

ARTICLES

SOCIAL UTILITY OF MUSIC: A CASE FOR A COPYRIGHT EXEMPTION FOR THERAPEUTIC USES

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Music is more than mere entertainment; modern research shows that it can be an effective therapeutic tool. The social utility of music therapy is undertheorized and underexplored from a legal perspective. This is worrisome because copyright law directly impacts this clinical discipline. The well-known concerns about fair use uncertainty and rightsholder overreach are at play for music therapists. The high social utility of music therapy coupled with the high transaction costs to license various uses of music justify a carveout under copyright law. To ensure robust safeguards for this burgeoning field, a statutory exemption for therapeutic uses of music is warranted.

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INTRODUCTION

It's hard to overstate the importance of music. From time immemorial, we have used music to soothe our newborns, celebrate our auspicious occasions, honor our heroes, practice our faith, enjoy our leisure, and mourn our losses.¹ Music is used to punctuate the most important

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¹ ELAINE FEDER & BERNARD FEDER, *THE EXPRESSIVE ARTS THERAPIES* 1 (1981) ("The use of the expressive arts in therapy can be traced in time to the dim beginnings of human artistic expression; it can be tracked across the continents and found in virtually every human culture."); Kate E. Gfeller, *Music: A Human Phenomenon and Therapeutic Tool*, in *AN INTRODUCTION TO MUSIC THERAPY: THEORY AND PRACTICE* 41, 42 (William B. Davis et al. eds., 3d ed. 2008) ("Throughout recorded time, music has soothed fretful infants, elicited joyful dancing and play, expressed social conscience and religious faith, and expressed grief as we bid loved ones goodbye.").

events in our lives, just as it fills the background of our daily routines.² Music gives us the ability to communicate what other forms of expression cannot.³ Music's appeal crosses all walks of life—it transcends demographic factors including age, race, sex, and wealth.⁴ Music is so fundamental to being human that no culture seems to have been without it.⁵ Music is simply in our nature.

The significance and universal appeal of music makes it a uniquely effective therapeutic tool.⁶ The relatively new clinical discipline of music therapy⁷ uses the power of music to effect both psychological and physiological change to treat a range of ailments for patients at all stages of life.⁸ The wellness benefits range from the biomedical to the psychotherapeutic.⁹ Music therapy can provide health benefits to premature babies, help children with cancer manage pain with reduced need for medication, promote the mental health of trauma victims, and offer comfort to the terminally ill and their families.¹⁰

² ALICIA ANN CLAIR, THERAPEUTIC USES OF MUSIC WITH OLDER ADULTS 9 (1st ed. 1996) (“Music is almost always used in the celebrations and rituals associated with important life events, such as birthdays, anniversaries, weddings, and funerals; in the work environment; in entertainment; and in structuring leisure time.”).

³ BOB KOHN, KOHN ON MUSIC LICENSING 626 (5th ed. 2018) (“Music would seem to be a part of human nature. What man fails to express through gesturing, speaking, writing, painting, and sculpting, he expresses through making music.”).

⁴ Gfeller, *supra* note 1, at 53.

⁵ CLAIR, *supra* note 3, at 9; William B. Davis & Kate E. Gfeller, *Music Therapy: Historical Perspective*, in AN INTRODUCTION TO MUSIC THERAPY: THEORY AND PRACTICE 17, 17 (William B. Davis et al. eds., 3d ed. 2008); Gfeller, *supra* note 1, at 42.

⁶ Gfeller, *supra* note 1, at 53.

⁷ Since the World War II era, music therapy has been recognized as an effective intervention for soldiers and trauma victims. FEDER & FEDER, *supra* note 1, 115 (“The impetus for research in music therapy was the need to help the swelling populations of veterans’ hospitals during and after World War II.”); DANIEL J. SCHNECK & DORITA S. BERGER, THE MUSIC EFFECT: MUSIC PHYSIOLOGY AND CLINICAL APPLICATIONS 13 (2006) (“Introduced in the United States just after World War II, primarily as an intervention to help trauma victims of combat, music therapy has grown to be recognized internationally as a medical treatment.”); Jill M. Sullivan, *Music for the Injured Soldier: A Contribution of American Women’s Military Bands During World War II*, 44 J. MUSIC THERAPY 282, 282 (2007) (suggesting the women’s military bands that performed for convalescing World War II soldiers in hospitals may have been the impetus for the music therapy profession).

⁸ SCHNECK & BERGER, *supra* note 7, at 24–25.

⁹ Kate E. Gfeller & William B. Davis, *The Music Therapy Treatment Process*, in AN INTRODUCTION TO MUSIC THERAPY: THEORY AND PRACTICE 429, 473 (William B. Davis et al. eds., 3d ed. 2008) (“While music therapists often address the psychological and social needs of persons with medical problems, music therapists also collaborate with physicians, nurses, physical therapists, and other health-care providers to treat or ameliorate the physical, biological, or neurological aspects of the disease or condition.”) (parenthetical omitted).

¹⁰ Kate E. Gfeller, *Music Therapy, Medicine, and Well-Being*, in AN INTRODUCTION TO MUSIC THERAPY: THEORY AND PRACTICE 305, 311–12, 318 (William B. Davis et al. eds., 3d ed. 2008); Joey Walker & Mary Adamek, *Music Therapy in Hospice and Palliative Care*, in AN INTRODUCTION TO MUSIC THERAPY: THEORY AND PRACTICE 343, 361 (William B. Davis et al. eds., 3d ed. 2008).

But music therapy isn't just any pleasurable or entertaining use of music.¹¹ Music therapy involves a professional relationship between a credentialed therapist and a client who has a health-focused goal—whether it be cognitive, behavioral, psychoemotional, or physiological.¹² And to help a client reach her therapeutic goal, a music therapist must tailor both the musical selection and the musical intervention to fit each client.¹³ Often the most effective musical selections include arrangements familiar to the client—which tend to be copyrighted.

The social utility of music therapy is undertheorized and underexplored from a legal perspective. This is troubling because copyright law directly impacts this clinical discipline. This Article is the first to make a case for a statutory exemption for therapeutic uses of music.¹⁴ Part I summarizes mounting scientific literature documenting health and wellness benefits of music therapy, along with anecdotes from clinicians that illustrate music therapy in action.¹⁵ Both the scientific and anecdotal evidence attest to the high social utility of music therapy in helping to heal the living and to console the dying.

Part II outlines current copyright protections for music and identifies the various rightsholders who license different uses of music. Not all therapeutic uses of music implicate copyright; but for those that do, there isn't a blanket license nor is there a single rightsholder to license the variety of uses. Separate licenses must be negotiated with separate rightsholders—and some of these rightsholders enjoy the full right to exclude.¹⁶ For entertainment professionals, negotiating music licenses is a

¹¹ Joke Bradt, *Introduction*, in *GUIDELINES FOR MUSIC THERAPY PRACTICE IN PEDIATRIC CARE* 3, 6 (Joke Bradt ed., 2013) (“[M]usic therapy goes far beyond distraction and symptom reduction.”); KENNETH E. BRUSCIA, *DEFINING MUSIC THERAPY* 36 (3d ed. 2014) (“As a process, music therapy is a health-focused interaction between client and therapist—not just any experience that happens to be positive, beneficial, or health-enhancing.”).

¹² See BRUSCIA, *supra* note 11, at 196, 202.

¹³ Lillian Eyre, *Introduction*, in *GUIDELINES FOR MUSIC THERAPY PRACTICE IN MENTAL HEALTH* 3, 9–11 (Lillian Eyre ed., 2013).

¹⁴ I acknowledge there are those who distinguish between music therapy and music medicine. *E.g.*, Joy L. Allen, *Introduction*, in *GUIDELINES FOR MUSIC THERAPY PRACTICE IN ADULT MEDICAL CARE* 3, 4 (Joy Allen ed., 2013); see also Bradt, *supra* note 11, at 6–7 (“[M]usic therapists continue to advocate for a clear distinction between music interventions administered by medical or health care professionals (music medicine) and those implemented by trained music therapists (medical music therapy). The continuum of care in music in medical settings ranges from performances for patients by musicians to focused individualized psychotherapeutic music therapy interventions.”); Claire M. Ghetti, *Pediatric Intensive Care*, in *GUIDELINES FOR MUSIC THERAPY PRACTICE IN PEDIATRIC CARE* 152, 192 (Joke Bradt ed., 2013) (“Inconsistencies regarding the definition of music therapy within research studies continue to persist.”). I consciously elide this distinction. For present purposes, if music intervention is applied by a trained and credentialed therapeutic professional, it should qualify for an exemption from copyright law.

¹⁵ Therapeutic uses of music can range from receptive listening to active music-making. Gfeller, *supra* note 1, at 52.

¹⁶ This means the license fee is unconstrained and permission can be denied altogether.

tedious and frustrating process. For music therapists, the prospect of licensing the multifarious uses of music is an impossibly high transaction cost.

Part III discusses the need for a statutory exemption for therapeutic uses of music. Music can be used as a functional, therapeutic tool—use that should be exempt from copyright. In theory, fair use is a viable defense; in practice, fair use is too ad hoc to provide a reliable shield. Music therapists need more dependable and robust protection than fair use can offer: therapeutic uses of music need a statutory carveout. The socially valuable uses of music therapy, coupled with the high transaction costs to individually license songs and the de minimis lost revenue for not licensing the uses, fits the model for justifying an express carveout from copyright law.

I. MUSIC'S THERAPEUTIC RANGE

It's likely we've all experienced how listening to music can make our pulse race and our spirits rise.¹⁷ Scientific research is helping to explain why music can elicit both physical and emotional responses from a listener. Modern research techniques offer us new tools to observe the effects of music on the brain.¹⁸ Imaging studies show that music triggers the “reward centers” in our brain, which control the production of dopamine—a feel-good hormone associated with feelings of pleasure.¹⁹ Studies show that familiar music in particular can activate the brain centers associated with pleasure and emotions.²⁰ Music not only stimulates the brain's production of dopamine, but it is also shown to reduce the brain's production of cortisol—a stress hormone.²¹ Music's ability to influence our emotional state by increasing pleasure and reducing stress in

¹⁷ DAVID ALDRIDGE, MUSIC THERAPY RESEARCH AND PRACTICE IN MEDICINE: FROM OUT OF THE SILENCE 68–69 (1996); Daisy Fancourt, *Understanding Music, Mind and Emotion from the Perspective of Psychoneuroimmunology*, in THE ROUTLEDGE COMPANION TO MUSIC, MIND AND WELL-BEING 179, 184, 187 (Penelope Gouk et al. eds., 2019).

¹⁸ Ole A. Heggli et al., *Please Please Me!: The Pleasure of Music in the Brain*, in THE ROUTLEDGE COMPANION TO MUSIC, MIND AND WELL-BEING 205, 205 (Penelope Gouk et al. eds., 2019) (“Only recently, with the advent of modern neuroimaging techniques, have we been able to begin to understand the neural mechanisms that are the basis of the pleasure of music.”); Alexandra Lamont, *Approaches to Music, Well-Being and Emotion from Psychology*, in THE ROUTLEDGE COMPANION TO MUSIC, MIND AND WELL-BEING 191, 192 (Penelope Gouk et al. eds., 2019) (“Neuroscientific approaches to music and emotion have begun to identify which parts of the brain respond to musical stimuli, when an emotional response is detected in a piece of music and whether these emotional responses look similar or different in different listeners.”) (citation omitted).

¹⁹ Lamont, *supra* note 18, at 195. See also Anne J. Blood & Robert J. Zatorre, *Intensely Pleasurable Responses to Music Correlate with Activity in Brain Regions Implicated in Reward and Emotion*, 98 PROC. NAT'L ACAD. SCI. U.S. 11818, 11821–23 (2001).

²⁰ See Heggli et al., *supra* note 18, at 206–07.

²¹ Laura Ferreri et al., *Dopamine Modulates the Reward Experiences Elicited by Music*, 116 PROC. NAT'L ACAD. SCI. U.S. 3793, 3795 (2019); Stefan Koelsch et al., *Effects of Music*

turn produces positive physical effects as well. Although the neuroscience of music is a relatively new field,²² as explored below, the connection between a person's emotional health and her physical health is undeniable.²³ Music's power to affect us emotionally and physically makes it a unique therapeutic tool capable of offering a broad range of health and wellness benefits—both psychological and physiological.²⁴

The relationship between emotional well-being and physical health is especially important for premature infants, who are “so vulnerable physically and emotionally that they cannot survive on their own.”²⁵ The trauma caused by premature separation from womb²⁶ coupled with the stressful environment of the NICU,²⁷ place preterm babies at great risk of suffering developmental problems.²⁸ As therapists know, “In order to deal with these stresses, the infant uses an enormous amount of energy, which he would normally invest in his growth and development.”²⁹ In

Listening on Cortisol Levels and Propofol Consumption During Spinal Anesthesia, 2 FRONTIERS PSYCHOL. 1, 6–7 (2011).

²² Heggli et al., *supra* note 18, at 215 (“The neuroscience of music is, despite its prolificacy, a fairly new field. While theories pondering how we understand, perceive and create music probably predate Classical Antiquity, brain imaging methods offering a view into the function brain has only existed for around 40 years.”).

²³ See *id.* at 208.

²⁴ See, e.g., BRUSCIA, *supra* note 11, at 203–09; Eyre, *supra* note 13, at 7–8; Fancourt, *supra* note 17, at 186–87; Susan Hallam, *Music, Cognition and Well-Being in the Ageing*, in THE ROUTLEDGE COMPANION TO MUSIC, MIND AND WELL-BEING 291, 298 (Penelope Gouk et al. eds., 2019); Michelle R. Hintz, *Introduction*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN DEVELOPMENTAL HEALTH 3, 4–5 (Michelle Hintz ed., 2013); EVEN RUUD, *MUSIC THERAPY: A PERSPECTIVE FROM THE HUMANITIES* 1 (2010). See also Joy L. Allen, *Pain Management with Adults*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN ADULT MEDICAL CARE 35, 38 (Joy Allen ed., 2013) (“Music therapy is applied not only to soothe and relax, but also to promote expression of thoughts, fears, grief, and anger. Music therapists in medical settings are trained to address the psychosocial as well as the clinical issues faced by patients and their families. Music therapy works by interfering with the brain's perception of pain, reducing anxiety, reducing muscle tension, and stimulating endorphins.”) (citations omitted).

²⁵ Monika Nöcker-Ribaupierre, *Premature Infants*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN PEDIATRIC CARE 66, 66 (Joke Bradt ed., 2013).

²⁶ *Id.* at 67 (“For the infant, premature birth can cause physical and mental trauma. Preterm infants are prematurely withdrawn from the rhythms created biologically (the cadenced sounds produced by their mother's heartbeat, breathing, blood flow through the placenta, etc.), the pace of their mother's movements, the closeness of her voice, and her constant physical and emotional presence. This trauma can lead to biophysical and social stress reactions. Because of their developing autonomous nervous system, these infants have decreased self-protective and self-regulatory abilities. This means that they cannot filter or process harmful stimuli. As a result, they are extremely vulnerable to sensory stimuli such as noise, touch, and light, including the invasive and painful treatments they need to survive.”) (citations omitted).

²⁷ *Id.* (“[T]he NICU environment remains rather dystopian because of all the mechanical equipment and commotion needed to ensure the survival of the infants staying there.”).

²⁸ *Id.* at 71.

²⁹ *Id.* at 67 (“This unfamiliar, nonphysiological, highly mechanized environment is often chaotic and filled with bright lights and unpredictable noises. This overstimulation causes stress, anxiety, and agitation in the infant.”) (citations omitted).

the NICU's highly mechanized environment, preterm infants can have difficulty sleeping, feeding, and even breathing, and they are often sedated to help minimize the effects of the stressful environment.³⁰ Music can help provide the calm and soothing environment preterm infants need.³¹ Exposing preterm infants to music therapy has been shown to reduce irritability and ease respiratory distress.³² Moreover, studies have shown that musical rhythm can help premature infants gain weight faster by helping them develop coordinated and sustained sucking behavior.³³

Outside of the NICU, music has also proven to be a powerful tool for reducing anxiety and managing pain. Effective pain management has become a health care priority in light of the mounting evidence that "untreated or inadequately treated pain may have a long-term negative impact on pain sensitivity, immune function, neurophysiology, and health-related behaviors."³⁴ Studies have shown a close correlation between anxiety and pain, suggesting anxiety often makes the pain experience worse.³⁵ Music, both active music-making and receptive listening, has been used in clinical settings to reduce stress levels during medical treatments.³⁶ As noted above, music's ameliorative effect on stress and anxiety is attributed to its ability to slow the brain's production of cortisol,

³⁰ *Id.* at 73 ("Premature infants react to stress-inducing noises with observable and measurable physiological stress responses. These include reduced oxygen saturation, increased rates of apnea and bradycardia, wide fluctuations in blood pressure, increased excitement and agitation, crying, and sleep disturbances. Consequently, premature babies are often treated with sedatives in order to handle and to reduce these effects.").

³¹ See John F. Mondanaro, *Surgical and Procedural Support for Children*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN PEDIATRIC CARE 205, 205, 231 (Joke Bradt ed., 2013); Nöcker-Ribaupierre *supra* note 25, at 95.

³² Nöcker-Ribaupierre, *supra* note 25, at 85 ("The music therapist begins by matching the infant's crying tone, pitch, and intensity vocally with her voice. Here within, she orients herself to the infant's audible breathing by releasing the same vocal tone in synchrony with the infant. The music therapist works by being constantly aware of the infant's emotional expressions and gives the infant time to respond by providing many grand pauses. The therapist may then change her vocal expressions (e.g., into lullabies) and develop interactive music behaviors with the infant.") (citation omitted).

³³ *Id.* at 83–84 ("Premature infants may lack coordinated sucking behavior and, in addition, may develop an aversion to oral feeding because of prolonged gavage feeding. Music-reinforced nonnutritive sucking uses lullabies as contingent reinforcement for sucking through the use of the Pacifier-Activated Lullaby (PAL) mechanism. . . . The goal is to support the infant in developing his sucking capacities, to increase sucking duration, and to transfer the infant's sucking behavior from nonnutritive to nutritive sucking.") (citations omitted).

³⁴ Joke Bradt, *Pain Management with Children*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN PEDIATRIC CARE 15, 15 (Joke Bradt ed., 2013) (citation omitted).

³⁵ *Id.* at 23 ("Clinical experience has shown that acute anxiety usually heightens the pain experience.").

³⁶ See, e.g., Frances H. le Roux et al., *The Effect of Bach's Magnificat on Emotions, Immune, and Endocrine Parameters During Physiotherapy Treatment of Patients with Infectious Lung Conditions*, 44 J. MUSIC THERAPY 156, 156 (2007); Joanne V. Loewy & Ralph Spintge, *Prelude to the Special Issue in Music and Medicine: Music Therapy and Supportive Cancer Care*, 3 MUSIC & MEDICINE 5, 5 (2011).

the body's primary stress hormone,³⁷ while also stimulating the production of dopamine, the body's feel-good hormone.³⁸ Listening to music, particularly a familiar musical style,³⁹ has been shown to reduce a patient's perceived pain, making pain medication⁴⁰ and sedative drugs⁴¹ less necessary. Thus, music therapy offers effective pain management without the contraindications of addiction, dependency, and overdose, which have typified the opioid crisis.

Music therapy has also been shown to be an effective pain management technique for children.⁴² Children in hospitals often experience anxiety at levels greater than those of adults⁴³—anxiety that may worsen the pain.⁴⁴ Listening to preferred music helps to refocus the child's attention away from the pain,⁴⁵ and singing a favorite song can be an effective mechanism for shifting a child's attention to focus on her own voice instead of on her pain.⁴⁶ Songwriting can also be a creative outlet for

³⁷ Fancourt, *supra* note 17, at 184–86; Stefan Koelsch et al., *Effects of Music Listening on Cortisol Levels and Propofol Consumption During Spinal Anesthesia*, 2 *FRONTIERS IN PSYCHOL.* 1, 6–7 (2011).

³⁸ Laura Ferreri et al., *Dopamine Modulates the Reward Experiences Elicited by Music*, 116 *PROC. NAT'L ACAD. SCI. U.S.* 3793, 3795 (2019).

³⁹ Bradt, *supra* note 34, at 34 (“Patient familiarity with the selected music is desirable, because it provides a sense of security and safety in the chaos and threat caused by the pain.”).

⁴⁰ See, e.g., Marion Good et al., *Relaxation and Music to Reduce Postsurgical Pain*, 33 *J. ADVANCED NURSING* 208, 214 (2001); Ulrica Nilsson, *The Anxiety- and Pain-Reducing Effects of Music Interventions: A Systematic Review*, 87 *AORN J.* 780, 802 (2008); María Dolores Onieva-Zafra et al., *Effect of Music as Nursing Intervention for People Diagnosed with Fibromyalgia*, 14 *PAIN MGMT. NURSING* e39, e39, e43 (2013).

⁴¹ See, e.g., Boukje M Dijkstra et al., *The Effects of Music on Physiological Responses and Sedation Scores in Sedated, Mechanically Ventilated Patients*, 19 *J. CLINICAL NURSING* 1030, 1037–38 (2010); Catherine Paugam-Burtz & Jean Mantz, *Sedative Effects of Mozart's Music in the Critically Ill: Enjoy the Hormonal Symphony*, 35 *CRITICAL CARE MED.* 2858, 2858 (2007).

⁴² Bradt, *supra* note 34, at 15.

⁴³ See *id.* at 53 (“Most children who are hospitalized experience pain. The continuous fear of painful procedures and the actual experience of pain make hospitalization a stressful and even traumatizing event.”).

⁴⁴ *Id.* at 23 (“For most children, anxiety and fear are the immediate emotional responses associated with painful stimuli. In fact, it is almost impossible to behaviorally distinguish between children's perceived pain and anxiety. Clinical experience has shown that acute anxiety usually heightens the pain experience.”).

⁴⁵ *Id.* at 32 (“Music listening can enable a child to focus on a stimulus different than pain. . . . Music is an excellent stimulus for holding one's attention and directing it away from the pain.”).

⁴⁶ Allen, *supra* note 14, at 52 (“Singing involves the client using their voice to reproduce preferred music. It is not unusual for individuals experiencing pain to display shallow breathing patterns. Singing can encourage patients to take deep breaths, while regulating their respiratory rate. The goal of this technique is the self-monitoring of physiological signs of pain, as well as increased self-expression.”); Bradt, *supra* note 11, at 48 (“Singing favorite songs can be an effective way to help the child shift his focus away from the pain. Allowing the child to select the songs gives a sense of control over the environment. Singing songs furthermore normalizes the sterile hospital environment and gives parents an opportunity to playfully interact with the child.”).

patients to process their feelings about a painful procedure or chronic pain.⁴⁷ The following story illustrates how improvised music-making with a therapist can help a child manage pain and regain a sense of control.⁴⁸

Dayla, a five-year-old girl with sickle cell, was hospitalized for a vaso-occlusive crisis and presented with extreme pain. Her mother came to find me and said that her daughter had been asking for the music lady since her hospitalization earlier that afternoon. I followed the mother to Dayla's room, to find her in bed crying. I walked up to Dayla and strummed my guitar. This caused her to halt her crying momentarily and offer me a faint smile, after which she continued to sob quietly. I quickly consulted my little notebook to see what songs Dayla had liked during previous hospitalizations and noticed that "Old MacDonald" "with jungle animals" was her favorite. I began to hum the beginning of the song, pausing after the first line. Dayla motioned with her leg as if to say, "Continue." I continued the song and waited for Dayla to suggest the first animal. Dayla said "elephant," looking at my face for a reaction. She giggled as I reacted surprised. Within a few minutes, Dayla, her mom, and I were rocking out on "Old MacDonald," naming all the jungle animals we could think of, with Dayla jumping up and down her bed as we sang about monkeys on the farm. To an outsider, this may have appeared as the "music lady" just singing some songs, but we witnessed the transformation that singing songs can bring to a child in extreme pain.⁴⁹

⁴⁷ Allen, *supra* note 14, at 53 ("Songwriting is a great way to foster the decision-making process while providing a valuable tool for the exploration of feelings, beliefs, wishes, and emotion as well as a tool to encourage communication. In acute pain situations, it may be used as a way to focus the patient on a more pleasant stimulus while enhancing a sense of control. In chronic pain clients, it may be used to address the emotional, social, and spiritual components of the pain experience."); Bradt, *supra* note 34, at 49 ("Songwriting gives the child the opportunity to articulate his feelings and direct them into a creative form. It offers the child an avenue for telling his story. This can be powerful for children who have experienced a long journey of painful medical procedures.") (citation omitted).

⁴⁸ Bradt, *supra* note 34, at 43 ("Using music-making to actively engage the child with his surroundings in a playful manner can restore a sense of control, mastery, and even normalcy."); *id.* at 42 ("In contrast to distracting the child's attention away from the pain, integration requires the child to come into the body by focusing on the breath, heart rate, emotions, and feeling of pain itself. Thus, in integration the child has an active role in his own pain management rather than being a passive recipient of distraction stimuli.")

⁴⁹ *Id.* at 49.

Although music's efficacy as a pain management tool is a relatively recent discovery, society has long recognized the power of music to serve as a balm for emotional and psychological ailments. Music therapy can be a vehicle for self-discovery,⁵⁰ helping us recognize and understand unrealized emotions.⁵¹ Focusing on how we react to music can help bring latent feelings and unconscious attitudes to the fore, so we can begin to understand them and address their negative effects.⁵² In essence, music can be a bridge to the inner self.⁵³ The following story illustrates how music can be a therapeutic tool for self-reflection and growth.

Kari's psychologist has referred her to an outpatient music therapy group at a local mental health center in order to help Kari gain greater insights into her irrational thoughts and to gain social support for changing her belief system. Because many of the clients in this group are working on setting realistic goals, the music therapist has chosen to play for the group a song by Billy Joel named "Pressure." This song portrays the emotional tension that builds up when people try to accomplish more than is humanly possible. After the song is played, the music therapist leads a group discussion about what the song lyrics mean (in an activity called lyric analysis); group members then relate the song lyrics to their own

⁵⁰ RUUD, *supra* note 24, at 2 ("[I]nterpretive music therapy helps us to understand our individual world with its particular intentionality, our ability to create symbols, and the value and role of autonomy and self-determination."). See also Stefan Gebhardt et al., *The Effects of Music Therapy on the Interaction of the Self and Emotions—An Interim Analysis*, 41 *COMPLEMENTARY THERAPIES MED.* 61, 64–66 (2018) (concluding music therapy helps patients acquire more conscious (i.e., cognitive-related strategies) emotion modulation techniques, whereas patients without music therapy simply "vent" their negative emotions (i.e., non-cognitive strategies)).

⁵¹ See Kate E. Gfeller & Michael H. Thaut, *Music Therapy in the Treatment of Behavioral-Emotional Disorders*, in *AN INTRODUCTION TO MUSIC THERAPY: THEORY AND PRACTICE* 209, 234 (William B. Davis et al. eds., 3d ed. 2008) ("Sometimes, people describe music as sounding like a particular feeling, such as mournful or perhaps happy. Music may also bring to mind particular memories or thoughts.").

⁵² BRUSCIA, *supra* note 11, at 82.

⁵³ Kenneth E. Bruscia, *Introduction: Songs in Psychotherapy*, in *CASE EXAMPLES OF THE USE OF SONGS IN PSYCHOTHERAPY* 11, 11 (Kenneth E. Bruscia ed., 2012) ("Because songs have such meaning and significance in our lives, they provide an easy access to our emotional world, and to the thoughts, attitudes, values, and behaviors that emanate from it."); Eyre, *supra* note 13, at 7 ("One of the most illuminating aspects of music therapy is music's ability to put people in touch with their internal positive resources. Music helps clients who are stuck in a negative space to shift it and to find the source of healing that exists within. The communal nature of music allows clients to share the personal benefits of accessing the positive, resourceful aspects of themselves as they collaborate together, whether this is in a dyadic relationship with the therapist or with peers in a group. Such collaboration addresses the intrapersonal and interpersonal needs that are necessary to achieve therapeutic gains in mental health.").

situations. As Kari joins in on the discussion, she may develop some insights into her own self-imposed pressures. The comments of other group members can help her to realize that she is not the only person struggling with this problem; that realization may help her to open up to others more easily when she needs support.⁵⁴

Songs can also be containers for our feelings.⁵⁵ Music can open those containers, allowing us to communicate our feelings, break down emotional defenses, and bring about emotional release.⁵⁶ Song listening with lyric discussion can be an effective means to connect with and express emotions.⁵⁷ In this context, the song lyric analysis is psychotherapeutic rather than purely didactic; the lyrics are analyzed for insights about the client rather than to assess the songwriter's message.⁵⁸ The

⁵⁴ Gfeller & Thaut, *supra* note 51, at 229 (citation omitted).

⁵⁵ Nancy A. Jackson, *Adults with Depression and/or Anxiety*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN MENTAL HEALTH 339, 346 (Lillian Eyre ed., 2013) ("Songs are expressions of peoples' thoughts, feelings, relationships, and experiences. They serve as objects themselves with which we develop relationships, and they serve as links to important people, events, and experiences in our lives.") (citation omitted).

⁵⁶ Eyre, *supra* note 13, at 7 ("The nonverbal nature of music, its rhythmic movement in time, and the fact that it opens people up to the language of feeling and emotions renders it an organizing force that breaks through the barriers of confusion and circular, stuck, or obsessive thoughts, bringing us to a place where new ideas and feelings can challenge destructive thoughts and feelings. Yet this is all accomplished with little resistance or conscious thought, thus empowering individuals to experience the natural healing capacities that each of us possesses, but with which we can all so easily lose contact. Because mental health issues are often accompanied by stigma and guilt, this experience of empowerment can provide a strong internal representation of one's potential that lasts far beyond the confines of the music therapy session.")

⁵⁷ *See id.* ("When working at a deeper or unconscious level, the capacity of music to evoke images, memories, and associations can be of inestimable value in making meaning of one's life, bringing past trauma into the present where it can be given voice and worked through, and providing solace and healing.")

⁵⁸ Amy Clements-Cortés, *Adults in Palliative Care and Hospice*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN ADULT MEDICAL CARE 295, 310 (Joy Allen ed., 2013) ("Song (lyric) discussion is an exceptional intervention in assisting clients who are having emotional difficulty relating to feelings that may be too difficult to express or who need help in defining feelings and emotions they are having difficulty understanding within themselves."); Sandra Lynn Curtis, *Women Survivors of Abuse and Developmental Trauma*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN MENTAL HEALTH 263, 271 (Lillian Eyre ed., 2013) ("In lyric analysis, the client chooses songs, listens to a recording and/or sings them with the therapist, and discusses the themes which arise. Lyric Analysis has been shown to be an effective music therapy method used across diverse approaches with abused women. It can be particularly effective in a group therapy setting where each woman can contribute at the level she is able to.") (citations omitted); Jackson, *supra* note 55, at 346 ("[S]ongs are powerful tools for music therapy. In song discussion, clients can interact with songs in order to examine their own thoughts and feelings, to reminisce, to communicate, and to problem-solve. Goals related to these interactions might include increasing self-awareness around a particular topic, behavioral pattern, or emotion state; exploring ways of expressing specific emotions; identifying and practicing communication of thoughts and feelings; and working through the thoughts and emotions resulting from difficult experiences in one's life."); Peggy Tileston, *Adults and Ado-*

following story illustrates how therapeutic listening and lyric analysis can help a client connect with and express his feelings.⁵⁹

John, a client in music therapy, has gone through a devastating series of personal losses throughout his lifetime. As a child, his father abandoned the family. Later, his mother became ill and died while he was in high school. In his adolescence and young adulthood, he found it difficult to meet and establish a comfortable relationship with women. Hal, the music therapist, decided to focus today's group therapy session on the topic of relationships, and he started the group discussion with Simon and Garfunkel's classic song, "I Am A Rock," which describes a person who is afraid to get close to others for fear of being hurt. After the song is finished, John tells Hal that he feels just like the singer—that he, too, is afraid to get close to others for fear that the person will abandon him and he'll get hurt all over again. The rest of the group then offers [the client] feedback and support.⁶⁰

Because songs can be strongly associated with memories—both pleasurable and painful—listening to a song may reawaken memories and their related emotions.⁶¹ Music can bring traumatic memories and emotions to the present, and song lyric discussion can be an effective means to work through the emotions.⁶² Negative emotions and painful memories can also be processed through creating a collage of meaningful music. The music therapist can help a patient assemble and organize songs—which can be self-created or pre-existing—to form a personal "trauma narrative." By sharing her trauma narrative, the patient is able to

lescents with Eating Disorders, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN MENTAL HEALTH 402, 412 (Lillian Eyre ed., 2013) ("This experience tends to be very popular and effective with all ages of this [eating disorder] population because it provides an enjoyable and nonthreatening method for clients to express themselves and to begin discussing and processing their feelings and experiences.").

⁵⁹ Gfeller & Thaut, *supra* note 51, at 234 ("[A] music therapist can use the emotional language of music to help clients become more aware of their feelings and thoughts, or to promote discussion, social interaction, or insights.") (citations omitted).

⁶⁰ *Id.*

⁶¹ Karen Anne Litecky Melendez, *Adult Females in Correctional Facilities*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN MENTAL HEALTH 559, 574 (Lillian Eyre ed., 2013) ("In this [song listening with lyric discussion] method, patients listen to and discuss how song lyrics relate to one's life. While listening, memories connected to familiar songs are often reawakened or discovered, triggering an array of emotions. Sometimes these emotions are positive; sometimes they are painful and need a supportive, safe environment to be experienced.").

⁶² See Eyre, *supra* note 13, at 7.

gain mastery over her trauma reminders, resolve detrimental avoidant behaviors, and develop healthy coping skills.⁶³

In addition to lyric analysis and musical collage, lyric modification can be a powerful way to process negative emotions and to heal.⁶⁴ The following story illustrates how a therapist can use a “cloze procedure”⁶⁵ to remove words from a familiar song and invite the client to substitute her own words:

This is a highly structured activity where the therapist chooses a song for the client/group and removes particular words from the lyrics, asking the client(s) to fill in their own words. e.g., using the Paul Simon song “El Condor Pasa,” leaving out a few words so that the song would read: “I’d rather be a [. . .] than a [. . .]. Yes, I would, if I could, I surely would.” The clients then fill in their own words for the missing lyrics. The structure provides opportunities for clients to express their own feelings in familiar songs with immediate success.⁶⁶

A client with an eating disorder, for example, could modify the lyrics of a song about being trapped in a dysfunctional relationship.⁶⁷ The modified song would then serve as a transitional object for the client.⁶⁸ This

⁶³ Michael L. Zanders, *Foster Care Youth*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN MENTAL HEALTH 205, 225 (Lillian Eyre ed., 2013) (“It is in the process of organizing songs that the client’s personal biography or narrative emerges. The therapist can work with the client on as many parts of the collage as needed to create the narrative, including both self-composed and borrowed songs. The sharing of a personal story that may be trauma-based can be referred to as a trauma narrative, and this sharing is critical for the client for three main reasons. The client: (a) gains mastery over the trauma reminders, (b) resolves avoidant symptoms, and (c) enhances healthy coping skills.”).

⁶⁴ Janice M. Dvorkin, *Adults and Adolescents with Borderline Personality Disorder*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN MENTAL HEALTH 378, 398 (Lillian Eyre ed., 2013); Katrina Skewes McFerran, *Adolescents with Substance Use Disorders*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN MENTAL HEALTH 502, 515 (Lillian Eyre ed., 2013).

⁶⁵ A cloze procedure is a deletion technique where a client is asked to fill-in-the-blank with their own word choice. This technique is commonly used in the therapeutic process. Shari L. DeVeney, *Cloze Procedure*, in THE SAGE ENCYCLOPEDIA OF COMMUNICATION RESEARCH METHODS 140–41 (Mike Allen ed., 2017).

⁶⁶ Andrea McGraw Hunt, *Adults with Schizophrenia and Psychotic Disorders*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN MENTAL HEALTH 21, 55 (Lillian Eyre ed., 2013).

⁶⁷ Tileston, *supra* note 58, at 435–37 (“[T]he client and/or group looks over the lyrics of several songs about eating disorders, and then, with the help of the therapist, writes a song using their own lyrics. The aim of the song is to help clients to disidentify with their eating disorder, seeing it as a part of themselves but not all of who they are. . . . Find a song that illustrates being trapped by the ED or caught in a dysfunctional relationship, and one that illustrates breaking free. . . . Have lyrics sheets to pass out, and a method of playing the songs.”).

⁶⁸ Dvorkin, *supra* note 64, at 397 (“The song that can be used as a transitional object in this manner is usually reflective of how the client sees herself, e.g., victim or orphan. An example of a song that is meaningful to many clients with BPD is ‘Maybe,’ from the Broad-

new song, much like a security blanket, becomes a source of comfort for the client.⁶⁹

After a song's lyrics are modified, sometimes the revised song will be recorded or performed in front of others. Recording the creative product can serve as therapeutically-important emotional validation and as an artifact that the client can revisit for support.⁷⁰ Moreover, a public performance of the modified song may also offer an opportunity for growth and self-expression.⁷¹ A public performance can help connect a client with her physical environment.⁷²

Not only can music help us connect with our emotional selves, it can also help us connect with others.⁷³ Music allows us to express what our own words and actions fail to say.⁷⁴ Thus, music can be an important expressive vehicle for those with communication difficulties. For patients suffering from severe dementia caused by Alzheimer's disease, for example, music can provide a connection when other forms of communi-

way musical *Annie*. While I prefer for the client to choose the song, this particular song directly addresses the longing that a BPD person has for parental support that will meet her emotional needs.”).

⁶⁹ *Id.* at 396 (“The therapist chooses a song that the client and therapist sing together, and then the therapist guides the client to improvise new lyrics that describe the client's emotions and significant aspects of her inner life related to abandonment. The client uses this song similarly to how a two-year-old might use a transitional object to reduce anxiety when the caretaker is not there. The transitional object represents the safe feeling of being with a caretaker.”).

⁷⁰ Ghetti, *supra* note 14, at 190 (“Capturing the outcomes of the creative music process through audio or video recording enables the child to retain and re-experience the benefits of that process. The recording becomes a resource upon which the child and family can draw during future times of challenge or celebration. . . . The recording process and final product offer a number of benefits, including development of an expressive outlet, validation of emotions and self-worth, improved self-esteem, increased choice-making, empowerment, increased attention span, improved follow-through with a long-term goal, and improved social connectivity.”). See also Christine Neugebauer, *Children in General Inpatient Care*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN PEDIATRIC CARE 477, 503 (Joke Bradt ed., 2013) (“Music video creation is a process, including planning, decision-making, and designing, that uses technology and media to create an original music video composition that conceptualizes one's thoughts and emotions into a contained product. . . . It is important that the music therapist be up to date regarding copyright laws and legal use of recorded music and how these laws apply to music therapy practice.”).

⁷¹ Sunelle Fouche & Kerryn Torrance, *Crossing the Divide: Exploring Identities Within Communities Fragmented by Gang Violence*, in CASE EXAMPLES OF MUSIC THERAPY FOR CHILDREN WITH EMOTIONAL OR BEHAVIORAL PROBLEMS 55, 56 (Kenneth E. Bruscia ed., 2012) (“[C]lients often moved between the private arena of the music therapy room and the public arena . . . which affords opportunities for concerts and ‘showing off’ developing talent[, which] provide different, but equally important, opportunities for the development of individual and group identities.”).

⁷² See Bruscia, *supra* note 11, at 85.

⁷³ Gfeller & Thaut, *supra* note 51, at 234 (“Because music is an emotional language that elicits thoughts and feelings, it can be a powerful tool toward increasing emotional expression and self-awareness.”).

⁷⁴ Gfeller, *supra* note 1, at 42; see also FEDER, *supra* note 1, and accompanying text.

cation, such as words or body language, cannot be understood.⁷⁵ The following story illustrates how music can promote meaningful interactions when words are unavailable:⁷⁶

Mrs. Jackson has late-stage dementia. She has not spoken in several years, and can no longer walk because of the progression of the disease. Although Mrs. Jackson generally does not make vocal sounds, she does make a vocal response at specific points each time a certain song is sung to her. History provided by the family members indicates that the song is familiar and that she enjoyed singing it early in her life. Mrs. Jackson makes ongoing attempts to sing, even though she can no longer match the pitches or articulate the lyrics.⁷⁷

Music's unique ability to provide comfort and create lasting memories is particularly meaningful for families of young children facing life-limiting conditions.⁷⁸ A total approach to palliative care is one that aims to provide both physical and emotional comfort to patient and family alike.⁷⁹ The following story illustrates how music therapy can be used to engage and comfort those nearing the end.

A four-year-old girl with a terminal brain tumor was quite lethargic the last month of her life. It was difficult to arouse her to engage in any way, and the nurse and social worker reported that this little girl was no longer moving her arms or legs and slept during most of the

⁷⁵ See CLAIR, *supra* note 3, at 14–15.

⁷⁶ *Id.* at 15 (“Mrs. Jackson can still enter into some level of participation with others because the structure of the familiar song makes it possible for her to use residual abilities in order to respond vocally, and do so in a rhythmic and melodic context. The music provides the opportunity to interact meaningfully with others and to be socially integrated. Most of all, music makes it possible for her to escape the isolation of degenerative disease, if only for a short time.”).

⁷⁷ *Id.* at 14–15.

⁷⁸ Kathryn Lindenfelser, *Palliative and End-of-Life Care for Children*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN PEDIATRIC CARE 324, 324 (Joke Bradt ed., 2013) (“Providing music therapy for children or adolescents diagnosed with a life-limiting condition and their families can be a way of altering the perception of the situation, enhancing communication and expression, improving the child’s physical state, and fostering positive experiences.”) (citations omitted); *id.* at 350 (“Whether it is sharing receptive music therapy methods such as listening to a favorite song together or discussing the meaning of the lyrics to create a song that expresses the challenges and joys faced by children or teens receiving palliative or end-of-life care and by their siblings or parents, music therapy is a means to altering the perception of the horrendous reality that these families face as it brings joy, relief, and happiness.”).

⁷⁹ *Id.* at 325 (“Palliative care for children and young people is an active and total approach to care. It consists of managing pain and symptoms, offering emotional and spiritual support, providing respite (restful) care, and supporting the family through bereavement.”). Care becomes palliative when the aim is no longer curative. When facing the end of life, both the patient and the family need comfort and support. *Id.* at 327–29, 331.

day. However, during music therapy the little girl exerted herself and would swing her legs and arms to play the drum, stay awake for a half-hour session, and giggle throughout music therapy.⁸⁰

This next story illustrates how improvisational music-making can help family members give expression to unstated emotions.

During musical improvisation and songwriting with a four-year-old child whose one-year old brother was receiving palliative care services due to a rare genetic condition, the four-year-old sang, “I’ll be so sad when you die and I hope that you go to heaven.” His mother cried and said she didn’t realize the four-year-old had an understanding or beliefs around what was happening to his brother, as this was not something they had previously talked about.⁸¹

The above story illustrates how group sing-alongs can bring comfort to both patient and family and create positive lasting memories. And, when recorded, the musical artifact can serve as a legacy gift for friends and family.⁸²

Emily was a 6-year-old female with an inoperable brain tumor, no longer active due to disease progression. Music therapy provided sessions for Emily with her younger sibling and other family members. Emily preferred quiet voices and low stimulation due to her diagnosis, but wanted to sing and have everyone around her. She gained great comfort by singing her favorite song for others and having her family repeatedly sing her favorite song to her. In addition to comfort, providing group sessions and a recording of Emily singing also helped create positive memories for Emily’s younger sister and family.⁸³

At the end of life, creating a musical, life-in-review collage can be a meaningful way to process difficult emotions.⁸⁴ As music therapist Jenny

⁸⁰ *Id.* at 333.

⁸¹ *Id.*

⁸² *Id.* at 328 (“Providing opportunities for children to leave a legacy may be empowering at the end of life. Music therapists have the unique ability to assist with this, as it is through the creation of videos, songs, journals, and pictures that children and families are able to create memories together that continue the child’s legacy. Such projects provide an outlet for expression and intimacy at the end of life.”) (citations omitted).

⁸³ Walker & Adamek, *supra* note 10, 359–60.

⁸⁴ Clements-Cortés, *supra* note 58, at 307 (“Music for reminiscence is concerned with helping clients use music to retrieve memories and to help bring them to life to recount in the

Martin notes: “Dying is never easy, neither for the dying person nor their family.”⁸⁵ The process of compiling a musical collage can be a meaningful outlet for the dying person.⁸⁶ And a legacy gift can be a deep comfort for the family.⁸⁷ Music therapist Laurel Young explains the compilation process:

The music therapist compiles and arranges a collage (collection) of music recordings that are significant or meaningful for the client. This may include recordings of live music from the client’s own music therapy sessions, commercially recorded selections, or a combination of both. . . . The main goals for the client are to participate in a life review process, increase cognitive stimulation, maintain a sense of identity, increase creative self-expression, increase self-esteem, and create a forum for interaction with loved ones.⁸⁸

therapy setting. Music therapists require experience with choosing appropriate repertoire and require training in clinical counseling skills before using this technique with palliative patients. Music for reminiscence may bring numerous serious issues to the surface for clients dealing with a terminal illness, and music therapists need to be aware of all counseling issues associated with this level of therapy before implementing this technique without supervision.”); Jenny A. Martin, *Music Therapy at the End of a Life*, in CASE EXAMPLES OF THE USE OF SONGS IN PSYCHOTHERAPY 152, 160 (Kenneth E. Bruscia ed., 2012) (“When working with someone who is dying, an important goal is to help someone to bring their life to a close. One way to do this is to encourage the patient to engage in the life review process, to look back over their life. Music because of its uncanny ability to evoke memories, can play a key role in this process.”).

⁸⁵ Martin, *supra* note 84, at 152.

⁸⁶ Clements-Cortés, *supra* note 58, at 309 (“When clients are diagnosed with a terminal illness, a large amount of their autonomy is lost. Song choice can be a way to regain control and assist the client in expressing their emotions. Song choice may also be a way to introduce the client to music therapy and act as an avenue to other music therapy interventions, such as music for reminiscence, music for relaxation, musical life review, and active music-making.”); Jackson, *supra* note 55, at 371 (“For example, topics like ‘my most important relationship,’ ‘the best day of my life,’ or ‘the thing about myself that I like the best’ can be helpful in assisting the client in focusing on personal strengths, attributes, and experiences that can bolster coping skills and increase feelings of self-worth. Compile the recording into a mini-album for the client.”).

⁸⁷ Clements-Cortés, *supra* note 58, at 307 (“[A musical life review] is also a valuable way to help family members remember their loved one and potentially record some type of legacy gift to assist in the grieving process.”).

⁸⁸ Laurel Young, *Persons with Alzheimer’s Disease and Other Dementias*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN MENTAL HEALTH 718, 752 (Lillian Eyre ed., 2013). See also Jackson, *supra* note 55, at 369 (“Musical audiobiography is a compositional approach that involves an individual client selecting and compiling music and sounds into a music product that reflects an important aspect of or important events and experiences in the client’s life related to treatment issues. Prerecorded music and sound, recordings of the client’s performance of precomposed or original music, recordings of improvisations from the client’s therapy sessions, and client’s recordings of other sounds can all be used as material for the final product.”).

The story of a 42-year-old woman with terminal cancer illustrates the value of leaving a legacy gift for a loved one:

Through her choice of songs, she was able to gain insight into her own feelings during the dying process, and by listening to them, she worked through the pain of leaving her husband. A songbook and tape of these songs provided her husband with a last gift of her love.⁸⁹

These musical audiobiographies are often recorded and shared as a memento with friends and family.⁹⁰

Much more can be said of the value and application of music as a therapeutic tool; the foregoing is not intended to be an exhaustive recitation, but rather a foundation and introduction to music therapy. The focus of this Article is on the potential impact of copyright law on this clinical field. It is unclear the extent to which some of the therapeutic interventions outlined above open the patient, therapist, or health care facility to copyright liability. Therapeutic uses of music include both the receptive (i.e., listening) and creative (i.e., music-making).⁹¹ Some uses of music—like original songwriting or improvisation—do not implicate the rights of others. But other therapeutic uses—like legacy recordings, lyric modifications, or performing popular music—may trigger the copyright holder’s exclusive rights to reproduction, derivatives, and public performance.⁹² The next Part discusses copyright law and music licensing.

II. COPYRIGHT & MUSIC LICENSING

The complexity of copyright law is reputed to rival that of the U.S. tax code.⁹³ The law of music copyright is particularly intricate. This Part will briefly outline some of the legal and practical complexity of copy-

⁸⁹ Jane Whittall, *Songs in Palliative Care: A Spouse’s Last Gift*, in CASE EXAMPLES OF THE USE OF SONGS IN PSYCHOTHERAPY 235, 235 (Kenneth E. Bruscia ed., 2012).

⁹⁰ Beth Dun, *Children with Cancer*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN PEDIATRIC CARE 290, 313 (Joke Bradt ed., 2013) (“Children and adolescents can create their own music artifacts, such as CD or video products, or record their musical creations, which may include their singing voices. These artifacts can assist in decreasing anxiety and increase positive coping while also becoming mementos for family members.”) (citations omitted).

⁹¹ While music therapy scholars identify four types of music experiences, for present purposes, I identify two types: receptive and creative. See BRUSCIA, *supra* note 11, at 128 (describing the four main types of music experiences as “improvising, re-creating, composing, and listening”).

⁹² Jo Bowman, *Feeling Groovy – Music Therapy*, WIPO MAG. (Sept. 2009), https://www.wipo.int/wipo_magazine/en/2009/05/article_0008.html (“In [music therapy] sessions where patients change an existing musical work in some way, permission needs to have been granted by the copyright holder of that music. If it is Mozart, you are in the clear as it is no longer copyright protected. If it is Oasis, you need to ask first or risk breaching copyright.”).

⁹³ Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1539 (2008) (arguing copyright offers poor ex ante guidance and “[t]his inherent uncertainty makes the Copyright Act even worse than the Tax Code”); Michael J. Madison, *Rewriting Fair*

right protection for music and music licensing. Part III will discuss why licensing music for therapeutic uses is impractical and, thus, why a statutory exemption for therapeutic uses of music is warranted.

Copyright represents certain intangible interests in a work, which exist separate and apart from ownership of the physical embodiment of the work, like a CD or book.⁹⁴ Mere ownership of a CD or a book does not transfer any ownership interest in the copyright to the CD or book. Rather, copyright law provides the creator of an original work with a bundle of exclusive rights (i.e., rights to exclude others from various uses of the creator's work),⁹⁵ subject to certain statutory exemptions⁹⁶ and limitations.⁹⁷ Copyright infringement is a strict liability offense, which means an individual can be liable to the copyright holder even if they do not intend to infringe, or even know that they infringed.⁹⁸ For registered works, a copyright owner is eligible for statutory damages and attorney's fees.⁹⁹ A willful infringer can be liable for statutory damages up to \$150,000 per infringement.¹⁰⁰ The innocent infringer is also liable for statutory damages¹⁰¹—but the court *may* reduce those damages, though

Use and the Future of Copyright Reform, 23 CARDOZO ARTS & ENT. L.J. 391, 396 (2005) (“the complexity of the copyright statute already compares unfavorably to the tax code”).

⁹⁴ 17 U.S.C. § 202 (2018) (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied.”).

⁹⁵ By statute, these rights include the following: (1) to reproduce the copyrighted work in copies; (2) to prepare derivative works based on the original material; (3) to distribute copies of their work; (4) to perform their work publicly; (5) to display their work publicly; and (6) for sound recordings, to perform their work publicly by means of a digital audio transmission. 17 U.S.C. § 106.

⁹⁶ *E.g.*, 17 U.S.C. § 110(4) (non-profit public performances).

⁹⁷ *E.g.*, 17 U.S.C. § 107 (fair use).

⁹⁸ 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.0.1 (3d ed. 2020) (“Strict liability is the rule in copyright cases, and the defendant who copies protected expression from a copyrighted work will be liable regardless of his innocence.”).

⁹⁹ 17 U.S.C. §§ 504-505. *See also* 17 U.S.C. § 412 (prohibiting recovery of statutory damages and attorney's fees for preregistration infringement, “unless such registration is made within three months after the first publication of the work”); *S. Credentialing Support Servs., L.L.C. v. Hammond Surgical Hosp., L.L.C.*, 946 F.3d 780, 785–87 (5th Cir. 2020) (holding preregistration infringement barred statutory damages for post-registration infringement).

¹⁰⁰ 17 U.S.C. § 504(c)(2) (“In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.”).

¹⁰¹ R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 133 (2007) (“[I]nnocent infringers are just as liable as those who infringe knowingly or recklessly.”).

not below \$200 per infringement.¹⁰² In addition to statutory damages, the court may also award a prevailing party costs and attorney's fees.¹⁰³

But not all uses of music require permission. For example, original music performed by the copyright holder and music in the public domain do not require a license.¹⁰⁴ Also, a plaintiff will not prevail even though her copyrighted work was used without permission, if the defendant can prove her use is a "fair" one.¹⁰⁵ Whether a fair use defense will succeed depends on consideration of four statutory factors: (1) the purpose and character of the defendant's use; (2) the nature of the plaintiff's copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect the use has on the potential market for or value of the copyrighted work.¹⁰⁶ Fair use is not a bright-line, safe harbor. Rather, the fair use analysis is considered on a use-by-use basis.¹⁰⁷ As a general matter, the more "transformative" the defendant's work is, the more likely it is a fair use of the copyrighted work.¹⁰⁸ On the other hand, the more the defendant's work competes with a licensable use of the copyrighted work, the more likely it is not a fair use.¹⁰⁹

¹⁰² 17 U.S.C. § 504(c)(2) ("In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion *may* reduce the award of statutory damages to a sum of not less than \$200.") (emphasis added). Note that statutory damages and attorney's fees are available only if the work was registered (1) before the infringement commenced or (2) within 90 days of first publication. 17 U.S.C. § 412.

¹⁰³ 17 U.S.C. § 505.

¹⁰⁴ 17 U.S.C. § 106(4) (the copyright owner has the exclusive right to perform the copyrighted work publicly); *Welcome to the Public Domain*, COPYRIGHT & FAIR USE STAN. U. LIBR., <https://fairuse.stanford.edu/overview/public-domain/welcome/> (last visited July 4, 2020) ("Anyone can use a public domain work without obtaining permission . . .").

¹⁰⁵ 17 U.S.C. § 107 (2018) ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright.")

¹⁰⁶ *Id.* See generally Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 54 (2012) (noting "these four factors were not intended to be exclusive, nor were they intended to be so specific as to freeze judicial development of the doctrine").

¹⁰⁷ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (noting fair use "calls for case-by-case analysis").

¹⁰⁸ *Id.* at 579 (asserting that transformative works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright"). See also Sag, *supra* note 106, at 55 ("According to *Campbell*, transformativeness not only occupies the core of the fair use doctrine but also reduces the importance of all other factors such that 'the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.'") (footnote omitted).

¹⁰⁹ *Campbell*, 510 U.S. at 590 (noting that market harm analysis "must take account not only of harm to the original but also of harm to the market for derivative works[,] in addition it must consider "whether unrestricted and widespread conduct of the sort engaged in by the defendant would . . . result in a substantially adverse impact on the potential market for the original") (internal quotations omitted). See also Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 617 (2008) (finding 99% correlation between market harm and no fair use: "of the 141 opinions that found that factor four disfavored fair use, 140 found no fair use").

To better understand the challenge facing music therapists (many of whom are not also copyright lawyers) as they try to understand whether they need a license for their particular use of a song, what sort of license they need, and how to go about getting that license, it is useful to explore the various interests protected by copyright. For music, copyright protects two distinct works: (1) the musical composition and (2) the sound recording.¹¹⁰ The musical composition is the words and melody of the song. To keep things simple, we'll say the musical composition is created by a songwriter (i.e., a composer).¹¹¹ A sound recording, on the other hand, is created by a performer (i.e., a recording artist) who fixes the sounds in a tangible medium like a tape, CD, or MP3 file. A singer-songwriter could, of course, hold copyrights in both the musical composition and the sound recording.¹¹² In many instances, however, these copyrights are not held by the same person or entity.¹¹³ Indeed, in most instances the copyrights aren't even held by the songwriter or performer.¹¹⁴ Rather the rights are typically assigned by the songwriter to the music publisher (in the case of the musical composition) and by the performer to the record label (in the case of the sound recording) in exchange for royalties.¹¹⁵ Figure 1 below illustrates the two separate copyrightable works in music and the typical rightsholders.

¹¹⁰ 17 U.S.C. § 102(a)(2) (2018) (“musical works, including any accompanying words”); 17 U.S.C. § 102(a)(7) (2018) (“sound recordings”). See also OFFICE OF THE GEN. COUNSEL, U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 18 (2015), <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> (“A musical work can be in the form of sheet music, i.e., notes and lyrics written on a page, or embodied in a phonorecord, i.e., in a recording of the song. A sound recording comprises the fixed sounds that make up the recording. The musical work and sound recording are separately protected, and can be separately owned, under copyright law.”) (footnote omitted).

¹¹¹ Note that things get complicated when two or more creators own the copyright. KOHN, *supra* note 3, at 267.

¹¹² See *id.* at 79–80.

¹¹³ *Id.* at 269.

¹¹⁴ See *id.* at 87.

¹¹⁵ See ALEXANDER LINDEY & MICHAEL LANDAU, 4 LINDEY ON ENTERTAINMENT, PUBLISHING & THE ARTS § 8:51 (3d ed.), Westlaw (database updated Dec. 2019) (“The sound recording copyright is owned by the record label. The copyright in the musical work itself is owned by the music publisher, which grants the record label a ‘mechanical’ license to record and distribute the song as part of the record.”).

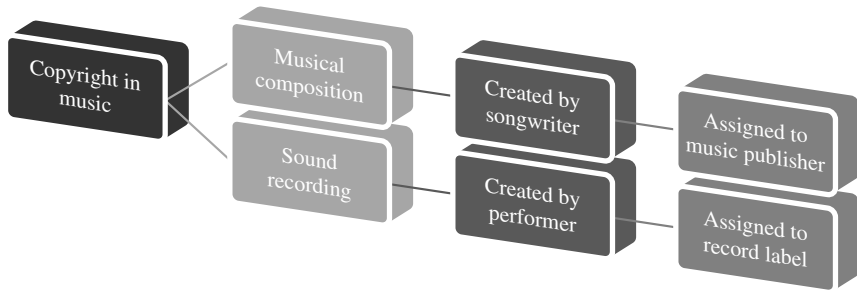


FIGURE 1: TYPICAL RIGHTSHOLDERS OF MUSIC.

As noted above, copyright gives the creator a number of exclusive rights in the work.¹¹⁶ For the sake of brevity, we'll focus on the rights relevant for this discussion: (1) the exclusive right to reproduce and distribute copies of the work, and (2) the exclusive right to publicly perform the work.¹¹⁷ The reproduction right is the exclusive right to make copies of the work.¹¹⁸ The performance right is the exclusive right to perform the work “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”¹¹⁹ A performance is “public” if it occurs either (1) in a place open to the public or (2) in a semi-public place.¹²⁰ Examples of places courts have held to be “semi-public” for

¹¹⁶ 17 U.S.C. § 106 (2018).

¹¹⁷ The exclusive right to prepare derivative works is also relevant, but to minimize confusion this discussion will focus on the rights to reproduce, publicly distribute, and publicly perform the work. A license of the exclusive right to reproduce presumably includes a license of the exclusive right to distribute as well. *Cf.* Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 574 (1997) (noting a license to reproduce a work by email “presumably includes by implication” the right to distribute the work by email).

¹¹⁸ 17 U.S.C. § 106(1). Technically, there is a distinction between “copies” and “phonorecords,” *see* 17 U.S.C. § 101, but this distinction is not important for present purposes. In this article, “copies” includes both terms.

¹¹⁹ 17 U.S.C. § 101 (defining “[t]o perform or display a work ‘publicly’”). It is also a public performance to “transmit” a performance of the work to the public or to a public or semi-public place. *Id.* In 2014, the Supreme Court held a service that streamed broadcast television programming to its subscribers over the Internet publicly performed the copyrighted works. *Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 436 (2014).

¹²⁰ *See, e.g., Daniel Cantor, How Many Guests May Attend a Wedding Reception Before ASCAP Shows Up? Or, What Are the Limits of the Definition of Perform “Publicly” Under 17 U.S.C. § 101?*, 27 COLUM. J.L. & ARTS 79–80 (2003).

copyright purposes include private golf clubs,¹²¹ public and private schools,¹²² and doctors' offices.¹²³

The public performance right for a sound recording is more limited than the performance right for a musical composition. In part, this reflects Congress's reluctance to extend copyright protection to sound recordings, which is a relatively recent amendment to federal law.¹²⁴ Musical compositions have been federally protected since 1831,¹²⁵ and the public performances right was granted in 1897.¹²⁶ Sound recordings, by contrast, were not eligible for federal copyright protection before 1972.¹²⁷ In 1971, sound recording rightsholders were granted certain exclusive rights with respect to their recordings (namely, exclusive rights to (1) reproduction, (2) derivative works, and (3) public distribution of copies).¹²⁸ But an exclusive right to public performance of a sound recording

¹²¹ See, e.g., *Bourne Co. v. Hunter Country Club, Inc.*, 990 F.2d 934, 935 (7th Cir. 1993); *Fermata Int'l Melodies, Inc. v. Champions Golf Club, Inc.*, 712 F. Supp. 1257, 1260 (S.D. Tex. 1989), *aff'd*, 915 F.2d 1567 (5th Cir. 1990) (concluding that a performance of songs in restaurant of private golf club constituted a "public performance" in a semi-public place where 21 club members were in attendance); cf. *Hinton v. Mainlands of Tamarac*, 611 F. Supp. 494, 496 (S.D. Fla. 1985) (concluding that a performance in a condominium clubhouse was a "public performance").

¹²² See, e.g., *Bagdadi v. Nazar*, 84 F.3d 1194, 1198–99 (9th Cir. 1996).

¹²³ *Rodgers v. Black*, Civ. No. 85–0208 P, 1986 WL 12876, *1 (D. Me. July 29, 1986) ("Since playing the tapes publicly in stores and doctors' offices amounts to public performance of the musical compositions, 3M required licenses from the copyright owners to avoid claims of copyright infringement.").

¹²⁴ 1 HOWARD B. ABRAMS & TYLER T. OCHOA, *THE LAW OF COPYRIGHT* § 5:193, Westlaw (database updated Nov. 2019) ("[T]he failure of the 1976 Copyright Act to grant a right of performance to the owners of copyrights in sound recordings was quite deliberate.") (footnote omitted); GOLDSTEIN, *supra* note 98, § 7.2.1.2 ("Congress long resisted efforts to extend copyright protection to recorded performances."); Liam Séamus O'Melinn, *The Recording Industry v. James Madison, aka "Publius": The Inversion of Culture and Copyright*, 35 SEATTLE U. L. REV. 75, 78 (2011) ("Copyright for sound recordings was once controversial[.]").

¹²⁵ Copyright Act of 1831, ch. 16, 4 Stat. 436. See also ABRAMS & OCHOA, *supra* note 124, § 2:44 ("Given the technology of that day, the only copies that the Copyright Act of 1831 envisioned were in the form of printed music. No account was taken of music boxes, and such devices as phonograph records simply did not exist.").

¹²⁶ Copyright Amendment Act of 1897, ch. 4, 29 Stat. 481.

¹²⁷ ABRAMS & OCHOA, *supra* note 124, § 8:38 ("Any sound recording fixed before February 15, 1972, the effective date of the 1971 Sound Recording Amendment, is not eligible for federal statutory copyright protection. As a result of the Classics Protection and Access Act, however, sound recordings fixed before February 15, 1972, are now afforded parallel federal protection that is equivalent (but not identical) to federal copyright protection for sound recordings fixed on or after that date.") (footnotes omitted). Compare Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391, with Title II of the Music Modernization Act of 2018, Pub. L. No. 115-264, 132 Stat. 3676.

¹²⁸ 17 U.S.C. §§ 106, 114(b) (2018). See also ABRAMS & OCHOA, *supra* note 124, § 2:44 ("[The 1971 Sound Recording Amendment] provided a copyright in the performance that was independent of the copyright in the musical work that was performed, thus allowing the owner of the rights in the performance to directly sue infringers.").

was not granted at that time.¹²⁹ It wasn't until 1995 that a limited public performance right was extended to digital audio transmissions of sound recordings (i.e., streaming services).¹³⁰ Songs played over terrestrial radio remain excluded from the sound recording public performance right—these performances are considered free promotion that help drive album sales.¹³¹ This means that for copyrighted songs played over terrestrial radio, a performance license is required for the musical composition, but not the sound recording.¹³² On the other hand, for copyrighted songs played over Internet radio, a performance license is required for both the musical composition and the sound recording.¹³³

Figure 2 below summarizes the reproduction right and public performance right of musical compositions and sound recordings, including the dates those rights were first recognized under federal law.

¹²⁹ ABRAMS & OCHOA, *supra* note 124, § 2:44 (“The rights granted to a copyright owner of a performance embodied in a sound recording are comparatively limited, protecting only against a direct copying of the particular sounds captured in the original sound recording, and providing no right of public performance.”) (footnote omitted).

¹³⁰ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104–39, 109 Stat. 336. The 1998 Digital Millennium Copyright Act (DMCA) included webcasting as a category of performance that triggered this limited performance right. DMCA, Pub. L. No. 105–304, 112 Stat. 2860, 2890–91 (1998).

¹³¹ See 17 U.S.C. §§ 112(a)(1), 114(d)(1) (2018).

¹³² Matt Jackson, *From Broadcast to Webcast: Copyright Law and Streaming Media*, 11 TEX. INTELL. PROP. L.J. 447, 451 (2003) (“When records are performed on the radio, the copyright owner in the musical composition earns a performance royalty but the copyright owner in the sound recording does not.”); J.P. Urban, Note, *Performance Royalties for Sound Recordings on Terrestrial Radio: A Private Solution to A Public Problem*, 16 VAND. J. ENT. & TECH. L. 197, 199 (2013) (“Congress limited its extension of the sound-recording performance royalties to digital broadcasters. It did not require traditional terrestrial radio stations to pay sound-recording performance royalties, leaving sound recordings with an asymmetrical performance right.”) (citation omitted).

¹³³ Amanda Reid, *The Power of Music: Applying First Amendment Scrutiny to Copyright Regulation of Internet Radio*, 20 TEX. INTELL. PROP. L.J. 233, 263 (2012) (“Internet radio is obligated to pay a royalty for both the sound recording and musical work copyrights; however, terrestrial radio is still exempt from paying a royalty for the sound recording.”).

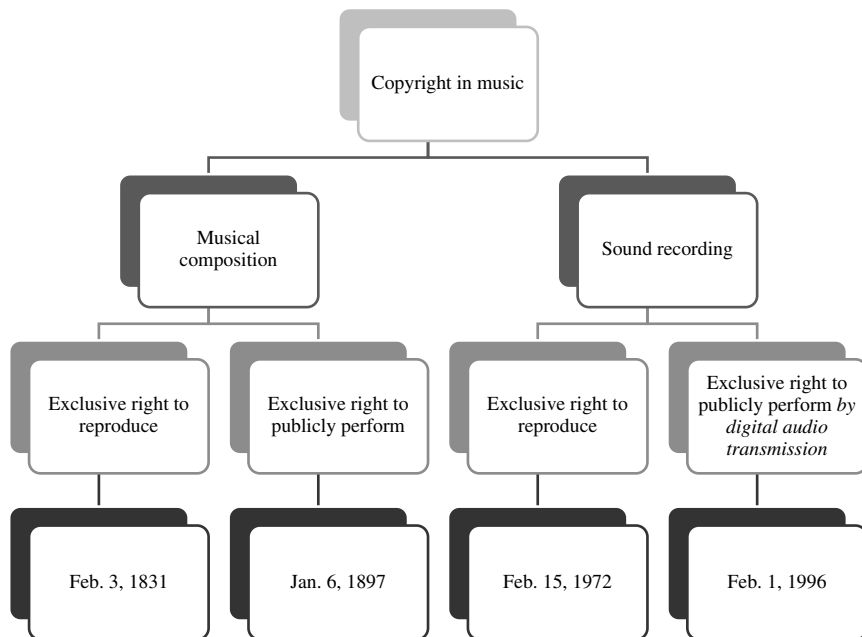


FIGURE 2: REPRODUCTION AND PERFORMANCE RIGHTS IN MUSIC.

An important feature of a copyright is that its constituent bundle of rights is divisible.¹³⁴ Divisibility means, for example, the holder of the reproduction right can be different from the holder of the public performance right.¹³⁵ Again, the copyright owner of the musical composition and the sound recording each have the exclusive right to reproduce and publicly perform the work.¹³⁶ Moreover, there are, of course, many ways a musical work can be reproduced and many ways it can be performed. The divisibility of rights results in a bewildering maze of potential licenses. If a particular use of a copyrighted song implicates more than one right—like reproducing sheet music for a choir’s public performance—the user may need to find different rightsholders in order to request the necessary licenses.

Now that we have sketched out the musical composition and the sound recording as two distinct copyrightable works in music, and the divisibility of the attendant exclusive rights, we can examine the different rightsholders who grant licenses for a variety of uses. Figure 3 below summarizes various licenses for using copyrighted music. Note that the

¹³⁴ 17 U.S.C. § 201(d) (2018) (transfer of copyright ownership); *see also* U.S. COPYRIGHT OFFICE, 86TH CONG., DIVISIBILITY OF COPYRIGHTS I (Comm. Print 1957), <https://www.copyright.gov/history/studies/study11.pdf> (authored by Abraham L. Kaminstein).

¹³⁵ 17 U.S.C. § 201(d)(1) (“ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law”).

¹³⁶ *See supra* Figures 1 & 2.

exclusive right to reproduce the musical composition is a subdivided licensing schema; the appropriate license needed to reproduce the composition depends on how the music is to be used—i.e., a print license to copy the sheet music or a mechanical license to make your own sound recording of the musical composition. The exclusive right to publicly perform by digital audio transmission also further subdivides, depending on how interactive the streaming service is.¹³⁷

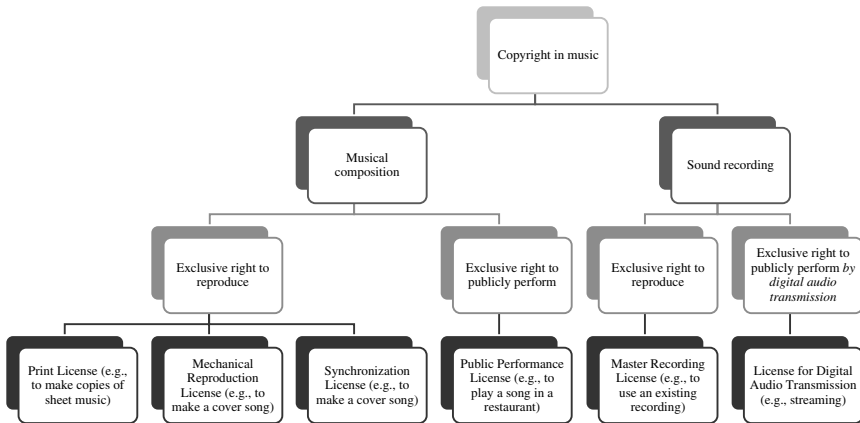


FIGURE 3: STANDARD LICENSES FOR USING COPYRIGHTED MUSIC.

The exclusive right to reproduce means the rightsholder can authorize copying lyrics or sheet music by selling a print license.¹³⁸ At one time, print licenses were the main source of income for songwriters and music publishers.¹³⁹ Today, the majority of the music publishing income is derived from public performance licensing (40%) and mechanical reproduction licensing (25%).¹⁴⁰ There is no set fee that a music publisher can charge for a print license.¹⁴¹ For example, the average fee for re-

¹³⁷ Compare 17 U.S.C. § 114(d)(2) (prescribing statutory licensing of certain transmissions) with § 114(d)(3) (detailing licenses for transmissions by interactive services); see also *Am. Broad. Cos.*, 573 U.S. at 442–44. The purpose of Figure 3 is to illustrate the complexity of the music licensing system. This purpose is amply satisfied without further reflecting all the technical minutiae of online streaming services.

¹³⁸ KOHN, *supra* note 3, at 308 (“A print license is a permission that authorizes one to make printed copies of music, such as the reproduction of musical notation in sheet music and printed music folios (also known as transcriptions) and reprints of lyrics in books, magazines, and print advertising. A print license typically invokes the copyright owner’s exclusive rights of reproduction and distribution.”) (emphasis omitted).

¹³⁹ Jacob Wunderlich et al., *What are Print Rights?*, EXPLORATION (Dec. 15, 2018), <https://exploration.io/what-are-print-rights/>.

¹⁴⁰ KOHN, *supra* note 3, at 91.

¹⁴¹ Wunderlich et al., *supra* note 139 (“If a music publisher wants to refuse to allow the printing of lyrics to one of their songs, they have the legal right to do so. Likewise, they can charge any amount of money for such usage.”). See also LAWRENCE A. WAKS & BRAD L. WHITLOCK, 1 TEXAS PRACTICE GUIDE BUSINESS TRANSACTIONS § 4:281, Westlaw (database updated June 2020) (“The publication of a composer’s work in print, sheet music, songbooks,

printing song lyrics in a church bulletin averages between \$15.00 and \$35.00 per song.¹⁴² But the bulk of the fee, however, doesn't make it to the composer. Under the standard music publishing agreements, songwriters typically receive between 7¢ and 8¢ of the fee.¹⁴³

While a print license fee is unconstrained, a mechanical license is limited by a statutory rate. Over a century ago, Congress extended to songwriters the exclusive right to reproduce musical compositions in mechanical devices like piano rolls and phonograph records.¹⁴⁴ In exchange for this new exclusive right, Congress compelled a licensing system whereby others may create and distribute cover versions of a musical composition for a set fee.¹⁴⁵ Worried about “a great music monopoly,”¹⁴⁶ Congress enacted a compulsory license system in the 1909 Copyright Act to permit the “mechanical” reproduction of music on the technology of the day: piano rolls and phonograph records.¹⁴⁷ Today, the compulsory mechanical license permits a licensee, who pays the statutorily prescribed rate (currently 9.1¢ per track), to reproduce the musical composition in an original sound recording.¹⁴⁸ In other words, the compulsory license allows you to sing, record, and distribute your own cover

or arrangements and the like, generally is undertaken by print companies who are licensed by the music publisher to do so.”).

¹⁴² *Rates and Licenses*, MUSIC SERVICES, <https://www.musicervices.org/license/rates> (last visited June 11, 2020). See also DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 260 (10th ed. 2019) (“For single-song physical sheet music, the standard royalty is 20% of the marked retail price (currently most single-song sheet music has a \$4.95 retail price, so the publisher gets about 99¢.)”); Wunderlich et al., *supra* note 139 (“For single-song physical sheet music (non-digital), the industry standard is a 20% royalty of marked retail price. Given an average price of \$5.00 per sheet music, the publisher receives about 99 cents from each purchase.”).

¹⁴³ KOHN, *supra* note 3, at 1670; see also WAKS & WHITLOCK, *supra* note 141, § 4:254. (“The royalties paid on sheet music typically are only a nickel or dime for each copy sold.”).

¹⁴⁴ Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, § 1(e), 35 Stat. 1075, which superseded *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

¹⁴⁵ Technically, others may record cover songs only after there has been an authorized recording of the song. 17 U.S.C. § 115(a)(1) (2018) (detailing eligibility for compulsory license).

¹⁴⁶ 2 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 8.04 (Matthew Bender, Rev. Ed.) (quoting H.R. REP. NO. 60-2222, at 6 (1909)). Accord ABRAMS & OCHOA, *supra* note 124, § 2:44 (“Fearful that protecting musical copyrights from unauthorized phonorecords might result in ‘establishing a great music monopoly,’ Congress reacted with the convoluted provision that came to be known as a ‘compulsory license,’ a device which was the prototype for the compulsory licenses that have proliferated in the 1976 Act.”) (footnotes omitted).

¹⁴⁷ Copyright Act of 1909 Pub. L. No. 60-349, ch. 320, § 1(e), 35 Stat. 1075.

¹⁴⁸ 17 U.S.C. § 115 (2018). The statutory rate has increased over time; today, the statutory rate for the reproduction and distribution of musical works in physical and permanent digital downloads is 9.1¢ for recordings up to five minutes in length and, if over five minutes, 1.75¢ per minute of playing time. See ABRAMS & OCHOA, *supra* note 124, § 5:26.

version of a musical composition—so long as you pay a statutorily prescribed license fee.¹⁴⁹

Today, the Harry Fox Agency (HFA) issues the bulk of the mechanical reproduction licenses.¹⁵⁰ HFA represents over 60% of the domestic music publishers.¹⁵¹ For administrative convenience of songwriters and music publishers, HFA issues reproduction licenses on their behalf. In theory, a mechanical license to create a cover song can be secured below the statutory rate.¹⁵² But, in practice, mechanical licenses from HFA are typically at the statutory rate (9.1¢ per song).¹⁵³ This mechanical reproduction license fee is typically split equally between the music publisher and the songwriter.¹⁵⁴

But the scope of the compulsory mechanical license has its limits.¹⁵⁵ The mechanical reproduction license does not permit the use of someone else's sound recording; it permits you to create your own sound record-

¹⁴⁹ Technically, you need to (1) “serve notice” of your intention to make a cover song to the copyright holder, and (2) make timely royalty payments. 17 U.S.C. § 115(b)(1), (c)(1). The Music Modernization Act creates procedures for sound engineers and record producers to receive royalties for digital performances of sound recordings. Music Modernization Act of 2018, Pub. L. No. 115-264, 132 Stat. 3676. The new blanket licensing system will come into effect on January 1, 2021. See ABRAMS & OCHOA, *supra* note 124, §§ 5:23–5:25 (discussing the MMA's compulsory blanket license for digital performances of music).

¹⁵⁰ *History of HFA*, HFA, <https://www.harryfox.com/#/history> (last visited July 7, 2020). (“The Harry Fox Agency (HFA), established in 1927, has long been America's premiere licensing agent for issuing mechanical licenses, and continues to serve the industry today through its commitment to innovation while enhancing value for music creators and publishers.”).

¹⁵¹ KOHN, *supra* note 3, at 564. See also *History of HFA*, *supra* note 149 (“HFA has commercial connectivity with over 48,000 affiliated publishers, more than 2,500 record labels and several top-tier digital service providers (DSPs) operating within the U.S.”).

¹⁵² KOHN, *supra* note 3, at 857 (“A copyright owner will occasionally receive a request that a mechanical license be issued for a fee that is below the statutory rate. This is known as asking for a rate. To give a rate refers to charging a mechanical license fee that is below the statutory rate set by the compulsory license statute. When a ‘rate’ is offered, it is usually quoted at either 50% or 75% of statutory.”) (emphasis omitted).

¹⁵³ LINDEY & LANDAU, *supra* note 115, § 9:16 (“HFA will not issue a mechanical license at less than the statutory royalty rate unless so instructed by its publisher principal.”).

¹⁵⁴ KOHN, *supra* note 3, at 94 (“Under a standard music publishing arrangement, the writer's share and the publisher's share, for the most part, are equal (i.e., the publisher and writer split most of the publishing income on a 50-50 basis.”) (footnote omitted).

¹⁵⁵ The purpose is also limited; the primary purpose of making the cover song must be for a private use, not a commercial use. 17 U.S.C. § 115(a)(1)(A) (2018) (“A person may obtain a compulsory license only if the primary purpose in making phonorecords of the musical work is to distribute them to the public for private use . . .”). See also KOHN, *supra* note 3, at 683–84 (“A mechanical license is a license that permits (i) the audio-only reproduction of music in phonorecords (i.e., copies that may be heard with the aid of a ‘mechanical’ device—such as a player piano, a phonograph record, a CD player, personal computers, digital music players, such as MP3 players, the Apple iPod or iPhone, and player-equipped Internet browsers)—and (ii) the distribution or delivery of such phonorecords to the public for private use. Phonorecords may be distributed physically (e.g., CD) or delivered digitally by permanent download, limited download, or on-demand (i.e., interactive) stream.”) (emphasis omitted).

ing.¹⁵⁶ The mechanical reproduction license does not permit the copying of sheet music—that requires a separate print license.¹⁵⁷ The mechanical license permits an audio-only recording of the song; the use of visuals along with the audio recording—like in a film—requires a different license: a synchronization license.¹⁵⁸ And, lastly, the compulsory mechanical reproduction license requires that the cover song “shall not change the basic melody or fundamental character of the work.”¹⁵⁹ While a compulsory license “includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved”¹⁶⁰—the exact scope of permissible song modification is unclear.¹⁶¹ Changes to the basic melody or fundamental character of a song require a separate permission-to-arrange license.¹⁶² Licensing companies like Tresóna suggest “[l]yrical changes of any kind require the publisher’s permission via a Custom Arrangement license.”¹⁶³ Requiring an additional license for *any* lyrical al-

¹⁵⁶ 17 U.S.C. § 115(a)(1) (2018).

¹⁵⁷ *ABKCO Music, Inc. v. Stellar Records, Inc.*, 96 F.3d 60, 64 (2d Cir. 1996) (“[W]hile a compulsory license permits the recording of a ‘cover’ version of a song, it does not permit the inclusion of a copy of the lyrics. That requires the separate permission of the copyright holder.”). See also KOHN, *supra* note 3, at 649 (“It goes without saying that the mechanical license permits only the use of a musical work in the making and distributing of phonorecords (i.e., physical objects that embody audio-only sound recordings). It does not permit the making of copies of the musical work (e.g., sheet music, audiovisual works, etc.) nor does it permit the public performance of such musical work. The reproduction of copies and the performance of the work must be made under separate licenses.”) (emphasis omitted).

¹⁵⁸ NIMMER & NIMMER, *supra* note 146, § 8.04.

¹⁵⁹ 17 U.S.C. §115(a)(2) (2018).

¹⁶⁰ *Id.*

¹⁶¹ *Compare* *Stratchborneo v. Arc Music Corp.*, 357 F. Supp. 1393, 1405 (S.D.N.Y. 1973) (“A licensee has the right so to alter a copyrighted work to suit his own style and interpretation.”), *with* *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1432–33 & nn.3–4 (6th Cir. 1992) (conceding the distortion in 2 Live Crew’s alleged parody of a classic song lacked entitlement to a compulsory license), *rev’d*, 510 U.S. 569 (1994).

¹⁶² See KOHN, *supra* note 3, at 649 (“It has been asserted that the procurement of a mechanical license gives the licensee the privilege of preparing custom musical arrangements of the musical work and of reproducing the arrangements in copies to facilitate public performances without further permission. But this is not the case.”) (emphasis omitted); MARK S. LEE, ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW § 7:14, Westlaw (database updated Dec. 2019) (“Permission from the underlying copyright owner is needed because the arrangement is a derivative work.”) (footnote omitted); *What is/When Do I Need a Custom Arrangement License?*, TRESONA.COM, <https://tresona-help.groovehq.com/help/what-is-a-custom-arrangement-license> (last visited July 7, 2020) (“Whenever music is altered from its original form and one desires to make sheet music of the arrangement, it becomes a derivative work. Creating sheet music of a derivative work requires the permission of the publisher via a Custom Arrangement License.”).

¹⁶³ *What is/When Do I Need a Custom Arrangement License?*, *supra* note 162. Note that Tresóna recently lost a copyright case brought against a high school show choir. *Tresóna Multimedia, LLC v. Burbank High Sch. Vocal Music Ass’n*, 953 F.3d 638, 642 (9th Cir. 2020) (“We conclude that Tresóna lacks standing to sue as to three of the four musical works at issue, and that the defense of fair use renders the use of the fourth noninfringing.”).

teration seems like an unreasonable interpretation.¹⁶⁴ But substantial song modifications can warrant a custom arrangement license—absent fair use.¹⁶⁵

If you want to put your cover song on a CD, the Harry Fox Agency can sell you permission to record your own version of a musical composition.¹⁶⁶ But if you want to publicly perform that musical composition, you will need to talk with a performing rights organization, such as the American Society of Composers, Authors and Publishers (ASCAP).¹⁶⁷ Note that private performances, like singing in the shower, are outside the scope of a rightsholder.¹⁶⁸

Performing rights organizations (PROs)—like ASCAP, BMI,¹⁶⁹ and SESAC¹⁷⁰—negotiate license agreements for the public performance of musical compositions.¹⁷¹ The PRO collects the license fees and then distributes proceeds to songwriters and music publishers. For places that

¹⁶⁴ Any new recording will, invariably, include some amount of song adaptation. Therefore, the wisest interpretation of the statutory language would permit a musical arrangement to the extent necessary to conform to the style or manner of interpretation involved. *See also* Jonathan Minkoff, *Permission to Arrange for Live Performance*, A CAPELLA 101 (Feb. 2, 2012), <http://www.acappella101.com/home/permission-to-arrange-for-live-performance> (“There is no such thing as a performance that does not also embody at least a slightly new arrangement, if examined in fine enough detail. . . . Even if every single one of the notes were the same, the differences in timbre, tempo, dynamics, key, style, instrumentation, voicing, etc. would all contribute to whether the arrangement had been varied to some degree. Even a dead-on, sound-a-like tribute band would still vary the arrangement somewhat. And a varied arrangement, however slight, is a new arrangement.”).

¹⁶⁵ Note that there is very likely a license fee. In the FAQ section on HalLeonard.com there is the question “Do you ever grant gratis permission?” To which the answer is: “We receive a number of requests from charitable or non-profit organizations. In an effort to be fair and equitable in our handling of all requests, it is our general policy not to grant gratis permission.” *Licensing FAQs*, HAL LEONARD, <https://www.halleonard.com/licensing/faq.jsp> (last visited July 7, 2020).

¹⁶⁶ *See* OFFICE OF THE GEN. COUNSEL, U.S. COPYRIGHT OFFICE, *supra* note 110, at 21 (“[I]n practice, because of the administrative burdens imposed by the license—including service of a notice on the copyright owner and monthly reporting of royalties on a song-by-song basis—mechanical licensing is often handled via third-party administrators.”) (footnote omitted).

¹⁶⁷ *ASCAP Licensing: Frequently Asked Questions*, ASCAP, <https://www.ascap.com/help/ascap-licensing> (last visited July 7, 2020).

¹⁶⁸ KOHN, *supra* note 3, at 484 (“[T]he copyright owner cannot require that a fee be paid every time you play a compact disc in your home, insert an audiocassette of copyrighted music in your car stereo, or sing a song in the shower.”).

¹⁶⁹ Broadcast Music, Inc. (“BMI”).

¹⁷⁰ Society of European Stage Authors and Composers (“SESAC”).

¹⁷¹ *See* OFFICE OF THE GEN. COUNSEL, U.S. COPYRIGHT OFFICE, *supra* note 110, at 37 (“ASCAP is expressly barred from licensing any rights other than its members’ public performance rights (*i.e.*, ASCAP may not license mechanical or synchronization rights). Although BMI’s consent decree lacks a similar prohibition, in practice BMI does not license any rights other than public performance rights.”) (footnotes omitted). Note that each PRO licenses different musical compositions, thus licensees often pay a blanket license to more than one PRO. *See Licensing FAQ: If a Business Has a License with Another Performing Right Organization, Do They Still Need to License with BMI?*, BMI, <https://www.bmi.com/licensing> (last visited

regularly play music, like restaurants and radio stations, PROs offer blanket licenses rather than individually licensing performances.¹⁷² PROs each control a different catalog of songs, and a blanket license allows a licensee to publicly perform any of the songs in that PRO's repertoire. Blanket licenses are essential for establishments that routinely play music because negotiating a separate license for each public performance is simply impractical, and the transaction costs would be prohibitive.¹⁷³

Decades ago, there were concerns about ASCAP and BMI's anti-competitive behavior ; as a result, both PROs are subject to consent decrees with the Department of Justice.¹⁷⁴ Under the consent decrees, these PROs are required to allow licensees to publicly perform their songs in exchange for a blanket fee. However, the PROs get to decide how much they will charge for that license.¹⁷⁵ In other words, each PRO sets its own license fee, which is often based on the type and size of the business and how music will be performed.¹⁷⁶ If the PRO and putative licensee don't agree on a license fee, the licensee is authorized to challenge the reasonableness of the PRO's license rate.¹⁷⁷ But rate-challenging is an

July 7, 2020) (“[E]ach songwriter or composer may belong to only one performing right organization at any given time, so each PRO licenses a unique repertoire of music.”).

¹⁷² OFFICE OF THE GEN. COUNSEL, U.S. COPYRIGHT OFFICE, *supra* note 110, at 33 (“Most commonly, licensees obtain a blanket license, which allows the licensee to publicly perform any of the musical works in a PRO's repertoire for a flat fee or a percentage of total revenues.”) (footnote omitted). Note that small commercial establishments do not need to obtain a public performance license unless they play live music. *See* 17 U.S.C. § 110(5) (2018).

¹⁷³ KOHN, *supra* note 3, at 482 (“For certain kinds of uses, such as the public performance of music in restaurants, theaters, concert halls, and nightclubs, and broadcast on radio and television, it would be impractical for music publishers to negotiate a separate license for each and every performance that occurs every day throughout the year. The transaction costs would be prohibitive. The arrangement that has evolved for structuring and collecting fees for public performances is the blanket license[.]” (emphasis omitted).

¹⁷⁴ KOHN, *supra* note 3, at 483 (“The American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music Incorporated (BMI), the two largest performance rights societies in the United States, are each subject to court judgments, called consent decrees, which arose out of antitrust actions initiated by the U.S. Department of Justice many years ago.”). *See* *United States v. Am. Soc’y of Composers, Authors & Publishers*, No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001) (second amended final judgment); *United States v. Broad. Music, Inc.*, No. 64 CIV. 3787, 1994 WL 901652 (S.D.N.Y. Nov. 18, 1994) (amended final judgment).

¹⁷⁵ *See* PASSMAN, *supra* note 142, at 230.

¹⁷⁶ ASCAP *Licensing: Frequently Asked Questions*, *supra* note 167. (“The annual rate depends on the type of business. Generally, rates are based on the manner in which music is performed (live, recorded or audio only or audio/visual) and the size of the establishment or potential audience for the music. For example, rates for restaurants, nightclubs, bars and similar establishments depend on whether the music is live or recorded, whether it's audio only or audio visual, the number of nights per week music is offered, whether admission is charged and several other factors.”).

¹⁷⁷ *See Broad. Music, Inc.*, 1994 WL 901652, at *1; *see also Meredith Corp. v. SESAC LLC*, 1 F. Supp. 3d 180, 198 (S.D.N.Y. 2014) (“[I]f ASCAP and a putative licensee could not reach an agreement, the licensee could apply to a ‘rate court’ to set a reasonable fee, with ASCAP bearing the burden of proof as to the reasonableness of its rate.”).

expensive and time-consuming process, which is impractical and unaffordable for average licensees.¹⁷⁸

The scope of a PRO license is limited. A PRO's blanket license authorizes public performances of pre-recorded music and live performances.¹⁷⁹ Although a PRO license does not expressly authorize the live, public performance of a custom song arrangement—like for a show choir, a cappella group, or a parody version—it can be argued that a PRO license must include some implicit permission to make an arrangement that suits the performer.¹⁸⁰ Nonetheless, the parameters of any such implicit authorization are unclear.¹⁸¹ Notwithstanding implicit permission for some amount of performance flair, the creation of a derivative work with more substantial changes or alterations will require a separate license from the rightsholder—unless it qualifies as fair use.¹⁸² Also, PROs blanket licenses don't cover dramatic performances, like musicals.¹⁸³ For a live stage performance, you'll need to negotiate with the

¹⁷⁸ See KOHN, *supra* note 3, at 483 (“Where a licensee believes that the fees quoted by ASCAP or BMI are not reasonable, they may initiate a legal action, called a rate hearing, in a federal court for a determination of a reasonable fee for the use proposed by the licensee. Rate hearings are often lengthy and expensive and are usually initiated by radio and television broadcasters and large users of music on the Internet.”) (emphasis omitted).

¹⁷⁹ *What Does the ASCAP License Do?*, ASCAP, <https://www.ascap.com/help/ascap-licensing> (last visited July 8, 2020) (“Whether your music is live, broadcast, transmitted or played via CD’s or videos, your ASCAP license covers your performances.”).

¹⁸⁰ See Minkoff, *supra* note 164 (“If every new performance of a song (for recording or live performance) is really a new arrangement, and you (through the venue) have paid for the right to perform, but not the right to arrange, then what right do you really have? What real-world benefit did the live performance venue pay for in purchasing that blanket license? No benefit at all! Courts don’t interpret the benefits of a contract to be illusory. There are twists and turns to the contract, details galore, but in essence, composers get money and venues get the ability to perform the composers’ songs. Therefore, I argue, and the nearly uniform general practice follows that, the right to arrange for the purpose of performing under a venue’s blanket license is IMPLIED by the blanket license itself.”).

¹⁸¹ See, e.g., KOHN, *supra* note 3, at 650–51 (“[A]ny public performance of a custom musical arrangement not prepared under the authority of the music copyright owner would not be licensed by ASCAP.”) (footnote omitted); Charles J. Sanders & Steven R. Gordon, *Stranger in Parodies: Weird Al and the Law of Musical Satire*, 1 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 11, 38 (1990) (“Performing rights licenses issued to the broadcaster by ASCAP, BMI and SESAC do not authorize the performance of such parodies. The licenses granted by those organizations grant only the right to publicly perform the separate musical compositions in the organizations’ repertory. These licenses do not authorize licensees to make substantial changes to the individual songs such as the changes required to create a lyric parody. Whether or not such musical parodies are protected under the fair use doctrine depends on the application, on a case by case basis . . .”) (footnote omitted).

¹⁸² KOHN, *supra* note 3, at 651 (“Being that a performance license from a performance rights society is unavailable to permit live public performances of the unlicensed custom arrangements, a musical director would be required to obtain permission for their live public performances of such arrangements.”). See also *Tresóna*, 953 F.3d at 652 (finding a high school show choir’s performance was a fair use).

¹⁸³ *Common Licensing Terms Defined*, ASCAP, <https://www.ascap.com/help/ascap-licensing/licensing-terms-defined> (last visited July 8, 2020) (“ASCAP members grant to ASCAP only the right to license nondramatic performances of their copyrighted musical works.

rightsholder directly, and the typical license fee will depend on the size and prominence of the theatre. For example, an Off-Off Broadway theater, with 99 seats or fewer, could expect a license fee between \$5 to \$10 per performance of a song.¹⁸⁴

To summarize, we've discussed that the rights in a musical composition include the exclusive right to make and publicly distribute copies of the work, the exclusive right to publicly perform the work, and the exclusive right to make a derivative or adaptation of the work.¹⁸⁵ To make copies of the work you may need either a print license (e.g., to make copies of sheet music), a mechanical reproduction license (e.g., to record a cover version of a song), or a synchronization license (e.g., to use a song in a video). To publicly perform the work, you may need a license from a PRO or directly from the songwriter and music publisher. To make a derivative or adaptation, you may need a license directly from the songwriter or music publisher.

In addition to these various licenses to use the musical composition, there are also licenses to use the sound recording. The copying of someone else's sound recording is authorized by a master recording license.¹⁸⁶ For example, Napster's unlicensed filesharing of popular recorded music violated the exclusive right to copy the sound recording.¹⁸⁷ Note that whenever you need a master recording license from the sound recording rightsholder for an audio-only product, like a CD or mix-tape, you'll also need a mechanical reproduction license from the musical composition rightsholder.¹⁸⁸ Similarly, if you want to use a sound recording in an

Thus, an ASCAP license does not authorize dramatic performances of our members' works."'). But note that a PRO license does cover the nondramatic performance of individual songs from a dramatic work.

¹⁸⁴ KOHN, *supra* note 3, at 1697 (explaining an Off Broadway theater, with up to 500 seats, could pay between \$75 to \$250 per week, and an On-Broadway theater could pay between \$250 and \$500 per song per week, or "5% of the gross receipts prorated among all copyrighted songs in the play").

¹⁸⁵ U.S. COPYRIGHT OFFICE, CIRCULAR 56(A), MUSICAL COMPOSITIONS AND SOUND RECORDINGS 2 (rev. Jun. 2020), <https://www.copyright.gov/circs/circ56a.pdf>. To be precise, the exclusive rights also include public display. 17 U.S.C. § 106 (2018).

¹⁸⁶ *What Are the Different Types of Music Licenses?*, SOUNDREEF (May 4, 2012), <https://www.soundreef.com/en/blog/music-licenses/>.

¹⁸⁷ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster users who download files containing copyrighted music violate plaintiffs' reproduction rights."); *see also* *Maverick Recording Co. v. Goldshteyn*, No. 05-CV-4523(DGT), 2006 WL 2166870, at *3 (E.D.N.Y. July 31, 2006) ("Downloading and uploading copyrighted files from a peer-to-peer network constitutes, respectively, reproducing and distributing copyrighted material in violation of 17 U.S.C. § 106."); *London-Sire Records v. Armstrong*, No. 3:05-CV-1771(JBA), 2006 WL 2349615, at *1 (D. Conn. July 28, 2006) (finding that the unauthorized downloading of music infringed plaintiff's reproduction rights in the copyrighted works).

¹⁸⁸ *Music Licensing of Existing Recordings*, EASY SONG LICENSING, <https://www.easysonglicensing.com/pages/help/articles/music-licensing/music-licensing-of-existing-recordings.aspx> (last visited July 8, 2020) ("Whenever you make a new recording of an existing recording that someone else made, even if it's just a small sample (such as audio samples,

audiovisual work, like a video, you will need both a master recording license and a synchronization license—which you will need to acquire from the appropriate rightsholder(s).¹⁸⁹

The legality of creating a mix-tape or digitally sampling another's recorded music occupies a gray zone between infringement and fair use.¹⁹⁰ Whether a license is required for sampling is a question that provokes strong responses; it is a fraught question.¹⁹¹ If a master-use license is indeed required, the rightsholder has the unfettered right to deny a license altogether or may charge an unlimited license fee.¹⁹²

As discussed above, in addition to the exclusive right to copy the sound recording, federal law also offers a limited right to publicly perform the sound recording by digital audio transmission (i.e., music streaming).¹⁹³ In other words, music streaming is a digital public performance for which the sound recording copyright holder has an exclusive right. For streaming services, the law has separate provisions for “interactive services” (i.e., music on demand)—and “non-interactive” services.¹⁹⁴ For non-interactive streaming services, like Pandora, a statutory

karaoke tracks, or background tracks), you need a master license . . . Whenever you need a master license for an audio-only product (such as CDs, digital downloads, and streams), you also need a mechanical license.”). Jacob Wunderlich, *What Is a Master-Use License?*, EXPLORATION (Oct. 2, 2018), <https://exploration.io/what-is-a-master-use-license/> (“to use a portion of a copyrighted sound recording (a sample) in a new sound recording . . . [one] will need both a master-use license and a mechanical license for use of the composition AND the sound recording”).

¹⁸⁹ Wunderlich, *supra* note 188 (“By obtaining a synch license and a master-use license, the rights to both the composition and the sound recording are granted for use within the [audiovisual] project.”).

¹⁹⁰ MATTHEW D. CATANIA & GAETANO D. MARRETTA, *GENERATION MIXTAPE: A USER'S GUIDE TO ONLINE COPYRIGHT 18* (2011) (“Absent a legal decision, many mixtapes exist in a liminal space between copyright infringement and fair use, the intellectual property equivalent of Schrodinger's cat.”) (footnote omitted).

¹⁹¹ The question has created a circuit split. *Compare* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 801 (6th Cir. 2005) (“Get a license or do not sample.”) *with* VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 880, 884, 886 (9th Cir. 2016) (rejecting Bridgeport Music's “bright-line rule” prohibiting “any unauthorized copying—no matter how trivial,” and applying a *de minimis* exception for copyrighted sound recordings).

¹⁹² *See* CATANIA & MARRETTA, *supra* note 190, at 93 (“While some rights holders may grant mixtapes free licenses for noncommercial uses, others may charge a fee ranging from hundreds to thousands of dollars. Rights holders also have the option to withhold composition and sampling licenses from mixtapes.”); *What Is a Master License?*, EASY SONG LICENSING, <https://www.easysonglicensing.com/pages/help/articles/music-licensing/what-is-a-master-license.aspx> (last visited July 8, 2020) (“Note that master licensing can be challenging because, by law, master rights holders maintain total control of their works. This means they can set any fee, take all the time they need, and reject the license outright.”).

¹⁹³ 17 U.S.C. §§ 106(6), 114 (2018).

¹⁹⁴ Reid, *supra* note 133, at 262 (discussing the “complex ‘three-tiered system,’ categorizing license requirements for digital audio transmissions of sound recordings into separate rates for (1) interactive services, (2) non-interactive subscription transmissions, and (3) non-interactive non-subscription transmissions”) (footnotes omitted).

license rate is available.¹⁹⁵ SoundExchange collects and administers the royalties for digital performances of sound recordings.¹⁹⁶ For interactive streaming services, like Spotify, a statutory license is not available, and the rightsholder can demand an unconstrained license fee or deny the use altogether.¹⁹⁷ For qualified digital music providers, the 2018 Music Modernization Act introduced a new blanket compulsory mechanical licensing system for the reproduction and distribution of musical works—whether to facilitate streaming performances or downloads.¹⁹⁸ Note that this new license does not include the sound recording, which is still requires a separate license.¹⁹⁹ There is no one-stop-shopping for music licensing. Figure 4 below summarizes the various rights and rightsholders for copyrighted music.²⁰⁰

¹⁹⁵ 17 U.S.C. § 114(d)(2); *see also* Ben Sisario, *For Pandora, Ruling on Streaming Royalty Rates Is Crucial*, N.Y. TIMES (Dec. 13, 2015), <https://www.nytimes.com/2015/12/14/business/media/for-pandora-ruling-onwebcasting-royalty-rates-is-crucial.html>.

¹⁹⁶ William Glanz, *You Have Questions. We Have Answers.*, SOUNDEXCHANGE (Aug. 22, 2018), <https://www.soundexchange.com/2018/08/22/you-have-questions-we-have-answers/>.

¹⁹⁷ 17 U.S.C. § 114(d)(3); *see also* Sarah Jeong, *A \$1.6 Billion Spotify Lawsuit Is Based on a Law Made for Player Pianos*, THE VERGE (Mar. 14, 2018, 12:28 PM), <https://www.theverge.com/2018/3/14/17117160/spotify-mechanical-license-copyright-wixen-explainer> (“When it comes to sound recordings, Spotify has to negotiate with individual labels and artists.”); Michelle Castillo, *Spotify IPO Filing Reveals How Insanely Complicated It Is to License Music Rights*, CNBC (Feb. 28, 2018, 5:44 PM), <https://www.cnbc.com/2018/02/28/how-spotify-licenses-and-pays-for-music-rights.html> (“[Spotify] has paid more than \$9.7 billion in royalties to artists, music labels and publishers since it launched in 2006.”).

¹⁹⁸ Music Modernization Act of 2018, Pub. L. No. 115-264, 132 Stat. 3676 (codified at 17 U.S.C. § 115 (2018)). Licenses become available January 1, 2021 and are administered by a new mechanical licensing entity. *Designation of Mechanical Licensing Collective and Digital Licensee Coordinator*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/rulemaking/mma-designations/> (last visited July 8, 2020). *See also* BOB GOODLATTE, REPORT AND SECTION BY SECTION ANALYSIS OF H.R. 1551 BY THE CHAIRMEN AND RANKING MEMBERS OF SENATE AND HOUSE JUDICIARY COMMITTEES (2018), https://www.copyright.gov/legislation/mma_conference_report.pdf.

¹⁹⁹ ABRAMS & OCHOA, *supra* note 124, § 5:23 (“[I]n order to engage in digital phonorecord delivery (such as permanent or limited downloads), the digital music provider must also get permission from the copyright owner of the sound recording (unless the digital music provider makes its own sound recordings). In order to engage in interactive streaming, the digital music provider must also get a license to publicly perform the musical works in question (through a performing rights organization such as ASCAP or BMI), and it must get a license to publicly perform the sound recordings from the sound recording copyright owner.”) (footnotes omitted).

²⁰⁰ Note that Figure 4 simplifies the sound recording right to publicly perform by digital transmission. Technically, the law distinguishes between (1) interactive services, (2) non-interactive subscription transmissions, and (3) non-interactive non-subscription transmissions. *See Reid, supra* note 133, at 262.

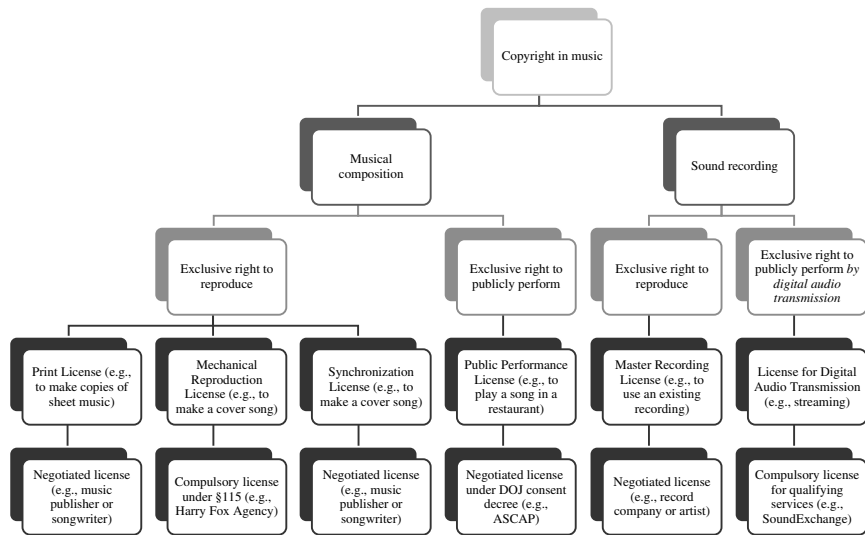


FIGURE 4: LICENSES FOR COPYRIGHTED MUSIC AND LICENSING ENTITIES.

Finding, and then negotiating with, the appropriate rightsholder can be a time-consuming and frustrating process.²⁰¹ Music licensing expert Bob Kohn acknowledges that paying a license fee may sound easy, “but it’s rarely that simple in practice.”²⁰² Copyright creates a divisible and assignable bundle of rights.²⁰³ The original author is often not the current rightsholder,²⁰⁴ and Figure 4 reflects that the original author is often not the standard licensing entity. We still await a single database that can tell

²⁰¹ KOHN, *supra* note 3, at 562 (“If you know the name of the song, or you managed to discover it without too much trouble, the next thing you need to know is who controls the rights to the song. In other words, with whom do you need to deal to obtain a license? This is not as easy a question to answer as you might expect. If you already know the answer, you are way ahead of the game. If you don’t, you may be in for a rude awakening.”).

²⁰² *Id.* at 581 (“Licensing music may sound as simple as knowing the name of the song you want, calling the performance rights society to find out who controls the rights, and obtaining the proper license. It sounds easy, but it’s rarely that simple in practice. Any number of things may come up that will delay the completion of a project that contains copyrighted music.”).

²⁰³ Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 570 (1997) (“Under the modern divisibility rule, it is entirely possible that unrelated entities will own different exclusive rights to the same copyrighted work. Party A may own the exclusive right to reproduce the work in copies, while party B owns certain adaptation rights, and party C owns public performance rights in the work.”).

²⁰⁴ This presumes a single author. Note that identifying the appropriate rightsholder can be particularly challenging when a copyright is jointly held by two or more people. KOHN, *supra* note 3, at 563 (“[I]t is becoming more difficult for anyone to know who owns or controls what song, as publishing interests of an increasing number of songs are being retained by songwriters and an increasing number of songs are becoming the subject of split copyrights[.]”) (emphasis omitted).

you who holds which particular right.²⁰⁵ Licensing vexation isn't reserved for the uninitiated; even for professionals, the process can be daunting.²⁰⁶ Bob Kohn recounts a familiar tale:

[M]usic publishers are well aware of the frustrations that producers experience when trying to track down copyright owners. A music publisher on the other side of a phone call will hear a producer express a long sigh of relief when, after nine or ten phone calls, he learns that he finally located the publisher. That's the good news. Then the producer learns the bad news, that the song is also controlled by three other publishers. When he finally finds all the publishers, he discovers that he also requires a print license to clear his particular use and then gets hit with the news that none of them control the print rights!²⁰⁷

Finding the appropriate rightsholder(s) is only the first step. The next step is negotiating the license fee—which can vary widely. When a song's use is not subject to a statutory license, the price at which a song's use will be authorized is unconstrained.²⁰⁸ A master-use license for a sound recording in a film is often between \$15,000 and \$70,000, depending on the artist's budget and the nature of the use.²⁰⁹ Synchronization licenses for a musical composition, unlike mechanical licenses, are not constrained by a statutory rate.²¹⁰ The fee to use a musical composition

²⁰⁵ The 2018 Music Modernization Act calls for the creation of a new musical database containing information such as the title of a work, its copyright owner and shares owned, and contact information for the copyright owner(s). 17 U.S.C. § 115(d)(3)(E)(i). This yet-to-be created publicly available database of rightsholders will be managed by a new mechanical licensing collecting society. ABRAMS & OCHOA, *supra* note 124, §§ 5:24–5:25.

²⁰⁶ OFFICE OF THE GEN. COUNSEL, U.S. COPYRIGHT OFFICE, *supra* note 110, at 16 (“Our rules for music licensing are complex and daunting even for those familiar with the terrain.”).

²⁰⁷ KOHN, *supra* note 3, at 581.

²⁰⁸ *Id.* at 484–85 (“Whatever the fee structure, songs with higher inherent values can generally command higher fees for their use. A music copyright owner's ability to determine the value of a particular song will vary depending on his experience and access to information about the value of other musical compositions. The value of a song has both quantitative and qualitative factors, both adding up to the present value of the licensing revenue the song is expected to generate during the remainder of the life of the copyright.”).

²⁰⁹ TODD BRABEC & JEFF BRABEC, MUSIC, MONEY, SUCCESS AND THE MOVIES: THE BASICS OF “MUSIC IN FILM” DEALS 6 (2008), https://www.ascap.com/~media/Files/Pdf/career-development/m_m_s_m.pdf (“[R]ecord companies normally charge between \$15,000 and \$70,000 for the use of existing master recordings in a major studio film but, depending on the stature of the artist, the length of the use, the music budget and how the recording is being used, these fees can be greater or less.”).

²¹⁰ PASSMAN, *supra* note 142, at 242 (“The fees for synchronization licenses are really all over the board, and they vary with exactly how the song is used, which media you want, how long you want to use it, and the importance of the song.”).

in a film can vary from \$15,000 to \$60,000.²¹¹ If the song is used during the opening and closing credits the license can be as little as \$30,000 or as much as \$500,000—depending on the importance and artistic relevance of the song.²¹² The more important the rightsholder thinks the song's use is, the more the rightsholder will charge.²¹³ The next Part discusses the therapeutic importance of using patient preferred music—which is often copyrighted music.

III. PROPOSED EXEMPTION FOR THERAPEUTIC USES OF MUSIC

Musical expression may be universal and may exist across cultures, but musical preference is not universal.²¹⁴ Cultural and generational forces exert a strong influence on musical preferences.²¹⁵ It is axiomatic that different people like different music.²¹⁶ And not all experiences with music are the same.²¹⁷

²¹¹ BRABEC & BRABEC, *supra* note 209, at 6 (“The synchronization fees charged by music publishers for major studio films are usually between \$15,000 and \$60,000 (with the majority ranging from \$20,000 to \$45,000) but can be lower if the music budget is small or higher if the song is used several times in the motion picture, if the use is under the opening or closing credits, if the song is a major hit, or if it is vital to the plot or particular scene of the motion picture. There are no hard and fast rules in this area as the fees are negotiated in the context of each individual film; the same song may be licensed at very different rates for different projects (i.e. major studio release, independent film, foreign film, film festival license only, web production, or student film).”).

²¹² *Id.* (“The fees charged by publishers are almost always higher than other uses of music in a film and usually range from between \$30,000 to \$65,000 for synchronization and video rights, but each negotiation and final price depends upon many of the factors mentioned earlier (i.e. budget of the film, music budget, importance of the song, whether there are replacement songs available, etc.). If the title of one of these opening credit songs is also used as the title of the film (but the film's plot is not based on the story line of the song) the fees are increased further (i.e. from \$75,000 to over \$500,000).”).

²¹³ See KOHN, *supra* note 3, at 486 (“The more important the song is in relation to its intended use, the more money the copyright owner can charge in exchange for the license.”); PASSMAN, *supra* note 142, at 243 (“Of course, if it's an incredibly hot, recent hit song, and the film company is salivating over it, these figures can get very high into six figures.”).

²¹⁴ CLAIR, *supra* note 3, at 10 (“[M]usic is universal, but it is not a universal language”); Annette Whitehead-Pleaux, *Burn Care for Children*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN PEDIATRIC CARE 252, 272 (Joke Bradt ed., 2013) (“There is no one type of music or tempo that works for all patients.”).

²¹⁵ CLAIR, *supra* note 3, at 10 (“A person's preference for a particular type or types of music depends on familiarity. Musical preference is, therefore, associated with age, cultural group, and peer group.”).

²¹⁶ See Bridget Doak, *Children and Adolescents with Emotional and Behavioral Disorders in an Inpatient Psychiatric Setting*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN MENTAL HEALTH 168, 173 (Lillian Eyre ed., 2013) (“One of the most common questions asked of a music therapist who works with adolescents is: ‘What kind of music do you use?’ The answer is: ‘It depends.’ The best way to find out the adolescent's preferred music is to ask.”).

²¹⁷ See *id.* at 172 (“Some adolescents report that listening to loud, fast music helps them to become calm. This seems to be opposite the conventional thinking that slow, soft music induces the relaxation response . . . [But i]t is possible that rapid rhythms may have a paradoxical effect in overstimulating subcortical processes that promote relaxation when adolescents listen to rapid, repetitive music.”); Fancourt, *supra* note 17, at 180 (“Music is a complex

Musical preference matters not only to the client,²¹⁸ but it is also relevant to the therapeutic objective.²¹⁹ Sometimes a therapist may want to use familiar and preferred music to help connect with a client.²²⁰ But other times, music without a preexisting association is therapeutically preferred.²²¹ Either way, music selection matters; music isn't fungible. The musical association, whether good or bad,²²² can be therapeutically relevant.²²³ And sometimes the therapeutically appropriate music is someone else's copyrighted music.

Copyright is a limited privilege, not a full property right. The Constitution prescribes that copyright is secured "for limited Times" to "Authors" for the purpose of "promot[ing] the Progress of Science."²²⁴

intervention: singing in a church choir is a different experience to listening to hip hop, rapping, playing the violin in an orchestra, visiting a jazz bar, going to a classical concert or having the radio playing in the background. It is important that distinctions between different types of engagement with or exposure to music in research studies are made as we cannot assume the same biological responses to all types of 'music.'").

²¹⁸ See Gfeller & Davis, *supra* note 9, at 458 ("Because music is such a powerful marker of culture, and because it can elicit powerful emotions, one type of music is not acceptable for all clients.").

²¹⁹ CLAIR, *supra* note 3, at 10 ("[P]referred music is music that is most often used by people and is well integrated into their lives. . . . Music that is not integrated into a person's life may simply have no effect on that individual or may even be offensive, resulting in inattention, agitation, or disengagement."); Gfeller, *supra* note 1, at 52 ("The challenge is to select music that is culturally meaningful, stylistically preferred, appropriate in complexity, within the abilities and interests of individual clients or groups, and appropriate for a given therapeutic objective.") (emphasis omitted) (citations omitted).

²²⁰ CLAIR, *supra* note 3, at 10–11 ("In order for interventions to be efficacious, it is important to determine the preferred music for individual clients. It is the preferred music that is more likely to encourage participation and commitment to the treatment regimen, at least initially. Although many types of music may elicit responses, it is the music with which individuals are familiar that seems to have the greatest potential to evoke emotional reactions and, subsequently, motivate participation.") (citation omitted).

²²¹ See Kathleen M. Murphy, *Adults with Substance Use Disorders*, in GUIDELINES FOR MUSIC THERAPY PRACTICE IN MENTAL HEALTH 449, 489 (Lillian Eyre ed., 2013) ("While music therapy can be extremely beneficial in substance abuse treatment, the use of music can be potentially harmful. As noted in the contraindication sections of several methods, songs used in treatment can induce memories of use, change mood, and induce cravings.").

²²² See, e.g., Gfeller & Davis, *supra* note 9, at 458 ("For example, there are individuals who have lost family members or ancestors to the Nazi Holocaust. For persons with this particular life experience, there are musical selections (such as Wagner's 'Ride of the Valkyries,' which was once played in concentration camps) that could result in tremendous emotional turmoil. Or there are specific musical selections that may be associated with traumatic events for a person who suffers from post-traumatic stress disorder.") (citation omitted).

²²³ See McFerran, *supra* note 64, at 515 ("[I]n lyric substitution, [t]he selection of the song needs to be carefully made, since changing the words to a song that has existing meaning for a young person can be counterproductive. If the song lyrics are already important and helpful, then this technique can effectively disrupt an existing association that may not result in the best therapeutic outcome. Alternately, if the associations are with the pleasure of substance use, then the song may reactivate a desire for using substances and even strengthen that desire. Awareness about existing associations is therefore required in order to consider contraindications.") (citation omitted).

²²⁴ U.S. CONST. art. I, § 8, cl. 8.

Copyright is a limited privilege extended to authors for the purpose of encouraging the creation of socially valuable works. Copyright is an instrumental tool to promote the public good.

To prevent copyright from undermining the public good, the law shields certain pro-social uses.²²⁵ For example, certain non-profit public performances are exempt under copyright.²²⁶ To ensure that face-to-face teaching is not impaired by copyright law, the statute provides an express exemption for such activities.²²⁷ Federal law also exempts public performances like reading the local newspaper on the radio for individuals with visual impairments and other disabilities.²²⁸ Making available copies of works in specialized formats for the blind or other persons with disabilities (e.g., braille) is also exempted from copyright liability.²²⁹ There is also a blanket exemption for an otherwise unauthorized public performance of music in the course of religious services.²³⁰ And sound recordings used in educational television programs by public broadcasting stations are also protected.²³¹

As a matter of copyright policy, we don't want high transaction costs for the user to thwart socially valuable uses of copyrighted works, especially those uses that have a low economic value to the rightsholder.²³² For example, mom-and-pop shops are protected by a statutory

²²⁵ See, e.g., GOLDSTEIN, *supra* note 98, § 7.0.4; 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 14:33, Westlaw (database updated Mar. 2020) (“Section 110 contains many important limitations on the public performance right, designed to permit socially desirable uses of copyrighted works by educational or other nonprofit organizations.”).

²²⁶ 17 U.S.C. §§ 110(1)–(4) (2018). The statute exempts four types of non-profit performances: (1) face-to-face teaching activities; (2) non-profit educational broadcasting and distance learning; (3) performance of religious music during a religious service at a place of worship; and (4) performances that lack any direct or indirect commercial advantage (i.e., no admission charged and no performers paid).

²²⁷ 17 U.S.C. § 110(1) (exempting “performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction . . .”).

²²⁸ 17 U.S.C. § 110(8) (2018). See also 142 CONG. REC. S9066 (daily ed. July 29, 1996) (remarks of Sen. Chafee) (quoting Register of Copyrights, Marybeth Peters, that “[b]lind and physically handicapped readers have a legitimate need for prompt and timely access as soon as possible after works become available to the general reading public[.]” thus an exemption is needed to “permit the speedy access to information that blind people need”).

²²⁹ 17 U.S.C. § 121 (2018). See also PATRY, *supra* note 225, § 11:49 (“This legislation was motivated by book publishers’ poor or nonexistent response to requests for use by educational institutions for the blind and was worked out by the Association of American Publishers and the National Federation of the Blind.”) (footnote omitted).

²³⁰ 17 U.S.C. § 110(3) (exempting “performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly”).

²³¹ 17 U.S.C. § 114(b) (2018).

²³² See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) (discussing tradeoffs of “limiting access to a work against the benefits of providing incentives to create the work in the first place”).

exemption for small businesses that play music.²³³ A statutory safe harbor exists for libraries to make a single archival copy of a work.²³⁴ And playing music at an annual horticultural fair is also protected.²³⁵ Copyright policy reflects the practical reality that the potential revenue from these activities is low, and the high transaction costs would thwart the uses.

The formula for a statutory exemption is thus: a socially valuable use coupled with either high transaction costs for the user or low lost revenue for the rightsholder (or both). As explored below, therapeutic uses of music satisfy this formula. Music therapy offers a range of health and wellness benefits, from the biomedical to the psychotherapeutic. The high transaction cost for therapists to license various uses of music, coupled with the low potential lost revenue to musical artists, justify a carveout under copyright law.

In the therapeutic setting, music is more than mere entertainment; it is a functional tool.²³⁶ Functional tools and useful articles are not protected by copyright.²³⁷ Thus when music is used as a therapeutic tool by a credentialed professional, such use should be exempted from copyright. Functional uses of music were not anticipated in the copyright bargain. Copyright protection automatically attaches to all works that are original and fixed—both of which are low thresholds.²³⁸ The exclusive rights endure for an additional 70 years after the author's death, which means most modern music will be under copyright for all of our lives.²³⁹ The copyright bargain seeks to foster creative expression, and it is fundamentally a poor fit when applied to functional and therapeutic uses of musical works.²⁴⁰

²³³ 17 U.S.C. § 110(5) (2018).

²³⁴ 17 U.S.C. § 108(a) (2018).

²³⁵ 17 U.S.C. § 110(6) (2018) (exempting “performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization . . .”).

²³⁶ See Ashwani Kumar Goyal, Geeta Yadav & Sarita Yadav, *Music Therapy: A Useful Therapeutic Tool for Health, Physical and Mental Growth*, 2 INT’L J. MUSIC THERAPY 13, 13 (2012).

²³⁷ See 17 U.S.C. §§ 101, 113(b) (2018). I acknowledge that certain types of functions—like conveying information—are excluded from the statute’s definition of a “useful article.”

²³⁸ 17 U.S.C. § 102 (2018) (“Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . .”). See also Feist Publ’ns, Inc., v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) (“[T]he requisite level of creativity is extremely low; even a slight amount will suffice.”).

²³⁹ 17 U.S.C. § 302 (2018) (duration of copyright).

²⁴⁰ See Jane C. Ginsburg, “Courts Have Twisted Themselves into Knots”: *U.S. Copyright Protection for Applied Art*, 40 COLUM. J.L. & ARTS 1, 4 (2016) (noting the “legislative policy choice to exclude functional items from the copyright domain, thus confining them to the realm of patents, or, more often, to the public domain”); Viva R. Moffat, *The Copyright/Patent Boundary*, 48 U. RICH. L. REV. 611, 650 (2014) (suggesting “the useful article doctrine is

Doctrinally it is problematic to apply copyright to music therapists' tools, and realistically it is unworkable. Securing permissions to use music is known to be a complex and time-consuming process—even for entertainment professionals.²⁴¹ For music therapists, it is an impractical and prohibitive process. A music therapist's use of music is so varied that a license from ASCAP or BMI is unlikely to cover all of her uses of music. For example, a PRO's blanket license would not authorize creating a mixtape or photocopying song lyrics.²⁴² A PRO license would not cover a slideshow recording that synchronizes a hospice patient's family photos along with her favorite song. And it isn't clear whether a PRO license would apply to the semi-public performance of songs modified and adapted for therapeutic purposes.²⁴³ The Harry Fox Agency licenses the recording of cover songs, but these mechanical licenses are issued on a song-by-song basis, rather than as a blanket license.²⁴⁴ The transaction costs to individually license the various uses of music is prohibitive. Moreover, any lost licensing fees to the songwriter or performer would be modest. Recall that a songwriter typically receives at most a dime for copies of sheet music.²⁴⁵ A songwriter typically receives half of the 9.1¢ per song for a mechanical license.²⁴⁶ And for a non-Broadway public performance of a song, a typical license is between \$5 and \$10 per song.²⁴⁷

As noted above, no license is needed for fair use of music.²⁴⁸ Therapeutically adaptive uses of music arguably constitute fair use. Under the

meant to channel works away from copyright law—toward patent law, or the public domain, or perhaps to a sui generis regime”) (emphasis omitted).

²⁴¹ See, e.g., *Music Licensing Under Title 17 (Part I & II): Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the Comm. on the Judiciary*, 113th Cong. 247 (2014) (statement of Cary Sherman, Chairman and CEO, Recording Industry Association of America).

²⁴² See Paul J. Bezilla, *Some Essential Facts About Music Performance Rights Organizations*, FOX ROTHSCHILD LLP (Sept. 26, 2017), <https://payorplay.foxrothschild.com/2017/09/articles/music/some-essential-facts-about-music-performance-rights-organizations/>.

²⁴³ See *id.*

²⁴⁴ *History of HFA*, *supra* note 150.

²⁴⁵ WAKS & WHITLOCK *supra* note 141, § 4:254 (“The royalties paid on sheet music typically are only a nickel or dime for each copy sold.”).

²⁴⁶ This is, of course, not technically correct; the Harry Fox Agency retains some amount for collecting and administering the license. As William Patry quips, “the old joke reminds us that collecting societies are called collecting societies and not distribution societies for good reason.” 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:119, Westlaw (database last updated Mar. 2020). Nonetheless, this illustrates the point that the songwriter—whom copyright law is designed to incentivize—stands to lose only a modest amount.

²⁴⁷ KOHN, *supra* note 3, at 1697.

²⁴⁸ *Id.* at 561 (“No permission is required to use a musical composition if the use is considered a fair use. However, the determination of whether a particular use falls within the fair use doctrine is often not an easy one, and should not be made lightly, and certainly not without the advice of competent legal counsel. The consequences of being wrong may be a costly lawsuit for copyright infringement.”) (emphasis omitted).

four-factor fair use analysis, a therapeutic use is a “further purpose” and “different character.”²⁴⁹ Moreover, a therapeutic artifact, like a legacy recording of a patient singing her favorite song, is unlikely to affect demand for the original copyrighted song. Nevertheless, the ad hoc, case-by-case basis of evaluating fair use provides insufficient protection for therapeutic activities. Non-lawyers are often admonished to get legal advice and to let a lawyer make the fair use determination.²⁵⁰ In contrast with fair use uncertainty, a statutory exemption would eliminate the guesswork—and the need to hire an attorney.²⁵¹

I spoke with several music therapists as part of this research.²⁵² A consistent message from these therapists is their profound uncertainty about the scope of copyright and reliability of fair use. One music therapist told me that she thinks fair use is “muddy” and “very unclear.”²⁵³ Another reported that it is her understanding that fair use is “very subjective.”²⁵⁴ Music therapists have heard stories about churches and schools being sued for copyright infringement, which makes some therapists uncertain about the efficacy of the fair use defense.²⁵⁵ Therapists have seen that fair use doesn’t save you from the aggravation and cost of a lawsuit. Because of the time and energy it takes to prevail on a fair use defense, several therapists told me that they are nervous and reluctant to rely upon it.²⁵⁶ Even if you win, it still feels like you’ve lost. To avoid the copy-

²⁴⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (explaining fair use inquires whether the new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative’”). See, e.g., *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 327 (S.D.N.Y. 2008) (concluding use of 15-second portion of song in movie for transformative purpose did not usurp market for licensing of song for traditional uses).

²⁵⁰ See KOHN, *supra* note 3, at 1630 (“The application of the doctrine of fair use in any particular case will, therefore, be largely judgmental, and the best a lawyer can do is to review the case books for any cases on point and making an assessment of the risk his client takes by using a work without the permission of the copyright owner.”).

²⁵¹ See PASSMAN, *supra* note 142, at 251 (“The problem is there’s no bright-line test of whether something’s a fair use, so you can’t be sure that you’re okay. And it will be expensive to prove you’re right if the other guy comes after you.”).

²⁵² Telephone Interview with Senior Advisor Policy and Research Consultant, American Music Therapy Association (AMTA) (Oct. 8, 2019). I spoke with a policy consultant for the AMTA, and she shared with me her experiences with clearing copyright licenses for music therapists. She also put me in contact with six music therapy clinicians. Two of the music therapists are tenured faculty at research universities. Four of the interviewees are music therapy clinicians who work at a pediatric hospital. I spoke with these music therapists on condition of anonymity.

²⁵³ Telephone Interview with a Music Therapy Research Faculty Member (Oct. 16, 2019).

²⁵⁴ Telephone Conference Interview with Four Music Therapy Clinicians at a Pediatric Hospital (Oct. 24, 2019). These interviewees work at the same in-patient facility and preferred to speak with me together on a conference call, rather than individually.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

right hassle, one music therapist told me that for legacy recordings for her pediatric patients, she tries to use only public domain songs to avoid copyright; but if a patient strongly prefers a particular (copyrighted) song, the therapist will license the use because she would rather “be safe rather than sorry.”²⁵⁷ Another music therapist told me that she discourages patients from posting therapy recordings on social media due to copyright liability concerns: the potential heartache to family members and headache to her employer is just “too much to risk.”²⁵⁸ Copyright scholars have roundly criticized fair use as a poor *ex ante* guide.²⁵⁹ Music therapists agree.

Other music therapists confessed that while they recognize the law’s uncertainty, they begrudgingly take the risk.²⁶⁰ Some therapists told me they individually make the calculus that their client’s therapeutic benefits outweigh the copyright risks.²⁶¹ But they candidly admit they aren’t fully comfortable with that conclusion; they aren’t uncomfortable occupying a gray area in the law. They hold their breath, cross their fingers, and just hope they, their employers, and their clients won’t get in trouble.²⁶² No one wants to be the test case.

CONCLUSION

Not all therapeutic uses of music implicate copyright law. Pure improvisation or original songwriting do not need anyone’s permission. But what about a therapist and client who record a modified version of a popular song with altered lyrics? What about a terminally ill patient sharing his legacy recording with friends and family via social media? Therapeutic interventions aren’t static; there can be a blend and overlap

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ See, e.g., Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1087 (2007) (“The [fair use] doctrine’s context sensitivity renders it of little value to those who require reasonable *ex ante* certainty about the legality of a proposed use.”); Niva Elkin-Koren & Orit Fischman-Afori, *Rulifying Fair Use*, 59 ARIZ. L. REV. 161, 189 (2017) (“The courts apply the four factors of fair use retrospectively, and this *ex post* determination does not generate any *ex ante* guidance for users as to the scope of the legal risk.”) (footnote omitted); Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 LAW & CONTEMP. PROBS. 185, 185–86 (2007) (“Because fair use relies upon a vague, multi-factor test, it is often impossible to know *ex ante* whether any particular use will qualify as fair.”); see also PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 157 (2d ed. 2018) (“Changing the balance of copyright involves building up fair-use practice.”).

²⁶⁰ Telephone Interview with a Music Therapy Research Faculty Member, *supra* note 253; Telephone Conference Interview with Four Music Therapy Clinicians at a Pediatric Hospital, *supra* note 254.

²⁶¹ Telephone Interview with a Music Therapy Research Faculty Member, *supra* note 253; Telephone Conference Interview with Four Music Therapy Clinicians at a Pediatric Hospital, *supra* note 254.

²⁶² Telephone Conference Interview with Four Music Therapy Clinicians at a Pediatric Hospital, *supra* note 254.

between therapeutic modes. What starts out as original songwriting could evolve into borrowing and modifying an existing song. What starts out as singing a favorite song in a private hospital room could evolve into recording that song as a legacy gift during end-of-life preparations.

It is well known that copyright's broad right to exclude, coupled with the prospect of statutory damages and attorneys' fees, exert powerful chilling forces. Music therapy is a relatively new clinical field, and modern research techniques are giving us new tools to better understand the power of music. Copyright is an unwelcomed interference in the therapeutic process. The growing calls for more mental health awareness and treatment counsel in favor of removing unnecessary impediments and confusion. Therapeutic uses of music warrant safe harbor protection under copyright law: a new statutory exemption is needed.