Can I Use That Song?

Copyright and Music Licensing for Sound Designers
SETC 2017
Presenters

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Copyright Basics

“Congress shall have the power {to secure} for limited times to authors and inventors the exclusive Right to their respective Writings and Discoveries”

- US Constitution, Art. 1, Sec. 8
Six Essential Copyright Protections:

- The right to reproduce the work
- The right to create derivative works
- The right to distribute copies (by sale, lease, rental, etc.)
- The right to perform the work publicly (does NOT apply to sound recordings)
- The right to display the work publicly (does NOT apply to sound recordings)
- In the case of sound recordings, the right to perform it publicly by means of digital transmission
Public Domain

- Copyright currently lasts for the life of the author, plus 70 years (for individuals)

- Once a work has past the life + 70 threshold, it enters the Public Domain, and is freely available for use by anyone

- Works published by the US Government are not covered by copyright, they are automatically part of the public domain

- There is no definitive database to determine if something is in the public domain, it requires research
Public Domain

- In the US, pieces of music written prior to 1923 are in the Public Domain

- No sound recordings will be in the Public Domain until 2067
Creative Commons Licensing

A Quick Intro

Creative Commons is a non-profit that helps sharing + reuse of creativity & knowledge via free legal and technological tools. These tools are not alternatives to copyright laws, rather they work alongside them.

TRADITIONAL COPYRIGHT SYSTEM

VS

CREATIVE COMMONS

• Allows you to easily give people the right to share or even build upon your work
• Allows you to reserve only those rights that you want.

LICENSE TYPES

ATTRIBUTION
CC BY

ATTRIBUTION - NON COMMERCIAL
CC BY-NC

ATTRIBUTION - SHAREDALIKE
CC BY-SA

ATTRIBUTION - NON COMMERCIAL - SHAREDALIKE
CC BY-NC-SA

ATTRIBUTION - NO DERIVATIVES
CC BY-ND

ATTRIBUTION - NON COMMERCIAL - NO DERIVATIVES
CC BY-NC-ND

PUBLIC DOMAIN
CC Zero

This is a licence, but a 'public domain declaration', in which you give up all copyright but retain moral rights. If you can’t give them up in your legal jurisdiction, and allow people to make any kind of use of the work without conditions.

THE SYMBOLS

ATTRIBUTION

Response acknowledgement of the author/creator (this is a necessary part of all the six licences)

SHARE-ALIKE

Usage is allowed only if the work for which it’s used is licensed under the same open licence.

NON COMMERCIAL

Usage is allowed only for non-commercial purposes.

NO DERIVATIVE

Creating ‘derivatives’ is not allowed.

All information present here is sourced from the creative commons website, with help from Farnak praises, Centre for Internet and Society - India.

Source: http://visual.ly/what-creative-commons
But First ...

Plays vs. Musicals
Plays vs. Musicals

**Plays**
- Text Based
- May make reference to music, but usually music licensing is not granted with production licensing

**Musicals**
- May contain text but focuses on singing
- Performance of the music in a musical is usually included in production licensing agreement.
Music Use in Theatre

So the main question is, CAN I USE THAT SONG?
It Depends...

When you decide to use a particular piece of music in a theatrical environment, there are several questions you must ask and steps you must take in order to make sure you are staying within the law and also being fair to other artists and creators:
Can I Use That Song?

• Is the piece of music in the Public Domain? If not, is it covered by a CC license?

• Is the recording you wish to use in the Public Domain?

• When in the course of the action is the piece being used? Is it being used for preshow/intermission? Is it used in the lobby before the show? Is it underscoring or diegetic?

• Does the producing organization have a license with a Performing Rights Organization?
Point by Point...

If the music is in the public domain, you can use it however you see fit.
Point by Point...

If the music is covered by a CC license, provided you adhere to the terms of the specific CC license, you are in the clear.
Point by Point...

The recording you wish to use is most likely not in the public domain...
However ...

- There is no copyright protection for the public playing of sound recordings, but ...

- Prior to 1972, any copyright protections for sound recordings resided at the state level, not federal. So it may depend on your state of residence as to the actual legality of using a specific recording without proper licensing, but ...

- Any editing or changes would likely be considered a derivative work, thus needing proper licenses
Point by Point...

When in the course of the action is it used? Does the producing organization have an agreement with one or all of the PRO’s?

Let’s examine PRO’s a little more closely ...
What is a PRO?

A Performing Rights Organization is a group that licenses performance rights and collects royalties on the behalf of rights holders (specifically, in this case, of composers, publishers, and lyricists).
In the US, there are 3 main PRO’s: ASCAP, BMI, and SESAC.

Songwriters may only belong to one PRO at a time. ASCAP and BMI are open to anyone. SESAC is by invitation.
What is a PRO?

PRO’s license performing rights, in other words, the rights dealing with having your work performed in a public setting. Generally, these are a blanket license, based on a number of factors.
What Does a PRO Cover?
Performing Rights (small performance rights) for public performances on radio, TV, in the background at public places.
So, the PRO covers non-dramatic performance, meaning:

If the producing organization has an agreement with the PRO’s, you are generally covered for things like lobby music, preshow, intermission, and walkout, as these are called “small rights.”
So, the PRO covers non-dramatic performance, meaning:

If the music used could be considered part of the dramatic action (just about anything else from the top of Act I to the curtain call), you are in “Grand Rights” territory, and a PRO license does not apply.
What Doesn’t a PRO Cover?

- Printing Rights
- Synchronization Rights
- Mechanical Rights
- Dramatic or “Grand Rights”

All of these uses require licensing
When Do I Need a License?

If the piece you wish to use is:

- Not in the Public Domain
- Not covered by a CC license

Then you will need to acquire Grand Rights.
Who’s Responsibility is it to Get a License?

The upside for a sound designer here is that it is explicitly not the designer’s responsibility.

The designer needs to provide a list to the producing organization including such information as the song title, composer/lyricist, publisher, start and end times, and any other pertinent information.

It is then the responsibility of the producers to secure the rights to those songs.
How Do I Protect Myself?

It should be contractually stated that:

A.) It is not the responsibility of the sound designer to secure rights/clearances

and

B.) The designer is indemnified against any legal action should the producers not acquire those licenses.
But I’m in Educational Theatre:

Isn’t It Fair Use?
Fair Use: Four Factors

- Was the use commercial in nature, or academic? Was it a non-profit use?
- The nature of the copyrighted work
- How much of the original work was used?
- The effect on the market - was the creator deprived of income, real or potential? Was the creator deprived of control of the work?

Outside of a closed classroom environment, it is highly unlikely for your use to be considered a fair use scenario.
Transformative Fair Use

- **Campbell vs. Acuff Rose Music (1994)**
  - 2 Live Crew parodied Roy Orbison/William Dees Song “Oh, Pretty Woman”
  - Ruling in Favor of 2 Live Crew (Campbell)
  - Court ruled that parody had “obvious claim to transformative value”

- **SOFA Entertainment vs. Dodger Productions (2013)**
  - Dodger used 7-second clip from *Ed Sullivan Show* in *Jersey Boys*
  - SOFA (*Jersey Boys*) claimed infringement
  - Court ruled in favor of Dodger, as clip was a “biographical anchor” in production
Licensing Issues

- Rights. Who holds the grand rights? This is not always clear, and not always easy to determine.

- Publishers. Multiple PRO’s may be involved - this is the case where a composer belongs to one PRO, and a lyricist to another.

- Timeline. Unlike a film, many theatre productions run on a very short timeline. Even with months of lead time, it may be difficult to get an answer.

- Cost. Even when a license is offered, it may be too costly for an organization.
The Sound Designer’s Dilemma

These licensing issues can cause some sound designers to be placed in a delicate position. If the organization does not (or is not interested in) procuring the appropriate licenses, what course of action does the sound designer take?
Moving Forward

As we move forward as an industry, there are some steps that can make this easier on everyone:

- Create a clearing house to acquire Grand Rights licenses
- Organizations / Managing Directors / Producers need to be made aware of the need for proper licensing
- Theatre Educators need to be train students in these needs as well
- Playwrights/Publishers who include specific songs in scripts need to negotiate those rights as part of the overall production license
Moving Forward

As we move forward as an industry, there are some steps that can make this easier on everyone:

- Access our own sense of empathy: As artists, we expect to be paid for our work, and we should understand that other artists should be paid for their work, as well
Resources

www.freepd.com
www.pdinfo.com
www.creativecommons.org
www.freesound.org
www.freemusicarchive.org
www.opsound.org