

BEST PRACTICES IN THE FAIR USE OF COPYRIGHTED MATERIALS IN MUSIC SCHOLARSHIP

The following document was written over a period of several years by an ad hoc committee of AMS Council, and formally adopted by the Board of Directors in March 2010.

I. Legal Background

A. Constitutional Basis for Copyright

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. —U.S. Constitution, Article I, section 8.

B. The Copyright Law

The copyright law (U.S. Code, Title 17) was established to balance the rights of authors, composers, performers and other owners of intellectual property, with the rights of users. Many scholarly and pedagogical uses of music materials are legitimate and vital to preserve and foster creativity and to ensure transmission of cultural heritage in the United States.

1. Exclusive Rights in Copyrighted Works

From *The Copyright Act of October 19, 1976*. This is the copyright law of the United States, effective January 1, 1978 (title 17 of the United States Code, Public Law 94-553, 90 Stat. 2541).

Text of Section 106. The following is a reprint of the entire text of section 106 of title 17, United States Code.

“§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) 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;

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- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”

2. *Limitations on Exclusive Rights: Fair Use*

Section 107 of the Copyright Law allows for the “fair use” of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. Additional guidelines (H.R. Rep. No. 94-1476, and United States Copyright Office Circular 21, *Reproduction of Copyrighted Works by Educators and Librarians*) permit multiple copies for classroom use under certain circumstances.

From *The Copyright Act of October 19, 1976*.

Text of Section 107. The following is a reprint of the entire text of section 107 of title 17, United States Code.

“§ 107. Limitations on exclusive rights: Fair Use

Notwithstanding the provisions of sections 106 and 106A, 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.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”*

*In addition to fair use, there are other specific exemptions that, while beyond the scope of these guidelines, may be relevant to music scholars: the use of materials in classroom teaching (17 USC 110(1)), the use of material in online teaching and distance learning (17 USC. 110(2), aka “TEACH Act”), and the preservation of materials in libraries and archives (17 USC 108).

II. The Position of the American Musicological Society

As stated expressly in section 107 of title 17, United States Code, printed above, scholarship and research fall under the provisions of fair use, providing one of the principal means by which scholars can document and share findings and knowledge with others. The American Musicological Society (AMS) unequivocally endorses the principle of fair use in scholarly research, publication, and teaching. It urges individual scholars to inform themselves on the principles of fair use incorporated in the copyright law stated above, and to exercise this right in the pursuit of their scholarly work. The AMS emphasizes that the exercise of the right of fair use is the responsibility of the individual author. The Society offers these guidelines in order to provide guidance to individuals in the fair use of copyrighted materials in the conduct of music scholarship.

The contents of these guidelines are for informational purposes only, and are not intended to be a substitute for professional legal advice. Scholars who wish to know how the principles of fair use apply to their specific circumstances, or how the law has evolved since this document was created, may wish to consult a knowledgeable intellectual property attorney and/or the General Counsel's office at their academic institution.

The following specific situational guidelines pertain to oft-recurring situations in the publication of music scholarship, and are not meant to be exhaustive. We do not include, for example, the long-established protocols regarding appropriate citation for quoting text, except to note that similarly full citation is also appropriate for other copied material, including materials whose use constitutes fair use, i.e., fair use only absolves the scholar of the permission obligation, not the citation obligation.

For each situation discussed, we consider the first and third fair-use factors in our general comments. The second factor, the nature of the copyrighted work, will almost always weigh in favor of the copyright owner, since musical or visual works of art are creative works that would receive strong protection under copyright law. We mainly leave the fourth factor (which may in rare cases override the general policy) to the consideration of individual cases. While the guidelines vary for the specific situations, the same questions are asked in each scenario and can assist the scholar when making a determination whether his or her particular use is fair use:

- Does the use “transform” the material taken from the copyrighted work by using the work for a different purpose, i.e., to show the copyrighted work in a new light for new reasons? In the case of music scholarship, the original purpose of the song or composition is typically entertainment or artistic creativity; the new purpose of the scholarly article or book is scholarship and teaching.
- Is the amount of the work used no more than is necessary to illustrate or advance the scholarly purpose?

Finally, before discussing specific types of copyrighted works, bear in mind that an initial consideration always should be whether the work is in the public domain and therefore no longer protected under copyright law. As of January 2010, any U.S. work published prior to 1923 is in the public domain. For works published after 1923, several variants affect its copyright status. To learn more, and find guidance for determining whether a work is in the Public Domain, we recommend the “Copyright Term and the Public Domain in the United States” chart at Cornell University’s Copyright Information Center: <http://www.copyright.cornell.edu/resources/publicdomain.cfm>. If you determine that the work you are using is in the public domain, there are no restrictions on how much or for what purpose the work is used.

Specific Situational Guidelines for Fair Use in Music Scholarship

Printed Music: Relatively brief excerpts (that is, only as much as is necessary), whether in full score or in reduction, and whether explicated or used in illustration of an argument or comparison, may be used without permission of the copyright holder. Note that this would apply both to original/unadulterated scores (which may be in the public domain in any event) and to later edited editions.

Note that if the scholarly analysis requires reproduction of the work in its entirety, then even this use would constitute fair use. In this case, the scholar should make certain that every part of the reproduction is necessary to the analysis. This position is strengthened if the work itself is quite short.

Lyrics: Citing song lyrics can often be essential to an argument or explication, or can provide a means for orienting a reader to a musical description. Thus, citing lyrics can be essential to learning—the very basis for copyright—and so must be permitted under fair use. Reasonable care should be taken to ensure that no more of a lyric is quoted than the critical or scholarly context requires; however, this admonition permits a very wide variance in the actual length of quoted material (extending even to quoting an entire lyric), as long as the quoted material is necessary to the argument being made. The requirement of some publishers that authors obtain permission for every quotation of song lyrics should be discontinued, as that practice runs counter to the principles of fair use.

Music Recordings: Relatively brief excerpts (that is, only as much as is necessary) of commercial recordings or other recordings of copyrighted material, whether explicated or used in illustration of an argument or comparison, may be used without permission of the copyright holder.

Transcriptions of Recordings or Live Performances: Depending on circumstances and notational method, musical transcriptions might be considered artifacts of scholarship or copies (similar to translations). An argument may be made that there should be no restrictions on the publication of transcriptions that fall in the first category, since the transcription actually is the scholarship; this

would have to be considered carefully on a case by case basis. If the transcription is being used as a substitute for the recording, as an aid to explication, an illustration, or a basis for comparison, the same rules should apply as to music recordings; in such cases, relatively brief excerpts (that is, only as much as is necessary) of copyrighted recordings without the permission of the copyright owner are allowed.

Paintings and Photographs: Use of photographs or paintings is fair use, provided the use is integral to the scholarship, e.g., a painting that inspired the composer, and not simply to provide a decorative element, e.g., a pretty painting for the book jacket. The fair use defense is strengthened if the reproduction is partial rather than of the entire work (thus mitigating the third factor) or if the reproduction is smaller or of lower quality resolution, so as to mitigate the fourth factor (effect on the potential market for the work). Nevertheless, in some instances reproduction of the entire work is required by the scholarly context, and in that case the use is fair use.

Film Stills and Publicity Photographs: The “Report of the Ad Hoc Committee of the Society for Cinema Studies, ‘Fair Usage Publication of Film Stills’ (cited above), well substantiates the claim that film stills (and, by extension, DVD “screen shots”), and usually also publicity stills, generally qualify for fair use. The same analysis used for paintings and photographs, above, would apply here: it is fair use provided that the use is integral to the scholarship, and that no more is used than is necessary to make the academic point. The report further suggests that asking permission to use film stills “just to be safe” may undermine fair use (op. cit., p. 13; cf. above discussion of “Lyrics”).

Video Recording: Relatively brief excerpts of commercially released films or videorecordings under copyright, whether explicated or used in illustration of an argument or comparison, may be used without permission of the copyright holder. Note, however, that under the Digital Millennium Copyright Act (“DMCA”), there are certain additional legal prohibitions against circumventing technical measures controlling access to a copyrighted work, i.e., making unauthorized copies of a commercial DVD. While one could certainly make the argument that fair use and the First Amendment would trump such restrictions, this question has not been addressed by the courts to date, so it is less clear how a court might strike the balance of these conflicting interests.