and never published: the longer of (a) life of the longest living author plus 70 years or (b) 31 Dec 2002.

4. all works created before 1 Jan 1978 and published sometime between 1 Jan 1978 and 31 Dec 2002: the longer of (a) life of the longest living author plus 70 years or (b) 31 Dec 2047.

5. all works, published or unpublished, created after 1 Jan 1978 have copyright that expires 70 years after the death of the longest living author.

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appellate opinion: http://www.bailii.org/ew/cases/EWCA/Civ/2005/565.html

[14] Standler, Copyright for New Editions of Public Domain Music in the USA, http://www.rbs2.com/cmusic2.pdf , (Oct 2009).

[15] Standler, Moral Rights of Authors in the USA, http://www.rbs2.com/moral.htm , (April 1998).

Some authors of law review articles have lamented legal restrictions on quoting music from earlier works, and especially criticized the increasing duration of copyright,[16] as inhibiting creativity of composers. I disagree: there is a very large number of public-domain musical compositions — including the compositions of J.S. Bach, G.F. Händel, Haydn, W.A. Mozart, Beethoven, Schubert and the works that they quoted — which is a rich collection of themes that are available for any use. Unlike text in science or medicine, there is no requirement that music be current or modern — we continue to enjoy music from more than two hundred years ago. Furthermore, quoting a few notes from a copyrighted work *may*[17] be fair use, which is a legal defense to copyright infringement. However, music students are warned to identify quotations,[18] even if the source of the quotation was either public domain material or fair use, to avoid a charge of plagiarism.

It is recognized that some publishers put copyright notices on reprints of old editions of sheet music, where both the original musical composition and the editing are in the public domain.[19] Worse, some publishers add an absolute prohibition against any copying without permission — even if some (or all) of the publication were protected by copyright, there is still the possibility of legally copying a small amount under the doctrine of fair use.

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16 Under the Copyright Act of 1909, the maximum duration of copyright was 56 years. Copyrights now have a duration of life of author plus 70 years, which is 130 years for a 20-y old composer who dies at age 80 y.

17 I say *may* because fair use is one of the most complex doctrines in copyright law. Whether a quotation is fair use depends on factors such as the purpose of the use (i.e., for-profit vs. nonprofit), the amount quoted and the qualitative value of the quotation, and the effect on the potential market for the quoted work. 17 U.S.C. § 107.

18 In the case of text, academic style manuals describe rules for the indicia of a quotation: either quotation marks, or single-spaced indented text. There are also elaborate rules for citing sources of text. See my essay on plagiarism in colleges at http://www.rbs2.com/plag.htm . In contrast, conventional identification of a quotation in music seems to be limited to a title (e.g., Johannes Brahms: Variations on a Theme by Haydn).

19 Paul J. Heald, "Payment Demands for Spurious Copyrights: Four Causes of Action," 1 JOURNAL OF INTELLECTUAL PROPERTY LAW 259 (Spring 1994); Paul J. Heald, "Reviving the Rhetoric of the Public Interest: Choir Directors, Copy Machines, and New Arrangements of Public Domain Music," 46 DUKE LAW JOURNAL 241 (Nov 1996); Jason Mazzone, "Copyfraud," 81 NEW YORK UNIV. LAW REVIEW 1026 (June 2006).

common issues for music and text

Many legal issues are the same for copyright of sheet music and copyright of literary works (e.g., text, computer programs), including the following:

1. copyrightability: need original, creative expression. 17 U.S.C. § 102; *Feist Publications, Inc. v. Rural Telephone Service Co.,* 499 U.S. 340, 345 (1991) ("The sine qua non of copyright is originality."); *Atari Games Corp. v. Oman,* 979 F.2d 242, 244 (C.A.D.C. 1992) (The Register of Copyrights said "... the Copyright Office is applying the same creativity standard to the videogame ... as it would to any other type of work, be it a pictorial, graphic, dramatic, musical, or literary work, etc.").

2. derivative work. 17 U.S.C. § 103(b).

3. exclusive rights of authors/composers. 17 U.S.C. § 106.

4. fair use of short quotations or paraphrases. 17 U.S.C. § 107.

5. duration of copyright (see page 5, above).

6. legal test for copying (i.e., plagiarization).
   A. If alleged infringer had access to copyrighted work, then legal test for copying is "substantial similarity" between the copyrighted elements of the original and the allegedly copied work.

   B. Without proof that alleged infringer had access to copyrighted work, then the plaintiff must show "striking similarity" between the copyrighted elements of the original and the allegedly copied work, so "as to preclude the possibility of independent creation". *Ferguson v. National Broadcasting Co., Inc.,* 584 F.2d 111, 113 (5thCir. 1978).

7. whether parody infringes copyright. *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569 (1994) (Rap music group parody of Roy Orbison's song "Pretty Woman" was fair use.).

Because these legal issues are the same for both sheet music and literary works, in cases involving literary works judicial opinions cite cases involving music, and vice versa, without mentioning the subject of the dispute in each cited case.

The details of how much originality or how much creativity are necessary for copyright of musical compositions have been decided by judges in U.S. District Court cases.[20] Interestingly, few of these cases have been appealed and produced a published decision by a U.S. Court of Appeals, which would be legal precedent. Because decisions of judges in U.S. District Courts are *not* precedential, the precise criteria for copyrightability of music are *un*certain.

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[20] See cases cited in NIMMER ON COPYRIGHT § 2.05[D].

A commentator has noted that the misuse of musical terms in judicial opinions shows that the judges did *not* understand music,[21] although they were deciding a case involving copyright on music. Perhaps the stupidest example was Judge Ryan who wrote "neither rhythm nor harmony can in itself be the subject of copyright," *Northern Music v. King Record,* 105 F.Supp. 393, 400 (S.D.N.Y. 1952). Ryan's rule would prohibit copyright of a drum solo (e.g., rhythm) and prohibit copyright of an orchestration (e.g., harmony) of the melody in public-domain song. Fortunately, Ryan's rule is not followed.[22]

In another essay,[23] I chronicled the legal standard for copyrightability of a musical arrangement and showed that (1) judges erroneously used a standard from patent law to decide copyrightability, and (2) judges continued to use this erroneous standard until at least the year 1994, despite the fact that the legal standard for copyrightability of literary works (i.e. text) was changed in 1945.

famous cases involving copyright of sheet music

- *Cooper v. James,* 213 F. 871 (D.C.Ga. 1914) (The addition of an alto part to well-known hymns for soprano, tenor, and bass was *not* enough originality to entitle the arranger to a copyright.);
- *Victor Herbert v. Shanley Co.,* 242 U.S. 591 (U.S. 1917) (Orchestra that played copyrighted music in a restaurant infringed copyright on sheet music. Early victory for ASCAP.);
- *Fred Fisher, Inc., v. Dillingham,* 298 F. 145, 148 (D.C.N.Y. 1924) (Judge Learned Hand's opinion on subconscious copying of song: "Once it appears that another has in fact used the copyright as the source of his production, he has invaded the author's rights. It is no excuse that in so doing his memory has played him a trick.");
- *Italian Book Co. v. Rossi,* 27 F.2d 1014, 1014 (S.D.N.Y. 1928) (Sailor could copyright his version of Italian folk songs. Defendants "were free to copy the original, but not to copy [the sailors]'s variation.");

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[21] Ronald P. Smith, Note,"Arrangements and Editions of Public Domain Music: Originality in a Finite System," 34 CASE WESTERN RESERVE LAW REVIEW 104, n. 34, n. 41, n. 85 (1983).

[22] *Levine v. McDonald's Corp.,* 735 F.Supp. 92, 99 (S.D.N.Y. 1990) (rhythm and harmony can be copyrighted, even if melody is monotonous repetition of one tone); *Tempo Music v. Famous Music,* 838 F.Supp. 162, 169 (S.D.N.Y. 1993) ("... it becomes clear that harmony can, as a matter of law, be the subject of copyright."); *Santrayll v. Burrell,* 1996 WL 134803 at *2 (S.D.N.Y. 1996) ("repetition of the non-protectable word 'uh-oh' in a distinctive rhythm" is copyrightable).

[23] Standler, Copyright for New Editions of Public Domain Music in the USA, http://www.rbs2.com/cmusic2.pdf , (Oct 2009). See the subsection titled "need nontrivial change from pre-existing work".

- *Norden v. Oliver Ditson Co.,* 13 F.Supp. 415 (D.Mass. 1936) (Norden's version of a Russian hymn, with English words, held to have insufficient originality for copyright.);

- *Darrell v. Joe Morris Music Co.,* 113 F.2d 80, 80 (2dCir. 1940) (no infringement: "It must be remembered that, while there are an enormous number of possible permutations of the musical notes of the scale, only a few are pleasing; and much fewer still suit the infantile demands of the popular ear. Recurrence is not therefore an inevitable badge of plagiarism."). Quoted in *ABKCO Music, Inc. v. Harrisongs Music, Ltd.,* 722 F.2d 988, 998 (2dCir. 1983);

- *Freudenthal v. Hebrew Pub Co.,* 44 F.Supp. 754, 755 (S.D.N.Y. 1942) ("Even if the defendants did not knowingly copy plaintiff's composition, that would be no defense. **....** A copying from memory would be an infringement.");

- *Arnstein v. Porter,* 154 F.2d 464, 468 (2dCir. 1946) (discusses how to prove a copyright infringement case);

- *G. Ricordi & Co. v. Haendler,* 194 F.2d 914 (2dCir. 1952) (In 1893, Ricordi published a version of Verdi's opera FALSTAFF, and the copyright expired [in 1949?]. Händler photographed the Ricordi edition and published it without any changes. Ricordi then sued Händler for unfair competition. The trial court denied Ricordi's request for an injunction and the U.S. Court of Appeals affirmed.);

- *McIntyre v. Double-A Music Corp.,* 166 F.Supp. 681, 683 (D.C.Cal. 1958) (McIntyre's arrangement of public domain song held to have insufficient originality for copyright.);

- *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.,* 420 F.Supp. 177 (S.D.N.Y. 1976) (copyright infringed), *ABKCO Music, Inc. v. Harrisongs Music, Ltd.,* 508 F.Supp. 798 (S.D.N.Y., 1981) ($587,000 damages determined), *aff'd with modification,* 722 F.2d 988 (2dCir. 1983) (George Harrison, a member of the Beatles, found to have subconsciously infringed copyright in song.);

- *Tempo Music, Inc. v. Famous Music Corp.,* 838 F.Supp. 162 (S.D.N.Y. 1993) (Addition of harmony can be copyrighted as a derivative work.);

- *Three Boys Music Corp. v. Bolton,* 212 F.3d 477, 483 (9th Cir. 2000) (Subconscious copying of popular song.), *cert. den.,* 531 U.S. 1126 (2001);

Most music copyright cases involve popular music, because — in an economic sense — popular music is more valuable that baroque or classical music, so damage awards are greater for infringement of copyright in popular music. Furthermore, baroque and classical musical compositions are now all in the public domain (i.e., copyright has expired), with the possible exception of changes that were first published in recent editions of those old works.

Sound Recordings

A sound recording or phonorecord, as those terms are used in copyright law, are material objects that are used to mechanically play music (e.g., a player piano roll) or reproduce a performance of music (e.g., vinyl phonograph records, magnetic tape in a cassette, compact disk, digital data file, etc.).[24] Motion pictures and other audiovisual works are specifically excluded from sound recordings and phonorecords.[25]

A recording of a performance of a musical work is commonly made on a multichannel magnetic tape recorder (i.e., an analog recording) or a multi-channel digitizer (i.e., a digital recording). The original recording data are then edited to make a master recording. The master recording is then copied onto disks or tape for delivery to the listener. The copyright law in the USA is the same for all formats of a sound recording sold to a listener.

One can obtain a copyright on the master recording, because a recording is a kind of "derivative work", as the phrase is used in copyright law.[26] The copyright on the music itself generally comes first, then the copyright on the master recording.[27] An exception is when the music is an improvisation, when composing and performing are simultaneous.[28]

Copyright notice on sound recordings requires all three of the following: (1) the letter P inside a circle, (2) followed by the year of first publication of the recordings, and (3) the name of the owner of the copyright in the recording, which can be record producer's name if no other name appears on the label.[29]

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[24] 17 U.S.C. § 101.

[25] *Ibid.*

[26] 17 U.S.C. § 101 (definition of a derivative work includes a sound recording); NIMMER ON COPYRIGHT § 2.10 [A] [2] (Dec 2006).

[27] Registration of music with the Copyright Office requires Form PA, while registration of a sound recording with the Copyright Office requires Form SR.

[28] The copyright of both the musical work and the sound recording can be registered together on Form SR. 37 C.F.R. § 202.3 (b)(iv)(A).

[29] 17 U.S.C. § 402.

There are three reasons for having a different format for copyright notices for sheet music and sound recordings (i.e., © and ℗) — the different formats helps avoid confusion[30] between the copyright on the sound recording and:

1. the copyright on the record album cover (e.g., artwork, text),
2. the copyright on the text of the notes about the music or performers, and
3. the copyright on the sheet music that was performed in the recording.

compulsory licenses

After the copyright owner of the sheet music has licensed one person to make sound recordings, any other person is entitled to a compulsory license to make recordings of the same musical composition.[31] The initial purpose of the compulsory license was to prevent a copyright owner of music from authorizing one company to have a monopoly on sound recordings of the copyrighted sheet music.[32] Either there are *no* authorized sound recordings of the music, or a compulsory license is automatically available to *anyone* after the first authorized sound recording.

The rate in the year 1976 is specified in statute,[33] but the current rate is specified in the Code of Federal Regulations.[34] The royalty rate for a compulsory license from 1 Jan 2006 to 31 Dec 2007 is the greater of US$ 0.091 per work or US$ 0.0175/minute, with the performance time rounded up to the next integer minute.

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[30] U.S. House of Representatives Report Nr. 94-1476, at p. 145, reprinted in U.S. CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS, 5659, 5761.

[31] 17 U.S.C. § 115; 37 C.F.R. § 201.18-19.

[32] U.S. House of Representatives Report Nr. 60-2222 (1909); Sidney A. Diamond, "Sound Recordings and Phonorecords: History and Current Law," 1979 UNIV. ILLINOIS LAW FORUM 337, 361 (1979); Paul S. Rosenlund, Note,"Compulsory Licensing of Musical Compositions for Phonorecords Under the Copyright Act of 1976," 30 HASTINGS LAW JOURNAL 683, 686, n.21 (Jan 1979); Scott L. Bach, Note, "Music Recording: Publishing and Compulsory Licenses: Toward a Consistent Copyright Law," 14 HOFSTRA LAW REVIEW 379, 389 (Winter 1986).

[33] 17 U.S.C. § 115(c)(2) (enacted 1976, but made obsolete by decisions of Copyright Arbitration Royalty Panel, beginning 1 Jan 1981). This section of the Copyright Act is poorly written and confusing.

[34] 37 C.F.R. § 255.3(m) (current Dec 2007). Note that this rate typically increases every two years, for phonorecords made or distributed on or after 1 Jan 2000, 2002, 2004, 2006, ... For the current rate, see my webpage of links at http://www.rbs2.com/copyrm.htm .

In practice, because it is burdensome to use the compulsory license scheme in the Copyright Acts of 1909 and 1976, recording companies and owners of copyright of sheet music voluntarily negotiate a licensing contract, instead of using a compulsory license.[35] Because of the availability of compulsory licenses, voluntary contracts to make recordings commonly pay 3/4 of the compulsory license fee.[36]

Compulsory licenses, together with the small license fee, have encouraged recordings of music, perhaps at the expense of shortchanging composers and sheet music publishers.

duration of copyright for sound recordings

A work is eligible for copyright when it is "*fixed* in any tangible medium of expression". 17 U.S.C. § 102. Fixation occurs when performers play the music and the sounds are recorded on magnetic tape or digital data file. Fixation may also occur when previously recorded music is edited to produce a derivative work, such as conversion of an old analog recording to a digital file.

Surprisingly, U.S. federal copyright law does *not* include sound recordings[37] that were fixed *before* 15 Feb 1972. These old recordings are protected under state law, and unauthorized copying is commonly litigated as an "unfair competition" tort. State law protection for pre-1972 recordings persists[38] until 15 Feb 2067. Note that public sale of phonorecords (i.e., publication) that were fixed before 15 Feb 1972 does *not* extinguish common-law copyright[39] of these phonorecords, because no federal statutory copyright is available for these old recordings.[40]

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35 See, e.g., Paul S. Rosenlund, Note,"Compulsory Licensing of Musical Compositions for Phonorecords Under the Copyright Act of 1976," 30 Hastings Law Journal 683, 683, 701 (Jan 1979).

36 Nimmer on Copyright § 30.02 [F] [2] (Dec 2001).

37 See the third paragraph of the history section of this essay, below, at page 19.

38 17 U.S.C. § 301(c) (enacted 1976, amended 1998).

39 Standler, Common-Law Copyright in the USA, http://www.rbs2.com/clc.pdf (July 2013).

40 See citations in *Capitol Records, Inc. v. Naxos of America, Inc.,* 830 N.E.2d 250 (N.Y. 2005). The rule is different for literary works, for which common-law copyright is extinguished by publication, because, under the Copyright Act of 1909, only federal statutory copyright was available for published literary works.

For sound recordings fixed *after* 15 Feb 1972, protection under U.S. Copyright law has the following duration:

1. for anonymous or pseudonymous works, or for works "made for hire": copyright protection has a duration of the lesser of (a) 95 years from the first publication or (b) 120 years from the creation.[41]

2. for all other works: copyright protection has a duration of 70 years after the death of the last surviving author.[42]

The "author(s)" of a sound recording may include the named performers (e.g., members of an orchestra, soloists, conductor of orchestra), unless the written contract with these named performers specified that the recording was a "work made for hire". The author(s) of a sound recording can also include the producer of the sound recording, unless the producer has a written contract that specifies that recordings are "works made for hire".[43] In the case of a work made for hire, the employer is the author, for purposes of copyright law.

limited rights for sound recordings

A U.S. Court of Appeals wrote in 2003:

> This case deals with copyright protection for sound recordings. The creator of a musical composition has long had a right of exclusive public performance of that musical piece. 17 U.S.C. § 106(4). Therefore, every time you hear the ubiquitous refrain from "Happy Birthday" in a public performance, a subsidiary of AOL/TimeWarner cashes a royalty check.[FN1] However, the owner of a copyright in a sound recording of a musical composition has long had very little copyright protection. Until 1971 there was no copyright protection at all. With the Sound Recording Amendment of 1971, Pub.L. No. 92-140, 85 STAT. 391, a limited copyright in the reproduction of sound recordings was established in an effort to combat recording piracy. However, there was still no right to public performance of that sound recording. Therefore, while playing a compact disc recording of "Happy Birthday" in a concert hall for the paying public would still enrich AOL/TimeWarner, the person or company that owned the copyright on the CD recording of the music would earn no remuneration beyond the proceeds from the original sale of the recording. This dichotomy of copyright protection has a significant impact in the radio broadcasting industry. While radio

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41 17 U.S.C. § 302(c) (enacted 1976, amended 1998, current Nov 2008).

42 17 U.S.C. § 302(b) (enacted 1976, amended 1998, current Nov 2008).

43 *JCW Investments, Inc. v. Novelty, Inc.,* 289 F.Supp.2d 1023, 1032 (N.D.Ill. 2003) ("The author of a sound recording is the performer(s) or record producer or both. 1 Melvin B. Nimmer, NIMMER ON COPYRIGHT § 2.10[A][2][b], at 2-172.5 to 172-6 (2001). A record producer may be an author when he or she is 'responsible for setting up the session, capturing and electronically processing the sounds, and compiling and editing them to make a final sound recording.' See *Systems XIX, Inc. v. Parker,* 30 F.Supp.2d 1225, 1228 (N.D.Cal. 1998) (quoting H.R.Rep. No. 94-1476, 94th Cong., 2nd Sess. 56 (1976))."); *Forward v. Thorogood,* 985 F.2d 604, 605 (1stCir. 1993) ("The performer of a musical work is the author, as it were, of the performance. 1 NIMMER § 2.10[A](2)(a), at 2-149.").

> stations routinely pay copyright royalties to songwriters and composers (through associations like the American Society of Composers, Authors, and Publishers and Broadcast Music, Inc. ("ASCAP") and Broadcast Music, Inc. ("BMI")) [FN2] for the privilege of broadcasting recorded performances of popular music, they do not pay the recording industry royalties for that same privilege. Perhaps surprisingly, this state of affairs, until about ten years ago, produced relatively high levels of contentment for all parties. The recording industry and broadcasters existed in a sort of symbiotic relationship wherein the recording industry recognized that radio airplay was free advertising that lured consumers to retail stores where they would purchase recordings.[footnote omitted] And in return, the broadcasters paid no fees, licensing or otherwise, to the recording industry for the performance of those recordings. The recording industry had repeatedly sought, however, additional copyright protection in the form of a performance copyright. Until 1995, those efforts were rejected by Congress.
>
> > FN1. Happy Birthday, originally penned by two Kentucky kindergarten teachers in the late 19th century, remains a protected and highly profitable copyright in the intellectual property portfolio of AOL/TimeWarner. Purchased by the company in 1988 for an estimated $25 million, it produces revenues estimated at $2 million per year. Under the Copyright Term Extension Act of 1998, Pub.L. No. 105-298, 112 STAT. 2827, for better or for worse, the song will not enter the public domain until at least the year 2030.
> >
> > FN2. Performing rights organizations such as ASCAP and BMI facilitate the licensing and payment of royalties for composition copyrights by centralizing the process for songwriters, composers, lyricists and publishers.

Bonneville Intern. Corp. v. Peters[44], 347 F.3d 485. 487-488 (3dCir. 2003).

As explained above by the U.S. Court of Appeals, the owner of the copyright in the sheet music is paid a royalty when a sound recording of that music is broadcast on the radio, but the owner of the copyright in the sound recording is *not* paid. The copyright owner of sound recordings has no exclusive right of public performance,[45] except in the case of "digital audio transmission".[46] Also, stores can freely play copyrighted sound recordings if the *sole purpose* is to promote the sale of recordings.[47]

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[44] Marybeth Peters was sued in her official capacity as Register of Copyrights for The United States Copyright Office.

[45] 17 U.S.C. §§ 106(4), 114(a).

[46] 17 U.S.C. § 106(6) (enacted 1995).

[47] 17 U.S.C. § 110(7).

famous cases on sound recordings

- *G. Ricordi & Co. v. Columbia Graphophone Co.,* 258 F. 72 (S.D.N.Y. 1919), *appeal dismissed,* 263 F. 354 (2dCir. 1920), *confirming report of Special Master,* 270 F. 822 (S.D.N.Y. 1920) (early compulsory license for sound recording);

- *Waring v. WDAS Broadcasting Station,* 194 A. 631 (Pa. 1937) (Orchestra obtains injunction against a radio station that played its phonograph records.);

- *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.,* 101 N.Y.S.2d 483, 87 U.S.P.Q. 173 (N.Y.Sup. 1950) (granted preliminary injunction against defendant), *aff'd,* 107 N.Y.S.2d 795 (N.Y.A.D. 1951) (defendant copied radio broadcasts of Met Opera and then issued phonograph records of those performances);

- *Capitol Records v. Mercury Records Corp.,* 109 F.Supp. 330 (S.D.N.Y. 1952), *aff'd,* 221 F.2d 657 (2dCir. 1955) (Capitol had a license to sell recordings by Telefunken GmbH in the USA, while Mercury had a license to sell those recordings in Czechoslovakia. Mercury began selling the records in the USA and Capitol sued for unfair competition and common-law copyright infringement. Capitol won.);

- *Gieseking v. Urania Records, Inc.,* 155 N.Y.S.2d 171 (N.Y.Sup. 1956) (Pianist sued phonorecord manufacturer for unauthorized recordings. Trial court denied defendant's motion to dismiss complaint.);

- *Shapiro, Bernstein & Co. v. Remington Records, Inc.,* 265 F.2d 263 (2dCir. 1959) (Four music publishers sued a manufacturer of sound recordings for failure to pay compulsory license fees. At 273: "We will not permit commercial piracy to produce illegal gains immune from recovery. While the law cannot prevent all sin and wrongdoing[,] it can take some of the profit out of it.")

- *Goldstein v. California,* 412 U.S. 546 (1973) (Manufacturer of pirated records convicted of crime under state law. Held that federal copyright law did not preempt state law under Copyright Act of 1909.);

- *U.S. v. Taxe,* 380 F.Supp. 1010 (C.D.Cal. 1974), *aff'd in part,* 540 F.2d 961 (9thCir. 1976), *cert. den.,* 429 U.S. 1040 (1977) (criminal case: twenty counts of willful infringement of copyrights for profit);

- *Rosette v. Rainbo Record Mfg. Corp.,* 546 F.2d 461 (2dCir. 1976) (reaffirms rule that public sale of sound recording fixed before 15 Feb 1972 does *not* extinguish common-law copyright on that recording);

- *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.,* 780 F.Supp. 182 (S.D.N.Y. 1991) (recording part of a copyrighted song, called sampling, without permission is copyright infringement);

- *Rostropovich v. Koch International,* 34 USPQ2d 1609 (S.D.N.Y. 1995) (Cellist sued phonorecord manufacturer for sale of recordings made in the 1960s. Trial court denied some of defendant's motion to dismiss complaint.)

- *Bridgeport Music, Inc. v. Dimension Films,* 230 F.Supp.2d 830 (M.D.Tenn. 2002) (digital sampling is not infringement), *rev'd in part,* 410 F.3d 792, 799-804 (6thCir. 2005) (at 801: "Get a license or do not sample. We do not see this as stifling creativity in any significant way.");

- *Capitol Records, Inc. v. Naxos of America, Inc.,* 274 F.Supp.2d 472 (S.D.N.Y. 2003), *on appeal,* 372 F.3d 471 (2dCir. 2004) (certified questions to New York state court), 830 N.E.2d 250 (N.Y. 2005) (Yehudi Menuhin's performance of two violin concerti recorded in 1931-32 were released by EMI Records in the UK and Capitol Records in the USA. The copyrights in the UK expired in 1981-82, so the works were in the public domain in the UK. In 1999, Naxos began to sell copies of these historic recordings on compact disks. Held that these old recordings were protected under the common law copyright of New York State.) Naxos subsequently unsuccessfully sued their attorneys for alleged negligent legal advice. *HNH Intern., Ltd. v. Pryor Cashman Sherman & Flynn LLP,* 19 Misc.3d 1107(A), 2008 WL 763383 (N.Y.Sup. 2008).

Recordings That You Make

personal, noncommercial use

It is permissible to make a copy of a copyrighted recording, *if* the copy is made for personal,[48] noncommercial use. The U.S. Copyright Act says:

> No action may be brought under this title alleging infringement of copyright based on **....** the noncommercial use by a consumer of such a [digital or analog] device or medium for making digital musical recordings or analog musical recordings.

17 U.S.C. § 1008 (enacted 1992, current Oct 2009).

Examples of permitted activities include copying a vinyl gramophone record onto a cassette tape, so the owner of the vinyl record can enjoy the music on a tape-player in an automobile. However, you can *not* legally transfer ownership of any copy to another person,[49] such as by gift, sale, lending, etc. — each copy is only for your personal use. Transferring a copy to another person would *not* be personal use, and sale of a copy would be commercial use.

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[48] The word *personal* does not appear in 17 U.S.C. § 1008, but does appear in *Sony Corp. of America v. Universal City Studios,* 464 U.S. 417, n.40 (1984) ("Copying for commercial gain has a much weaker claim to fair use than copying for personal enrichment.") and *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.,* 180 F.3d 1072, 1079 (9thCir. 1999).

[49] Distribution is one of the exclusive legal rights belonging to an owner of a copyright, including a copyrighted sound recording, in 17 U.S.C. § 106(3).

In 1999, a U.S. Court of Appeals interpreted this statute.

> In fact, [defendant's] Rio's operation is entirely consistent with the Act's main purpose — the facilitation of personal use. As the Senate Report explains, "[t]he purpose of [the Act] is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use." S. Rep. 102-294, at *86 (emphasis added). The Act does so through its home taping exemption, see 17 U.S.C. § 1008, which "protects all noncommercial copying by consumers of digital and analog musical recordings," H.R. Rep. 102-873(I), at *59. The Rio merely makes copies in order to render portable, or "space-shift," those files that already reside on a user's hard drive. Cf. *Sony Corp. of America v. Universal City Studios,* 464 U.S. 417, 455, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984) (holding that "time-shifting" of copyrighted television shows with VCR's constitutes fair use under the Copyright Act, and thus is not an infringement). Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act.

Recording Industry Association of America v. Diamond Multimedia Systems, Inc., 180 F.3d 1072, 1079 (9thCir. 1999).

unauthorized recording of live performance

See my separate essay at http://www.rbs2.com/cpermission.pdf .

recording your own performance

If you record your own performance of copyrighted music and then distribute those recordings — either for free, sale, or promotional — then you need either a "mechanical license" or written permission from the copyright owners of each piece of sheet music that was performed. However, if all of the music on the recording is either:

(1) in the public domain,
(2) your arrangement of public-domain music, or
(3) your original composition (*not* an arrangement of copyrighted music),

then you do not need permission from anyone to distribute your recordings.

do *not* distribute copyrighted recordings

For completeness and to avoid misunderstanding, it is necessary to say that a person does *not* have the legal right to distribute copies of copyrighted recordings. Distribution is one of the exclusive legal rights belonging to an owner of a copyright, including a copyrighted sound recording, in 17 U.S.C. § 106(3). The prohibition against distribution applies regardless of whether the distribution is free (e.g., gift, posting at a website, or uploading to a peer-to-peer network on the Internet, "or other transfer of ownership"), a sale, rental, or a loan.

There is a simple explanation of legal property rights in copyright law. When you purchase a book, you own the paper, ink, and binding of the physical book, but the copyright owner (*not* you as the owner of one physical book) continues to own the expression in the text of the book.

It might be fair use for you as the owner of the physical book to make one photocopy of one page, for your personal use. It is definitely *not* fair use for the owner of the physical book to make one or more photocopies of an entire chapter, to distribute as a substitute for purchasing the book.

Similarly, when you purchase a sound recording, you own the vinyl disk, cassette tape, compact disk, or other medium used to distribute the recording, but the copyright owner (*not* you as the owner of the one sound recording) continues to own the music recorded in that medium. It is copyright infringement for you to make a copy of the recording to distribute as a substitute for purchasing the recording. And it is piracy to post a copy of a copyrighted recording on the Internet for downloading by other people, both infringing a copyright and engaging in blatantly unfair competition with the owner of the copyrighted recording.

Terse History of Music Copyright

The first copyright statute in the world was the Statute of Anne (1710), which gave a legal monopoly to publishers of books in England. Approximately seventy years later, the composer Johann Christian Bach, the eldest son of J.S. Bach, sued a publisher for selling unauthorized copies of J.C. Bach's works. The judge in that case, *Bach v. Longman,* 98 Eng.Rep. 1274 (K.B. 1777), declared that printed sheet music was covered by the Statute of Anne.

In the U.S.A., the first copyright statute, enacted in 1790, only covered books, maps, and charts.[50] However, the second copyright statute, which was enacted in 1831, included musical compositions as copyrightable subject matter.[51]

Until 1972, sound recordings were *not* protected by copyright in the USA, because those works were only readable by machines.[52] In 1972, as a result of widespread copyright infringement of sound recordings on vinyl records by copies on magnetic tape, the U.S. Congress made sound recordings copyrightable.[53] During the preparation of the Copyright Act of 1976, Congress *could* have granted federal copyright protection to pre-1972 sound recordings, but

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[50] 1 STATUTES-AT-LARGE 124 (1790).

[51] 4 STATUTES-AT-LARGE 436 (1831).

[52] *White-Smith Music Pub. Co. v. Apollo Co.,* 147 F. 226, 227 (2dCir. 1906), *aff'd,* 209 U.S. 1, 17-18 (U.S. 1908); *Capitol Records v. Mercury Records Corp.,* 221 F.2d 657, 661 (2dCir. 1955). These two decisions were legislatively overruled by the U.S. Congress in the 1970s.

[53] Sound Recording Act of 1971, 85 STATUTES-AT-LARGE 391 (1971). Legislative history is in House of Representatives Report Nr. 92-487, reprinted in 1971 U.S. CODE CONGRESSIONAL ADMINISTRATIVE NEWS 1566. The effective date of the 1971 amendments is 15 Feb 1972.

because of a mistake by an attorney in the Justice Department,[54] Congress continued state law protection for these old recordings.

Composers in the 1700s and 1800s sold their original manuscript of music, along with the right to publish and sell the music, to a publisher for one lump-sum of money. In the 1700s and 1800s, publishers did *not* pay royalties to composers. The publisher owned the copyright on the sheet music. A few composers (e.g., J.S. Bach, G.F. Händel, F.J. Haydn) were financially successful, mostly as a result of steady income as a church musician or as a royal composer. Most composers — even first-rate composers such as W.A. Mozart, Beethoven, and Schubert — were poor.

This general trend continues in modern times, as music publishing companies and manufacturers of sound recordings are financially successful, but composers and performers of serious music are poorly rewarded. However, composers or performers of *popular* music, mostly songs, have become millionaires from royalties on their copyrighted works. Musicians in the USA who specialize in baroque or classical music do *not* need to be told that they are poorly rewarded for their talent and skill.

Prior to approximately 1940, people routinely made their own entertainment, often by playing musical instruments, either alone or in small groups. During this time, there was a flourishing market for sheet music for amateur musicians, including arrangements of symphonies and operas for solo Klavier. Today, with ready access to radio, television, sound recordings (e.g., vinyl records, cassette tapes, compact disks, etc.), most people listen to professional entertainers, instead of making their own entertainment. This change in behavior is an example of how technology changed society.

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[54] Melville B. Nimmer, Paul Marcus, David A. Myers, David Nimmer, CASES AND MATERIALS ON COPYRIGHT, § 1.04[E], at pp. 95-96 (6th ed. 2000).

Bibliography

In addition to the statutes and court cases cited above, I recommend the following articles in legal journals and treatises.

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Charles Cronin, "Virtual Music Scores, Copyright and the Promotion of a Marginalized Technology," 28 COLUMBIA JOURNAL OF LAW & ARTS 1 (Fall 2004).

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Michael W. Carroll, "The Struggle for Music Copyright," 57 FLORIDA LAW REVIEW 907 (Sep 2005). History of copyright for music in England, up to the year 1800.

Aaron Keyt, Comment, "An Improved Framework for Music Plagiarism Litigation," 76 CALIFORNIA LAW REVIEW 421 (March 1988).

Lydia Pallas Loren, "Untangling the Web of Music Copyrights," 53 CASE WESTERN RESERVE LAW REVIEW 673 (Spring 2003). Recommends abolishing compulsory licensing of music for sound recordings, and recommends introducing the same public performance rights for both musical compositions and sound recordings.

Michael Der Manuelian, Note, "The Role of the Expert Witness in Music Copyright Infringement Cases," 57 FORDHAM LAW REVIEW 127 (Oct 1988).

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William F. Patry, PATRY ON COPYRIGHT, § 3:92-93 and § 11:16-28.

Paul S. Rosenlund, Note,"Compulsory Licensing of Musical Compositions for Phonorecords Under the Copyright Act of 1976," 30 HASTINGS LAW JOURNAL 683 (Jan 1979).

Amanda Scales, "Sola, Perduta, Abbandonata: Are the Copyright Act and Performing Rights Organizations Killing Classical Music?" 7 VANDERBILT JOURNAL ENTERTAINMENT LAW & PRACTICE 281 (Spring 2005). Suggests, at page 293, that classical music composers should form their own Performing Rights Organization, instead of using ASCAP or BMI.

Ronald P. Smith, Note,"Arrangements and Editions of Public Domain Music: Originality in a Finite System," 34 CASE WESTERN RESERVE LAW REVIEW 104 (1983).

This document is at **www.rbs2.com/copyrm.pdf**
My most recent search for court cases on this topic was in November 2008.
first posted 3 Dec 2008, minor revision 21 Jul 2013

go to my links on music copyrights in the USA: http://www.rbs2.com/copyrm.htm

go to my main webpage on copyright law: http://www.rbs2.com/icopyr.htm , which links to my other essays on copyright law.