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The Music We Perform:

An overview of
royalties, rentals and rights

Major Orchestra Librarians' Association

MOLA

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The orchestra is tuned and on stage, the conductor enters and the music begins to a program set some time before. The orchestral music has been obtained, the program advertised and seats sold. It seems simple enough but what of the composers who created the works being performed? Why is their music sometimes for sale or sometimes only available on a rental basis. Why do our orchestras have to pay so much for one piece and not for another? Why should we have to deal with a difficult publisher when we can photocopy music from another source?

Composers and other creative individuals are encouraged in their endeavors by the protection they receive for their intellectual property through the Berne Convention which was incorporated as a part of the U.S. Copyright Law effective March 1, 1989. This law grants creators of "original works of authorship" such as composers, authors, poets, dramatists, choreographers and others certain exclusive rights to do and to authorize 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;
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, and
5. in the case of literary, musical, dramatic, and choreographic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

It is illegal to violate these rights provided to the owner of copyright under the Berne Convention, but the rights do have some limitations in certain specific instances. One such limitation is the concept of "fair use" which appeared for the first time in statutory terms in the United States with the passing of the 1978 Copyright Law. Another takes the form of "compulsory license" under which certain limited uses of copyrighted works are permitted upon payment of certain royalties and compliance with specified conditions. Furthermore, there is a time limit after which these rights no longer apply and the work is said to be in the "public domain".

It is dealing with these issues of when a royalty is payable to a copyright owner or their agent for an intellectual work, when a rental fee is payable for use of the physical materials upon which the work exists and when a work is considered to be in the public domain that shall be addressed in this Resource Paper.

To this end, a basic knowledge of the applicable copyright laws of one's country is invaluable.

OVERVIEW OF THE BERNE CONVENTION

The Berne Convention for the Protection of Literary and Artistic Works was adopted in Berne, Switzerland on September 9, 1886. It was completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914 and revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971: and amended on October 2, 1979. There are currently 146 countries who are signatory to this agreement.

Prior to the Berne Convention's adoption works protected in a creator's country might be freely reproducible in another country. The Berne Convention provided that each contracting state would recognize as protected work created by nationals of another contracting state. Copyright under the Berne Convention is automatic: no registration is required nor is the inclusion of a copyright notice. The Berne Convention required that contracting states recognize the moral rights of integrity and attribution. It also required that there must be protection within each signatory country's own legal system for works by foreign nationals. It provided for a minimum term of copyright protection of the life of the author plus fifty years, but parties were free to provide longer terms of copyright protection. Some countries added years to copyright if the creator had been in government service, others added years to make up for war years when copyright was not recognized. On July 1, 1995 the European Union extended the term to life plus seventy years in their European Communities (Term of Protection of Copyright) Regulations, 1995. The United States followed with the Sonny Bono Copyright Term Extension Act of 1998, which is covered below.

One of the recent developments affecting the Berne Convention have been the TRIPS (Trade-Related aspects of Intellectual Property rights) Agreement. It requires member states to provide strong intellectual property rights in areas of copyright, patents, trademarks, trade secrets, industrial designs, geographical indicia and integrated circuit layouts. Many of its provisions on copyright were imported from the Berne Convention. TRIPS was added to the GATT (General Agreement on Trade and Tariffs) at the end of the Uruguay round of trade negotiations in 1994 after intense lobbying by the United States. The GATT became the basis of the World Trade Organization (WTO) which requires a ratification of TRIPS as a compulsory requirement of WTO membership. States which do not adopt TRIPS-compliant intellectual property systems can be disciplined through the WTO. If your organization is a member of the WTO, you are governed by the TRIPS copyright provisions.

The United States had initially refused to become a party to the Berne Convention since it required major changes in its copyright law, particularly with regard to moral rights and the registration of copyright works. However in 1988 the U.S. made the necessary changes and became a party to Convention as part of its campaign to obtain strong intellectual property provisions in the GATT.

The provisions of the Berne convention are also supplemented by the WIPO (World Intellectual Property Organization) which has administered the Berne Convention since

1967. The WIPO Copyright Treaty of 1996 supplemented the Berne Convention regarding computer programs, databases and technological copy protection measures.

The Berne Convention and TRIPS provide very strong and comprehensive intellectual property rights. However there are situations where exceptions are made. These are known as “fair use” provisions.

“Fair use” within the Berne Convention and TRIPS is subject to a so-called “three-step test”. This test says that limitations or exceptions to exclusive rights must be:

1. confined to certain special cases
2. that these cases must not conflict with the normal exploitation of a work; and
3. that these cases must not unreasonably prejudice the legitimate interests of the right holder.

Since this test is incorporated as a part of TRIPS, it governs the scope of limitations and exceptions to exclusive rights in certain copyright areas not covered by the Berne Convention.

OVERVIEW OF UNITED STATES COPYRIGHT LAW

American copyright law can be thought of in two parts - pre 1978 and post 1978. Until March 1, 1989 the US was not a party to the Berne copyright convention, and our copyright law differed markedly from that of the rest of the western world. Our copyrights were for a fixed term and renewal period, rather than being based on the life of the author plus a certain additional period of protection, as was the case in Berne Convention countries. Until 1978, copyright protection existed only for works officially registered with the Copyright Office, and was for an initial period of 28 years, with a 28 year renewal term available to those who submitted the proper form and fee to the Copyright Office. Thus, the maximum term of copyright protection available in the United States to the author of an original work was 56 years.

However, it became clear that this was inherently unfair to creators of intellectual property. If authors lived suitably long, they could outlive their copyrights, and find themselves in the odd position of being unable to realize income from their creative output. Recordings could be made and distributed, performances could be given, arrangements could be made and distributed, and exact reprint copies of their original copyrighted materials could be made, all without their realizing any income whatsoever from their creative output.

For this reason, in 1976 the copyright law was revised, with the revisions taking effect January 1, 1978. Simply put, any work protected by copyright before January 1, 1976, would have the term of copyright extended to a total term of 75 years from date of initial protection. Any work protected after January 1, 1978, would have as its term the life of the author plus 50 years. In addition, all terms of copyright protection end now on December 31 of the term-ending year, rather than 50 or 75 years to the day on which

protection began. Even though these changes in law brought the US into agreement with the Berne Convention concept of author's-life-plus for copyright protection, the US did not join the Berne Convention until March 1, 1989.

When US finally joined the Berne Convention, several other issues came into play. With the ratification of the Berne Convention, the US recognized that copyright exists from the moment of creation, not from the moment of registration. In fact, the need for registration of copyright no longer exists. One can claim a valid copyright without having ever registered the copyright. However, one cannot collect statutory damages without registration. It is also no longer required that works bear a copyright notification [© with date and copyright owner] in order to claim copyright protection. It is certainly a good idea to have the notification, but it is no longer required.

Further changes in American copyright law occurred December 4, 1994, when the President signed the "Uruguay Round Agreements Act" which implements the General Agreement on Tariffs and Trade [the GATT treaty]. In the agreement was the provision that signatories should recognize each other's copyright laws. This meant that works by foreign authors whose copyrights either were not recognized by the US (Soviet copyrights before 1975 form the bulk of this category), or whose copyrights had lapsed on account of a failure to file the proper paperwork to claim a renewal term could have copyright protection restored. This restoration of protection took effect on January 1, 1996, and is valid until the copyright would normally expire under US law. To regain protection, the claimant merely needed to file a notice of intent to enforce with the copyright office, and for the most part, US publishers with works that fell into this category have done so.

The Sonny Bono Copyright Extension Act of 1998 extended the existing terms to match those adopted by the European Union. This had the effect of extending the copyright of pre-1976 works to a copyright term of 95 years from the date of publication. If the work was registered but the registration was allowed to lapse, the term is 95 years from the date of initial registration. Post 1976 works are protected for the life of the author(s) plus 70 years.

See the chart below, "Materials protected by copyright, and available for purchase" for information on how this effects use of materials.

PERFORMANCE RIGHTS

As our orchestral programs often include music which is still under copyright, we face the questions of performance rights; the rights granted to the performing organization by the owner of the intellectual work or their agents. These are largely determined by the manner in which the composer's work is performed.

There are two types of performance rights - small (or concert) rights and grand (or dramatic) rights. Small rights are the rights to give concert performances of music - musicians giving a performance of musical sounds only. There are no extra-musical

aspects of the performance - there is no dance, pantomime, acting or other interpretive device associated with the performance. In a concert performance, the music tells the story. These rights are granted to orchestras and venues by performing rights organizations. Each country has its own particular performing rights organization. It is assumed that orchestra librarians are aware of the appropriate organization for their own particular country. In the United States rights are granted by ASCAP, BMI, and to a lesser extent, SESAC. American orchestras often have blanket licenses that give them the right to give concert performances anywhere in the US of copyrighted music. Some orchestras or venues may find it better for them to license individual performances of copyrighted music, and per performance licenses are also granted by ASCAP, BMI, and SESAC for the works they control. Note that no license is required for performance of any sort of works not protected by copyright (works said to be in the public domain).

GRAND RIGHTS

Grand rights on the other hand are the rights to give a performance which contains literary or visual elements that go beyond the performance of musical sounds alone. These can include non-musical plays with incidental music added after the play was written, plays where music is an integral part of the play as written, revues comprising stage presentations of separate musical numbers and dramatico-musical works. Dramatico-musical works are works in which the music is used to carry the action of the story forward. Opera, operetta, musicals, and ballet fall under this heading.

The owner of the copyright for these works has the exclusive right of performance and so their permission is required before a public performance can be legally given. The performing rights societies listed above have the right to license only non-dramatic performances of the music in their repertoire. The copyright owner or their agent, often a music publisher, retains the right to license all other uses of the music.

Unlike small rights, where performing rights societies grant licenses, grand rights involve negotiating directly with the copyright owner or their assigned agent. They usually involve fees based on a percentage of the gross box office revenues and can contain both royalty fees, for use of the intellectual property, and rental fees, for use of the physical material which represents the intellectual property. The size of the venue, anticipated audience, mean ticket price, number of performances and stature of the company performing the work can influence the ultimate fee for royalties payable. In addition some publishers will add a rental fee per performance for use of the necessary orchestral materials. All aspects of the grand rights license agreement an orchestra makes with a copyright owner or their agents is negotiable. Good luck!

It is important to remember that adding any element to a performance of a copyrighted work beyond musicians giving a performance of musical sounds only can make it subject to grand rights and consequently substantial payments of royalties and rental fees. These can include adding a dancer to a copyrighted orchestral work or dressing singers in costumes and have them gesturing to one another during a concert

performance of a vocal work.

It is also important to remember that when a grand rights license has been obtained, the income and performance information should not be included in the performing rights society reports that are submitted for non-dramatic performances.

Concert performances of ballets or operas in which there are no dancers or in which the singers appear in regular concert dress and address the audience instead of each other, and in which there is an absence of scenery do not require a grand rights license. There have occasionally been disputes with music publishers on these types of performances. This is an area which has rarely been defined through litigation and as such is subject to negotiation.

PRACTICAL APPLICATIONS OF COPYRIGHT

What effect does copyright law have on my orchestra? The first thing to bear in mind is that acquisition of materials does not give one a license to perform. All works protected by copyright need a performance license as discussed above in **Performance Rights**. Works in the public domain (not protected by copyright) do not require a license.

Apart from performance licenses, there are a myriad of dos and don'ts with regard to the actual printed parts your orchestra will be using. For performances in the US, the following charts and commentary are a summary of the issues involved.

Materials in the Public Domain, and available for purchase.

Acquire	Duplicate	Perform	Broadcast	Record
From your preferred music dealer	no restrictions	no license required	no license required	no license required

Materials protected by copyright, and available for purchase.

Acquire	Duplicate	Perform	Broadcast	Record
From your preferred music dealer	not permitted	license required	Often an additional rental fee; broadcasting stations require license from your performing rights organization.	Often an additional rental fee; recording company must have license from copyright owner
[see note 1]	[see note 2]			

Note 1: In the United States, the vast bulk of works with restored copyright protection by the GATT treaty fall into this category. Most of them are not longer available for purchase, but if your orchestra had purchased them while they were in the public domain they would be in this category.

Note 2: The U.S. copyright law does permit the duplication of materials protected by copyright if one is replacing worn-out materials and the copyright owner will not make replacement materials available at a reasonable cost. This does not change the copyright status of the work, and licenses are still required to perform, broadcast, or record. This is a fine point of law. You would be advised to check the applicable law in your own country.

Materials protected by copyright, and available only on rental

Acquire	Duplicate	Perform	Broadcast	Record
Can only be from copyright owner or agency thereof [see note]	not permitted	license required	Often an additional rental fee; broadcasting stations require license from your performing rights organization.	Often an additional rental fee; recording company must have license from copyright owner or agent

Note: Certain protected works have at one time been available for purchase and are now rental-only works. In some case these works can be obtained from a dealer who acquired these materials when they were available for purchase and now rents them. In those cases, the chart for materials protected by copyright and available for purchase would apply, except for the acquisition column.

Materials in the public domain, but available only on rental

Acquire	Duplicate	Perform	Broadcast	Record
From whomever has them	not permitted [see note 1]	no license required	no license required [see note 2]	no license required [see note 2]

Note 1: Duplication of materials in the public domain is permitted unless the rental agreement contains a prohibition against duplication or distribution.

Note 2: Broadcast or recording of works in the public domain is permitted unless the rental agreement contains a prohibition against broadcast or recording. An additional rental fee could be charged, but this is not a licensing fee.

If your orchestra is touring in another country there are some other issues to consider. Certain works that are clearly in the public domain in one country may be protected in other countries. These are generally works whose US copyrights lapsed naturally after the old 56 year term, but whose authors lived into the middle the 20th century, making their works protected by a “life-plus” term still protected in other countries. The typical example of this is Richard Strauss’s famous tone poems. His most popular orchestral works were all written in the 1890’s, and their US copyrights ran out long ago. Reprint editions of these works are generally used by American orchestras. However, Strauss died only in 1949, so his works are still protected for the time being in other countries. For this reason, the use of American reprint editions is not permitted outside the US. In

general, when performing such works, a US orchestra notifies the US agency of the foreign copyright owner of the performances and pays a fee in order to use these materials in a country where they would normally be prohibited. If your orchestra can perform from the actual original European-published parts for such a work, there is no fee payable.

Another issue with regard to touring is the acquisition of the proper performance licenses. Performance licenses from ASCAP, BMI, or SESAC are valid only in the US. Orchestras touring outside their own country should include in their contract with the presenter language that makes the presenter responsible for the performance licenses, and the orchestra responsible for rental fees.

Conversely, if your orchestra is presenting a foreign orchestra on tour in your country, your blanket performing license may cover all of your presentations. If you do not have such a license, it is possible that the venue has its own license which will cover all performances in that venue. Again, the foreign orchestra should be responsible for all rental fees, and the presenter should be responsible for licenses.

FUTURE CONSIDERATIONS

The approach to intellectual property is changing rapidly with emerging technologies. Copyright Law is also in the process of change to try and keep up with these technologies as well as anticipate new ones. Organizations such as the World Intellectual Property Organization and others exist which are constantly addressing these issues.

USEFUL INTERNET LINKS FOR COPYRIGHT INFORMATION

The following links, to organizations and laws discussed in this paper, might be of use to orchestra librarians:

World Intellectual Property Rights Organization

- The United Nations organization that administers, among other treaties, the Berne Convention. Their website has Arabic-, Chinese-, English-, French-, Russian-, and Spanish-language versions, including searchable full text versions of the Berne Convention. This link is to their homepage; users need to select their preferred language, so no specific link can be cited.
<http://www.wipo.org/>

Berne Convention for the Protection of Literary and Artistic Works

- searchable English-language full text:
<http://www.wipo.int/clea/docs/en/wo/wo001en.htm>
- use WIPO site for links to Berne Convention text in WIPO languages
- List of countries signatory to Berne Convention:
<http://www.wipo.org/treaties/documents/english/pdf/e-berne.pdf>

United States Code, Title 17 (US Copyright Law)

- searchable full text:
www.copyright.gov/title17/circ92.pdf
- Order a printed version of USC Title 17:
www.copyright.gov/title17/index.html#sudoc

European Copyright User Platform

www.eblida.org/ecup/

These non-governmental links might also be found useful:

Symphony Orchestra Library

- [A useful site for the orchestra, library, this link is to copyright information]
www.orchestralibrary.com/solcindex.html#EIGHTH

Music Library Association

- “Copyright for Music Librarians”
www.lib.jmu.edu/Org/MLA/

International Performing Rights Organizations

- This site, on the BMI website, is a page of links, roughly organized by country name in English, to foreign performing rights organizations:
www.bmi.com/international/links.asp

Sample form for purchasing music

It is recommended that music be ordered on your orchestra's letterhead.

Account no. [account number at this vendor]

To:

[name and address of vendor]

Ship to:

[shipping address]

Bill to:

[if different from shipping address]

Please supply the following items for delivery in [your town] not later than [date required]:

[Publisher or edition] [publisher's catalogue number]

[composer & title]

[quantity] [item required]

Note that various publishers package orchestra music in different ways - you should specify the total number of string parts that you require rather than saying "set of parts."

Please ship this order via [state your choice of carrier].

If for any reason this order cannot be filled by [date required], please call [contact name] as soon as possible at [contact telephone], or fax to [contact fax].

Sample form for renting music

This form should be printed on your orchestra's letterhead

Account no. [account number at this publisher]

To:

[name and address of publisher]

[date ordered]

Ship to:

[your name and address]

Bill to:

[if different from ship to]

Order No. [enter your order number, if any]

PLEASE CITE ORDER NUMBER IN ALL CORRESPONDENCE

The [your orchestra] requires in its library the following work:

[composer and title] [indicate version if this publisher has more than one version of this work]

for performances scheduled **[performance dates]**.

ALL PERFORMANCES WILL TAKE PLACE IN [YOUR HALL, YOUR TOWN], UNLESS OTHERWISE INDICATED.

We require **[quantity] full scores**, a **wind set**, and strings **[total strings required]**, to arrive not later than **[required date]**.

Conductor: **[conductor's name]**

Soloist: **[soloists' names, if any]**

Either: The [your orchestra] is licensed by [insert performing license organization here].

or: The [your orchestra] has obtained a performance license for these performances from [specify performing rights society].

If you have any questions about this order, please contact [contact name] as soon as possible at [contact telephone] or by fax at [contact fax].

Thank you very much for your cooperation.

[contact name]

[contact title]

NOTES: