

You Should Know About Music and Fair Use

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Introduction

"Every time we're afraid to use fair use we lose fair use because we take it away from ourselves"
T. K. Herrington, NINCH Copyright Town Meeting, Atlanta 2002.

This statement, "You Should Know About Music and Fair Use" has been prepared by the Music and Fair Use Forum of the Popular Music Section of the Society for Ethnomusicology.

From the provision of course packs and readers to the playing of sound recordings, videos, and DVDs in class, in our day-to-day educational and professional practice we frequently find ourselves in situations that involve the reproduction and public distribution of what are often understood as musical works. Legally speaking, such activities implicate us in the workings of copyright and fair use. Why should we be concerned about copyright and fair use? Why do such things matter? What do the terms mean? Where might we go to find out?

What This Statement Is

This statement is first and foremost a call to recognize that copyright and fair use concerns present us with issues, which we, as ethnomusicologists, cannot afford to ignore. This statement is an invitation to a conscientious and informed professional practice of ethnomusicology, mindful of the role and consequences of intellectual property. While acknowledging the variety of legislation internationally, this introduction has been drawn from U.S. legislation and advisory documents such as those issued by the U.S. copyright office and should not be taken to apply elsewhere in anything other than general principles. In other jurisdictions, for example in the United Kingdom, the concept of "fair dealing" may apply, which is considerably more restrictive than the concept of fair use.

Second, this statement provides the briefest of summaries of what discourses of fair use refer to. The legal context for discussions of fair use is described, and the "four factors" that inform most legal discussions of fair use are listed. In the light of these, some of the dominant understandings of fair use are very briefly discussed, and possible misunderstandings of fair use are enumerated. In conclusion, an invitation is issued to ethnomusicologists to acknowledge a wider context of academic analysis in which the broader social and ethical implications of intellectual property, copyright, and fair use may be explored.

Language is a key issue in this document. The language used in these discussions is often alienating for those unfamiliar with legal terminology. However, one point about legal debates is that specifically legal discourse is the privileged discourse of the field. To translate carefully-crafted (but not necessarily semantically unambiguous) legal language into a more informal register is often to run the risk of misrepresenting legislation and current legal thinking. Any such attempts within a short document must be limited in scope. Legal terminology is not unproblematic, but it is the language that judges will negotiate when making their decisions. Readers are encouraged to take any terminological difficulty as an invitation to further reading.

What This Statement Is Not

It is perhaps important to say what this statement is not. This is not a guide to negotiating legal pitfalls. There are many articles, some of which are listed below, that have been written as informational guides and practical handbooks on some of the subtle and not so subtle details of legislation and professional practice in educational fields with regard to copyright and fair use. Being as short as it is, this statement serves only to complement these efforts. As of yet there are few texts that engage with issues specific to ethnomusicology, but it is hoped that even as this statement is being drafted that there is a growing and increasingly relevant literature being generated. We encourage ethnomusicologists to engage with this literature and thereby familiarize themselves with problems that are frequently encountered by educators across disciplines.

Please note that **this is not a legal document**, and any explanations of copyright, fair use, and public domain in this document do not serve as legal definitions. This document does not substitute for legal advice. Legal advice is provided in the particular context of a specific attorney-client relationship.

Neither is this statement an all-out statement of activism with regard to music, copyright, and fair use. While there are copyright and fair use activists at work within our discipline, it would be amiss of us to automatically assume that all members of the Society for Ethnomusicology share a commitment to public advocacy in defense against encroachments upon fair use. Should advocacy be suggested as an appropriate strategy at a later stage, then the Music and Fair Use Forum will consider this.

Copyright

Whether or not use of materials is considered fair use, legally speaking, is always decided in a court of law, in the context of a court case. "Fair use" is a technical legal term used in the context of American copyright law protection and restrictions. It is therefore important to understand the basics of copyright law before we can even begin to understand what "fair use" might mean. The basics of copyright law are, of course, anything but basic, but the following brief details will provide a start. Ethnomusicologists are encouraged to familiarize themselves with copyright law.

Under U.S. law, Section 106 of the 1976 Copyright Act gives the owner of copyright the exclusive right to do or authorize others to do the following, with regard to literary, dramatic, musical, artistic, and other 'intellectual works' that have been fixed in material or tangible form, as summarized below:

- To reproduce the work in copies or phonorecords;
- To prepare derivative works based upon the work;
- To distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- To perform the work publicly, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works;
- To display the copyrighted work publicly, 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; and
- In the case of sound recordings, to perform the work publicly by means of a digital audio transmission.

Fair Use

It is in this context that the issue of "fair use" arises in United States legislation. In practical terms, indeed, one could take "fair use" to mean "fair use *of copyrighted works*." Section 107 of the Copyright Act of 1976 offers a brief discussion of fair use. It is noted that four factors should be taken into account in order to determine whether or not a particular "use" of a "work" is fair, again, as summarized below:

- (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.

These four factors, and the case law precedent proceeding from them, provide the primary guidance for court rulings in relation to fair use. By extension, therefore, we should consider them as key elements of any consideration of fair use in ethnomusicology.

Understanding and Misunderstanding Fair Use

In contrast to other areas of copyright law, the subject area of fair use is theoretically underdeveloped. Guidance in the issues of fair use can be found primarily within a complex and often contradictory body of case law precedent and legal opinion. Fair use, for example, has been presented by some in the United States as a right attached to First Amendment entitlements. Frequently, fair use has also been understood as a *post facto* affirmative defense within the context of copyright infringement litigation. That is, someone sues you, and you justify the alleged infringement on the basis of fair use rationale. At other times fair use is understood as statutory recognition that certain categories of activity would be protected in a court of law from the accusation of copyright violation, insofar as they pose no threat to the otherwise exclusive rights of a copyright owner. That is, insofar as fair use (in the United States) is described in federal or state written law enacted by the Congress or state legislature, this implies a certain expectation (but not guarantee) of protection for particular characters of activity. In specifically educational settings, fair use is thus generally thought to encompass such purposes as criticism, comment, news reporting, scholarship or research. These are the purposes of which we ourselves, as educators, should be most protective.

Fair use is not a natural, intrinsic, or essential quality of an action. Ultimately, whether or not an action may be legally deemed fair use is a matter to be determined in a court of law. As a general rule of thumb (not a legal recommendation) fair use may be judged in relation to the likelihood that the copyright holder will not require you to ask permission for use. To put this another way, in judging for yourself whether or not an action may be deemed fair use you should, first, consider the four criteria used to judge fair use in court cases, and, second, consider any possible discrepancy between your fear of litigation and the actual likelihood that someone will sue you for copyright infringement.

Court rulings have generally given most consideration to the amount and substantiality of the portion of an item used in relation to the copyrighted work as a whole, and to the effect of the use upon the potential market for or value of the copyrighted work. If you are only using a small part of a work and your use will not diminish the commercial value of the copyright, as tends not to happen in reasonable educational use, you probably don't need to ask for permission.

It should be noted that the issue of fair use applies only to those literary, dramatic, musical, artistic, and other 'intellectual works' that are copyrighted. Fair use is not an issue for works that reside in the public domain, and issues of fair use and public domain should not be equated. Works that are clearly categorized as being in the public domain may be used without restriction or license. However, it is perhaps wise to note in passing that the complex politics of claim and counterclaim in copyright practices can never fully guarantee safety from litigation.

It should also be acknowledged that copyright law and fair use are not really effected by the issue of genre, except insofar as genre may sometimes be a factor in considerations of commercial viability. From a statutory perspective, that is, as far as legal considerations go, literary, dramatic, musical, artistic, and other 'works' are either copyrighted or not, in the public domain or not. There are no gradations within these categories on the basis of genre. It should be emphasized, for example, that the terms 'traditional' or 'indigenous' neither have legal definition, nor are they necessarily equivalent to the term 'public domain'.

Afterword

The discourses and practices of copyright and fair use are increasingly influential in the lives of ethnomusicologists. Their reach can be felt from the presentation and analysis of recorded music in classrooms and lecture halls to the negotiation of ethical minefields in fieldwork and publication. Long shadows of legislation and fear of litigation continue to affect our behavior and our orientations within the academic community. The continued expansion of intellectual property may yet have major implications for critical inquiry and the open community of scholarship.

Without fair use there might be few or no limits to the prescriptive, monopolistic claims of copyright holders. Without fair use you could find your academic practices curtailed to the point of constant frustration. Without fair use you might be obliged to seek permission for any and all uses of a musical work, and there would probably be the expectation that any use of any work would require remuneration, that is if permission were granted at all. Without fair use you could find that any and all information you wished to access was locked up by copyright restrictions. The onus is now on each of us as professional ethnomusicologists to inform ourselves and our students. We should become aware of the fair use policies of our own universities. It is also suggested that we find ways to incorporate a greater awareness of law and legislation into our curricula.

It is important to understand the general principles of copyright and fair use. It is also important, however, to make a distinction between legal and 'extralegal' concerns. Whether or not someone is likely to engage you in litigation is a real concern. However, such potential sources of anxiety in the face of litigation should not prevent us from proactively working in our educational environments in such a way that fair use is deployed as a positive value in and through our academic practices. Stating this as an abstract aspiration is not enough, of course. It is worth our while exploring and imagining what such proactive deployments of fair use might look like, as well as identifying what current practices and strategies ethnomusicologists engage in as they negotiate the cautious terrain of copyright and fair use.

Anxiety about copyright and fair use should not prevent us from engaging critically with the basic assumptions of the discourses and practices of law, literary production, and economics. That is to say, a challenge that we face as scholars of any discipline is to recognize that the legal fields of intellectual property, copyright, and fair use are constituted by a diverse range of discourses and practices that are, at base, open to question, investigation, critique, and challenge. This introduction is accompanied, then, by an invitation to critical engagement with legal issues. It is strongly recommended that we foster sensitivities in our educational and professional contexts to the wider social and ethical implications and the ethnomusicological and anthropological relevancies of intellectual property, copyright, and fair use.

Because of the complexities and ambiguities of dealing with fair use, the above outline is intended only to alert ethnomusicologists to these issues. It is crucial to remember that, although legislation provides a basis for discussions of copyright and fair use, the legal documents themselves are very long, very complex, and should be consulted first-hand for authoritative information. A list of additional sources is presented below. Though brief, it is hoped that this statement will point ethnomusicologists towards more successful negotiations of the potential legal pitfalls of professional practice.

We hope that this brief overview of the principles of fair use serves to clarify some of the basic issues involved in the negotiation of fair use. It is also hoped that this statement and the resources that follow encourage you to engage with these issues further in your own practices.

Books and articles:

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Websites:

American Library Association Position on Fair Use in a Digital Information Environment

<http://www.ala.org/washoff/alawon/alwn601.html>

American Society for Information Science and Technology (New England Chapter) The Future of Fair Use: Bibliography

http://www.asis.org/Chapters/neasis/pc/programs/20011211_bibliography.html

Association of College and Research Libraries Copyright Committee

<http://www.library.cmu.edu/Unofficial/ACRL/>

Beyond the Commons Music and Fair Use Links and Bibliography

<http://www.beyondthecommons.com/fairuselinks.html>

<http://www.beyondthecommons.com/fairusebib.html>

CETUS "Fair Use of Copyrighted Works: A Crucial Element in Educating America"

<http://www.cetus.org/fairindex.html>

Connecticut College Copyright Basics for Teaching and Research

<http://www.conncoll.edu/is/info-resources/copyintr.html>

Indiana University Copyright Management Center

<http://www.copyright.iupui.edu/fairuse.htm>

NINCH Fair Use and Education Resources

http://www.ninch.org/ISSUES/COPYRIGHT/FAIR_USE_EDUCATION/FAIR_USE_EDUCATION.html

Stanford University Libraries Copyright and Fair Use site

<http://fairuse.stanford.edu/>

University at Albany Libraries Intellectual Property, Copyright, and Fair Use Resources

<http://library.albany.edu/divs/reserves/copyright.html>

University of Maryland University College Center for Intellectual Property

http://www.umuc.edu/distance/odell/cip/links_fairuse.html

University of Texas Crash Course in Copyright and Fair Use

<http://www.utsystem.edu/ogc/intellectualproperty/cprtindx.html>

Yale University Library Intellectual Property, Copyright, and Fair Use Page

<http://www.library.yale.edu/humanities/media/copyright.html>