

Copyright Primer for Folk Musicians

by Sylvia E. White, Ph.D.

University of Akron

School of Communication

Amateur musicians, particularly folk musicians, are often confused about copyright law as it applies to their performances and recordings. This primer is intended to explain copyright law in its practical application.

Please note: all copyright law is federal law. This means that copyright law is the same in every state. The United States is also a signatory to the Berne Convention that regulates international copyright. All signatory countries have made their laws substantially the same and signed an agreement to protect each other's copyrights. Most of the industrialized countries in the world belong to the Berne Convention.

The information in this primer comes from a variety of sources including: [This Business of Music](#) by M. William Krasilovsky and Sidney Shemel, Billboard Books, 1995; [Music Law: How to Run Your Band's Business](#), by Richard Stim, Nolo, 2001; <http://www.copyright.gov/>; <http://www.ascap.com/>; www.harryfox.com; <http://www.pdinfo.com/>; telephone contacts with the staff at ASCAP; and 24 years of teaching Media Law to undergraduate journalism, public relations and radio/tv majors.

Copyrights and Music Composers

You have just written your first tune. As soon as you put the tune into some form where another person could see or hear it, it is automatically copyrighted. You do not have to mark it as copyrighted. You do not have to register the copyright with the government. Even if you wrote it down in lipstick on a cocktail napkin - it is automatically copyrighted!

Your tune now has four different "rights" attached to it, all of which belong to you. You may sell, give-away, or rent-out those rights. In two out of the four cases, the government has developed some standard licensing requirements. The four rights are: the publication right, the performance right, the synchronization right, and the mechanical right.

Publication Right: This is the right to publish the sheet music of your tune. There is no form of licensing for this right. Anyone who wants to publish your tune in any form of sheet music (including dulcimer or guitar tab) must contact you and obtain permission. You can choose whether to allow publication and how much to charge. Professional musicians typically sell the publication rights to a commercial music publisher. You don't have to.

Performance Right: This is the right to perform your tune in public. A public performance would include any live performance or the playing of a sound recording over the radio, Internet, jukebox, etc. Each time your tune is performed in a public setting, you have the right to receive a royalty payment. If you register your tune with a performance rights organization, such as ASCAP or BMI, that organization will keep track of public performances and send you a quarterly royalty check. In this case, you must accept the standard fee determined by ASCAP and/or BMI. It is also possible (very likely for folk musicians) that you won't receive anything at all. ASCAP and BMI cannot keep track of EVERY performance. Instead, they sell blanket licenses to venues (festivals, restaurants, radio stations, etc.) that allow the venue to play any music in their catalog. They then "sample" the music played at the various venues and divide up the license money collected according to what percentage of the time your tune turns up in the sample (after taking their cut, of course). The less popular or "commercial" your tune, the less likely it will show up in any of their samples. You can, of course, choose not to register with a performance rights organization and negotiate and collect your own royalties. Good luck.

Synchronization Right: This is the right to synchronize your music into the sound track of a film or video. Anyone who wants to use your tune as part of their sound track must contact you and negotiate permission and price. This

right does not cover incidental music that might appear in a film or video, such as a documentary shot at a festival where a band is playing in the background. That would be covered by a performance license. This refers to that music that is deliberately selected and incorporated into the sound track.

Mechanical Right: This is the right to make a sound recording of your tune. Once the tune has been published, there is a compulsory license for sound recordings. This means you have to allow people to record your song and accept the statutory royalty fee set by the federal government. They are not allowed to change your tune in any substantial way. That's called a "derivative version" and you have the exclusive right to create derivative versions of your tune, but you have to allow other musicians to "cover" your tune. Music publishing companies and talent agencies often manage this right for professional musicians. Amateurs must look out for themselves.

All of the above "rights" apply to the composer of the music, not the performers or the recording companies.

Copyrights and Music Performers

You probably spend more time performing other people's tunes than writing your own. You "perform" other people's music when you play before a live audience and when you put a recording on your web site (or play it on your radio station).

Public Domain: Copyrights do not last forever. Once the copyright expires, the music enters the "public domain." You can play, record, publish, etc. any public domain music without worrying about copyright. So how old does the music have to be? It's a little complicated because copyright law changed several times over the course of the 20th century and continues to change. Current law says a copyright lasts the life of the last surviving composer plus 70 years. A good rule of thumb to use is that if the tune or recording was in existence before 1922 - it is probably in the public domain.

A word of warning: a tune might be in the public domain, but the harmony or a unique arrangement can be copyrighted. As a general rule assume harmonies and complicated arrangements are copyrighted (unless they were also in existence before 1922). How complicated must an arrangement be to be copyrighted? It needs to be unique. It needs to add something special and creative to the song. It can't just be an arrangement of melody line and chords, because anybody arranging music for a particular instrument would probably come up with something very similar, and it doesn't matter if the chords are strummed or arpeggiated. Watch out for unique bridges, introductions and endings. Also, watch out for fake books. Major music publishing companies have a nasty habit of taking a simple public domain folk tune, changing a measure or two slightly, and copyrighting "their" version. If you get caught recording "their" version without paying royalties, they sue. Go ahead and learn the tunes as written, but don't become "tab dependent." A good folk musician might learn a tune from a particular arrangement, but over time it changes and takes on a personal touch. Make it your own. Go ahead and change the tune, the chords, etc. Over time it will become your own unique arrangement. This won't happen unless you memorize tunes and PUT AWAY THE WRITTEN MUSIC! Playing other people's arrangements and harmonies is generally not a problem in public performances, but it is a problem when you start recording.

Web Sites: We've already covered the four "rights" belonging to the music composer. Whenever music is recorded there are two other groups that also own copyrights. The musicians own a copyright in their particular performance and the recording company owns a copyright in the actual recording. While musicians usually sell their copyright by contract to the recording company, recording companies can be vicious about their rights. Unfortunately, web sites are both similar to and different from broadcasters. Both need to get performance licenses in order to play any recorded music. These royalties go to the composer. In addition, web sites need to check the current law as it applies to record company royalties. When radio first began in the 1920s, agreements were made that musicians and recording companies would not get any royalties for music played in that venue. However, when radio stations and others started putting recorded music on the Internet, the recording industry demanded royalty payments for themselves. So far, the court cases have supported this demand. ASCAP and BMI are experimenting with web site performance licenses that would compensate the composers, but this does not solve the problem with the record companies.

So, if you want to use music on your web site - find a tune that is in the "public domain" and record your own performance! If you use original music or a friend's performance, get a signed statement giving you permission to use those performances on your web site. Verbal agreements are fine, but friendship is like marriage. Get a "pre-nup."

Performing Live: For live performances it is important to differentiate between public and private venues. You do not need to worry about copyrights and performance licenses when performing for a private party (weddings, birthday parties, etc.) Whenever a performance is "open to the general public" it constitutes a public performance. Public performances usually require a performance license from ASCAP and/or BMI (usually ASCAP for folk music).

Following is a quote directly from the [ASCAP web site](#) and has been confirmed in several private conversations with the staff at ASCAP:

Some people mistakenly assume that musicians and entertainers must obtain licenses to perform copyrighted music or that businesses where music is performed can shift their responsibility to musicians or entertainers. The law says all who participate in, or are responsible for, performances of music are legally responsible. Since it is the business owner who obtains the ultimate benefit from the performance, it is the business owner who obtains the license. Music license fees are one of the many costs of doing business.

As a performer, it is not your responsibility to get the license. In fact, ASCAP cannot provide performance licenses to performers. It is a violation of a consent decree signed with BMI. It is illegal for performance rights organizations to sell performance licenses to performers (unless the performers also own the venue). Performers can help naive venues obtain licenses by guiding them through the paperwork, but it's still not your responsibility. Venues can certainly reduce your fee to cover the cost of the license. That's between you and the venue.

The cost of performance licenses varies depending on the venue. The price is based on whether it is a one-time event or a regular club; how many people the hall can hold; how much the entry fee is; etc. Some benefit performances are exempt from any fees. To qualify as an exempt benefit performance the performers must be donating their performance and the venue must not directly benefit from the performance. For example, a church can sponsor a benefit concert to raise money for a worthy cause not directly associated with the church where the performers are donating their labor and all the proceeds (minus legitimate costs) are going to the designated cause. There are other formulas for benefits where the performers are getting paid or the venue is taking some or all of the proceeds. Contact ASCAP for more specific information before planning your benefit. My personal experience is that, if a benefit is not exempt, you can expect to pay close to \$200 minimum for a license!

Do ASCAP and BMI really care about the little gigs folk musicians play? Yes and no. Officially, of course they care. Unofficially, if you are playing for a church or nursing home, or playing an exempt benefit, they probably don't want to hear from you. Churches are supposed to pay royalties for the music they use (including your performances). They are notorious for violating this but almost never prosecuted. If your performance is part of the worship service or for an event that is limited to the church members, don't worry about it (it's not your responsibility anyway). If they are sponsoring a concert open to the general public, you might want to explain about benefits and suggest they contact ASCAP. You could make the argument that nursing home performances constitute "private" parties. Otherwise, the company running the nursing home, which probably brings in all kinds of musicians, has the responsibility for checking into licensing. It is probably covered by the same blanket license that covers the muzak they often play. It's not YOUR problem. Festivals typically get festival licenses to cover all the musical performances, so unless they specifically ask you to play only "public domain" music, don't worry about it. Businesses, such as clubs and restaurants, must have performance licenses for any music (except radio broadcasts) played in their establishments and ASCAP and BMI will go after these venues for violations. But again, it's not your responsibility. If any venue specifically asks you not to play any copyrighted music, you should warn them that it takes a lot of research to prove that any one specific song is public domain, that a lot of music folk musicians assume is traditional is not (hey, tradition has to start somewhere....). You will try to comply, but the risk is theirs.

Copyrights and Music Recording

You know you can make recordings of any music that has been published. If the music is under copyright, you must register your use with the copyright holder and pay the statutory royalty fee for every CD/tape you make. The first step in this process is to check with the [Harry Fox Agency web site](#) to see if they have the song you want to use in their catalog. If they do, everything is really easy. You fill out their form, send them a check, and they see that the royalty payments go to the right person. If the song is not listed with Harry Fox, you must find the copyright holder and send them a registration form and check. The book [Music Law: How to Run Your Band's Business](#) has copies of the forms and instructions. Keep copies of all forms, checks, etc. as proof of compliance.

If the song you want to record is in the public domain, you should do your best to obtain proof. If you are sued for copyright violation, you will need this proof to win your case. [The Public Domain Project web site](#) lists the following guidelines for what constitutes proof. I strongly recommend you go to this web site for assistance in your public domain research.

Legitimate Sources for Proof of Public Domain

- Original Book with PD copyright date on the Title Page
- Original Sheet Music with PD copyright date
- Photocopy of a Book or Sheet Music with PD copyright date which you photocopied yourself
- Photocopy of a Book or Sheet Music with PD copyright date from a person or company you trust
- Digital copy of a Book or Sheet Music with a PD copyright date printed on your printer from an internet web site you know to be reliable
- Digital copy of a Book or Sheet Music with a PD copyright date printed from a CD or DVD published by a person or company you trust

Questionable Sources for Proof of Public Domain

- Photocopy of sheet music or photocopy of pages of a book given you without your seeing the actual book
- Photocopy of sheet music with or without cover page without your seeing the actual sheet music
- Photocopy of a book without copy of Title Page - you cannot positively identify the source without the title page.
- Anything from an internet web site you know nothing about

Invalid Sources for Proof of Public Domain

- Original or photocopy of a Book or Sheet Music with no copyright dates
- The name of the song on a list of public domain music
- An old-looking book with no title page and no copyright dates anywhere in the book
- An old-looking page of music with no copyright date ripped from an old-looking book
- Photocopy of a Book or Sheet Music when you do not know who made the photocopy
- An individual telling you that a song is PD, even if you know and trust the individual.
- An email from anyone telling you a song is PD

As you can see, it is especially difficult for folk musicians to prove that the music they play is legitimately in the public domain. One problem is that a lot of folk tunes go by many names. The tune a trusted source lists under a particular name as public domain may not be the tune you mean when you use that name. Another problem is that folk music tends to be passed down in an oral tradition. A tune may have existed long before it was ever written down, but the copyright begins upon the first publication of the tune! Many tunes folk musicians play and sing are combinations of public domain tunes and copyrighted lyrics (examples: Morning has Broken, Danny Boy, Love Me Tender) or they may be copyrighted tunes and public domain lyrics (example: Phil Ochs' song The Bells, comprises Edgar Allen Poe's poem sung to an original tune).

Do the best you can to obtain evidence that the tunes you want to record are in the public domain (i.e. published before 1922). If you can't find any legitimate or questionable evidence that a tune is in the public domain even if you can't find any evidence of a composer's name - don't record it! Go ahead and play it in your public performances, but don't record it. If you can find at least questionable evidence (after trying hard to find legitimate evidence) AND you can't find any instance of the tune claimed under copyright, then go ahead and record it, understanding there is a slight risk. If you are recording for a commercial record label, they probably have a legal department that checks on copyrights for you. Watch out for "indemnity clauses." This clause in your contract basically says that you will compensate the record label for any legal harm they might suffer from publishing your recording. So, if they get sued, you have to pay them whatever it costs.

Many folk musicians are making their own digital recordings and marketing them at their gigs and on the Internet. Just be aware that the more widely you market your recordings, the more likely you are to get caught if you make a mistake. Don't let copyright law silence your recordings, just try to be careful. Accept the fact that you will not be able to record every song you might want.

What will happen if you get sued? The first thing that will probably happen is you will be contacted by a lawyer representing the copyright holder (usually the composer, their publishing company and/or agent). They will try to

scare you and will probably succeed. They may demand that you recall all copies of your CD that are not yet sold/distributed to consumers (you can re-issue the CD without the offending song), they may demand that you turn over to them or destroy any masters of the offending song and publicity materials, they will probably demand you turn over any profits from the sale of the song, etc. The best thing to do is to negotiate a settlement. It's kind of like negotiating the price of a car. They're going to start high, you can talk them into something reasonable. If you are cooperative, they will probably be reasonable. Understand that their main purpose is to stop the distribution of something they think they own/control or get their statutory compensation for your recording.

What if you think they are wrong and the tune they are trying to claim is legitimately in the public domain? You can try to argue with them. If they know their case is weak and you seem to have legitimate evidence, they will probably back down. If they believe your evidence is weak and they think they can bully you into settling, they will get meaner. Understand this about the way the American legal system operates: even if you're right, you will probably lose in some way you can't afford. Even if you win a court case, you will have to hire an intellectual property lawyer and pay court costs. The judge does not have to award you attorney's fees. So, you might be responsible for hundreds of thousands of dollars of lawyers fees and court costs even if you win! Most of the time, the people bringing lawsuits are not the actual musicians who composed the music. Instead, it will be a music publishing company that puts out all those books of sheet music. Big music publishers and talent agencies have whole departments of lawyers and huge litigation budgets. They are whales and you are a guppy. Guppies can't survive whale attacks! It's not fair, but no one ever promised life would be fair. If your club can afford it, it's a good idea to incorporate as a non-profit organization. That way the most they can do is bankrupt the club. Even without this legal protection, if you cooperate and are willing to negotiate a reasonable settlement (which might empty out the club coffers, such as they are) chances are you will never need to hire a lawyer and go to court.

If you are considered a "professional" musician, you can expect harsher treatment. What is a "professional" musician? Pretty much anyone who is trying to make a living off their music, they probably have a contract with a commercial recording label. The lawyers are much more likely to play "hard-ball" with the pros. A professional musician is much more likely to "re-offend," and their work has a significantly higher commercial value. The music publishers are going to want to punish the musician and the offending recording company to teach them, and all other similar musicians and recording companies, a lesson.

Summary

I hope this primer on copyright has answered any questions you might have regarding your use of music. I encourage you to investigate the sources I have listed at the beginning of this essay for more detailed information, and don't be afraid to contact ASCAP, BMI, Harry Fox Agency, or the U.S. Copyright Office if you still have questions.

Remember

- As the composer of a tune, you have the right to control the publication of the sheet music and the synchronization of the tune into a film or video sound track. You are entitled to receive royalties from public performances and sound recordings of your composition.
- As the performer of other people's copyrighted tunes, you are not responsible for obtaining the performance licenses - only the venue can obtain a performance license.
- As a recorder of copyrighted music, you must register any recordings of copyrighted tunes (harmonies and unique arrangements) and pay a statutory royalty to the composer.
- As a recorder of public domain music, you must try to research the tunes and obtain legitimate evidence of the tune's public domain status.
- If contacted by a lawyer claiming that you have violated a composer's copyright in your sound recording, remember that you are a guppy. Swallow your pride and settle!