

# CMAAMatters

CHAMBER MUSIC AMERICA

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## Copyrights— and Wrongs

It's easier than ever for composers and performers to disseminate recorded music—and run afoul of copyright law.

by BRIAN TAYLOR GOLDSTEIN, ESQ.

A leading orchestra recently presented a world premiere by a young composer and gave him a recording of the live performance. The composer proceeded to post excerpts from the recording on his website; he also played it in a master class, open to the public, that he gave in the orchestra's home city. He figured he should be able to use the recording as he saw fit—it was his piece, after all. But the orchestra hit the roof and enlisted legal counsel to contact him; he heard from the union reps as well. The guy avoided getting sued only because everyone involved gave him a break. After all, they don't teach copyright law in conservatory.

But maybe they should. Technology has made it easy, in a way never before imagined, to disseminate recorded music. Through mp3s and the Internet, performers and composers who want to promote themselves can gain nearly instant access to a world-wide audience. But just because it's easy to get a public airing for a piece of material doesn't mean it's legally sanctioned; artists may think they have the rights to material that really isn't theirs to share. Before you use an audio or video clip for professional

purposes, you have to understand who owns it. And that means finding out about copyrights and licenses.

Copyright law protects music, scripts, choreography, photographs, images, recordings, videos, DVDs, paintings, and other creative works. Whoever owns the copyright, owns the work. The copyright

owner can grant or sell permissions—"licenses"—to control or restrict how others use the work. According to copyright law, the work is protected the moment it is "fixed in any tangible medium of expression." For example, when a composer first "fixes" her musical work by writing the score or by recording her own solo performance of it, she *owns* the work.





## A Vexatious Video

A chamber orchestra was producing a big 25th-anniversary retrospective on DVD, including footage that had been generated over the ensemble's whole history. The ensemble was just about to deliver the material to the distributor when they mentioned it to me. I said "Whoa—back up!" It turned out that they'd done nothing about rights! The footage had been done by various videographers, so we had to track them down; luckily, they were all happy to sign releases. But some of the music was under copyright, as well. It's one thing to use a piece by Tchaikovsky; another if it's Schnittke or Piazzolla: for composers like those, you have to pay fees to the estates. The whole thing took a lot more time and money than the group had anticipated. They woke up to a level of stress that could have avoided if they'd said, "We'd like to get rights" rather than, "Oops! We need them!"

Even if the composer hasn't registered it with the U.S. Copyright Office, he nonetheless owns the copyright. Still, registration is highly recommended. It only costs \$35, and if a copyright owner sues someone for the unlicensed use of his work, it entitles him to attorney's fees and enhanced damages. Registration is easily accomplished online through [www.copyright.gov](http://www.copyright.gov).

If you're a musician who wants to perform a copyrighted musical composition in front of an audience at a live concert, you need to obtain a **performance license** from the composer. A license is also required anytime someone plays an already-existing recording of the composition for the public—on the radio, on television, on the Internet, or in any public place where it can be heard. (These rules are in place even if the composer hasn't obtained a license through the Copyright Office.) If the composer has registered with a performance rights society—in the U.S. these are ASCAP, BMI, and SESAC—then you would deal directly with the appropriate society. These societies determine performance license fees, issue the licenses, monitor public performances, collect royalties, and pay the composer according to a specific payment system. If the composer is not a member of one of these societies, then you need to contact her directly and negotiate fees.

Be aware: You may have bought or rented a copy of the score or of the parts. But this transaction merely gives you the right to learn the work and play it, not the right to reproduce it, perform it in front of an audience, record it, or even make copies. Copyright is quite literally the *right to make copies*—and to control how they're used. Copyright covers all adaptations, including transcriptions and new arrangements or orchestrations. All of these require permission from the composer.

In order to make an audio recording of a composition, you need to obtain a **mechanical license**. The Copyright Office sets a standard mechanical license fee (see "Calculating the Mechanical License" opposite page), but the fee for the first recording is negotiable. Typically, a label or an artist will approach the composer and ask for permission to record the work at a rate lower than the usual rate. After that, though, mechanical licenses for

subsequent recordings become "compulsory"—that is, the composer loses both the right of refusal and the right to set the fee. (The law makes exceptions for musical theater and opera, which never become "compulsory.") From then on, anyone who wants to record the music simply needs to notify the composer and pay at the statutory mechanical license rate for each recording sold. The artist or the recording label pays these royalties. A number of firms—most famously, the Harry Fox Agency—will issue and monitor mechanical licenses, collecting the composer's royalties for the performer.

"Putting material online in easily downloaded form is like parking your car on the street with the engine running and the keys in the ignition."

For video recordings, you need a **synchronization license**. Even if you make a video simply for promotional reasons—you don't intend to sell any copies—you still need this license any time music is recorded with visual images: videos, DVDs, and films. As with all other licenses (including the first mechanical license), the composer determines the fee or flatly refuses to grant the rights.

Now things get complicated. Although the copyright to the work itself remains with the composer, the recording is protected by a separate copyright. This means that once you make either an audio recording or an audio-visual recording (assuming you obtained the proper licenses), you own the recording and control all rights to it. The composer has no inherent right to use a recording of her own music, even for self-promotion, unless she also holds the copyright for the recording. Typically, whoever pays for the recording, owns it. If the recording is a one-person production, with the composer

using self-recording devices and software, then he's clearly the owner. But if he has hired musicians and a studio, even paying for their services out of his own pocket, he still needs to get a written release from each musician, as well as from the recording engineer or any technical staff, to establish ownership.

If you're a composer who wants to use a preexisting recording of one of your works as a promotional tool—typically, by putting it on your website—you can negotiate with the owner for permission to use a piece of it. Of course, since you have the absolute right to control the terms of your composition's first publicly released recording, you can always get the promotional rights in advance by negotiating to use excerpts as a condition of granting the mechanical license.

If your work is a commission, you can build these rights into the commissioning agreement, which might specify that you have the right to record a performance for promotional purposes or to use a copy of a recording that the commissioning organization is making. Ensembles or orchestras may be unwilling (or unable, because of union restrictions) to grant the composer rights to a full recording, but some will allow use of excerpts for promotional purposes or the right to make a so-called archival recording, with the stipulation that it's not for "commercial use." (Sometimes the commissioning organization will make its own archival recording, under the mistaken notion that it has an inherent right to do so.)

But the term "commercial use" is a misleading one. It doesn't pertain just to sales; it also includes promotion, marketing and advertising. "Noncommercial use" is pretty much limited to personal listening and study—and impressing your relatives at holidays. Any additional rights have to be negotiated—for instance, "Will you agree to three minutes that can be used for promotion, but not sold?" Any such exceptions should be set down in the commissioning agreement.

Once you've gotten legal clearance for material, you should think long and hard about how you want to offer it, especially on the Internet. It's tempting to want potential business partners—presenters, managers, musicians and producers—to

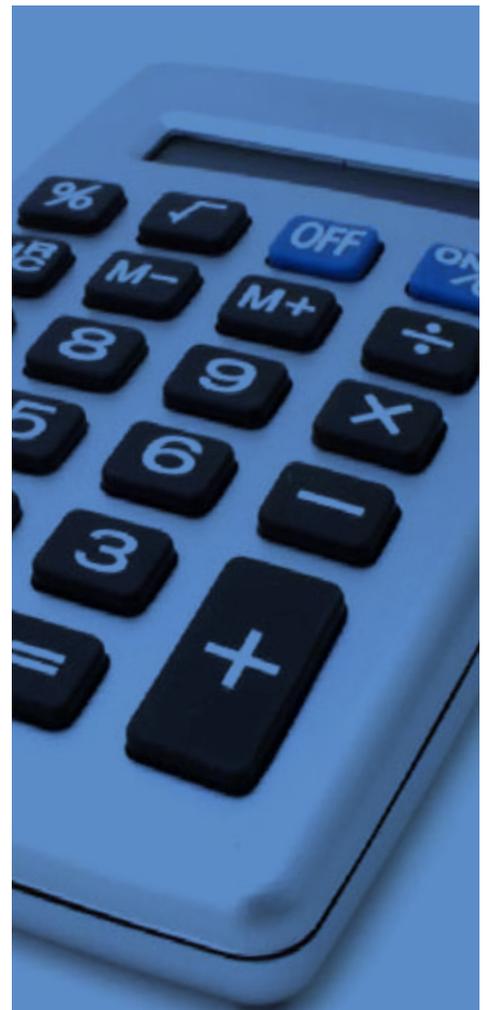
"Today's media offer new resources to develop audiences and opportunities. But before you dive in, you need to know how to protect your own work—and respect the work of others."

hear an entire performance or review an entire score. But even though you may feel *legally* protected, no copyright notice, threat, or warning can physically stop people from illegally downloading and copying materials placed on the Internet. In fact, many people—including industry professionals who should know better—think that anything placed on the Internet is "public domain" or "free for the taking." In fact, putting material online in easily downloaded form is like parking your car on the street with the engine running and the keys in the ignition.

That's why the marketing strategy of any artist, composer or performer should include safeguards against making a work too easy to steal. A number of software programs are available that will help thwart would-be downloaders. In addition, every artist should place a copyright notice on every page of a score and parts, as well as on all videos and recordings. And each page of an artist's website should include warnings and notices, alerting visitors that all material is protected, and that any use of it needs to be licensed.

A career in music is an entrepreneurial proposition; today's media offer new resources to develop audiences and opportunities. But before you dive in, you need to know how to protect your own work—and respect the work of others.

*Brian Taylor Goldstein is a partner in the firm FTM Arts Law, specializing in serving clients in the performing arts.*



## Calculating the Mechanical License

How much money will a composer net from a mechanical license? The mechanical license fee is set by the U.S. Copyright Office and is currently \$0.091 per copy for every track 5-minutes or less, and \$0.0175 per minute for tracks over 5 minutes. So if a work is approximately ten minutes in length, the composer is entitled to 17½ cents for every copy sold. You can try to negotiate a higher fee. But if a composer makes significant money from, say, a best-selling pop single, it's because of the number of copies sold, not necessarily because he's negotiated a high per-copy fee.

## CMA Matters

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### CMA Opportunities

**New Jazz Works: Commissioning and Ensemble Development**—Support for the creation, performances, and recording of new works. Option for support of professional development activities for the composer.  
**DEADLINE: March 9, 2012**  
FMI: [www.chamber-music.org](http://www.chamber-music.org)

**Classical Commissioning Program**—Support to ensembles and presenters for the commissioning of new small-ensemble works from American composers.  
**DEADLINE: April 6, 2012**  
FMI: [www.chamber-music.org](http://www.chamber-music.org)

### Other Opportunities

**Art Works**—NEA support to presenters for the creation of art that promotes public engagement, lifelong learning, and the strengthening of communities.  
**DEADLINES: March 8 and August 9, 2012**  
FMI: [www.nea.gov](http://www.nea.gov)

**Commissioning Music/USA**—Support to not-for-profit performing and presenting organizations for commissioning.  
**DEADLINE: March 19, 2012**  
FMI: [www.newmusicusa.org](http://www.newmusicusa.org)

**MetLife Creative Connections**—Support for American composers to participate in public activities related to performances of their music. Applications are submitted by the organization sponsoring the activities.  
**DEADLINE: April 1, 2012**  
FMI: [www.newmusicusa.org](http://www.newmusicusa.org)

**Van Lier Fellowships**—Support for African American and Latino composers under 32 years of age, and based in New York City. Funds are provided for the creation of new work, purchase of equipment, travel, or research.  
**DEADLINE: April 16, 2012**  
FMI: [www.newmusicusa.org](http://www.newmusicusa.org)

**USArtists International**—Funding for U.S.-based music ensembles that have been invited to participate in international festivals.  
**DEADLINE: April 20, 2012** for events taking place **July 1, 2012–June 30, 2013**  
FMI: [www.midatlanticarts.org](http://www.midatlanticarts.org)

**ACMP: The Chamber Music Network**—Support for adult amateur chamber music workshops, including coaches' salaries, reduced registration fees, and scholarships.  
**DEADLINE: April 30, 2012** FMI: [www.acmp.net](http://www.acmp.net)

**Composer Assistance Program**—Direct assistance to composers to help realize their music in performance.  
**DEADLINE: May 1, 2012**  
FMI: [www.newmusicusa.org](http://www.newmusicusa.org)

**French-American Jazz Exchange**—Support for collaborations between French and U.S. jazz artists.  
**DEADLINE: May 1, 2012**  
FMI: [www.midatlanticarts.org](http://www.midatlanticarts.org)

**Trust for Mutual Understanding**—Grants to nonprofits for cultural exchanges with institutions and individuals in Russia and Eastern/Central Europe. **DEADLINE:** Letter of inquiry due **May 1, 2012**, Proposal due **August 1, 2012**  
FMI: [www.tmuny.org](http://www.tmuny.org)

**Challenge America: Reaching Every Community/Fast-Track Review Grants**—NEA support for projects that reach underserved populations. **DEADLINE: May 24, 2012**  
FMI: [www.nea.gov](http://www.nea.gov)

**Aaron Copland Fund for Music/Performing Ensembles Program**—Support for organizations whose performances encourage and improve public appreciation of contemporary American art music.  
**DEADLINE: July 2, 2012**  
FMI: [www.coplandfund.org](http://www.coplandfund.org)