

Grey Paper No. 7 - April 2003 – Guide to Some Aspects of the use of Copyright Music in Theatres

Music is a valuable asset owned by its creator.

None of us would think that we had the right to perform a play without checking whether we need a licence to do so and paying any required royalty. But we often take a different view when it comes to the use of music. Yet the same copyright laws apply to music as to dramatic works. Indeed in practice the situation is more complicated because a piece of music can generate several copyright interests more easily than can a dramatic piece, so that there may be more than one person interested in 'the copyright', the simplest example being the separate interests of the composer and an arranger of a piece.

The law of copyright is not limited to artistic works, but is there at its most obvious. Anyone who creates an artistic work thereby acquires the exclusive right to regulate what others do with that work in public. So long as the presentation of the work is in public, it makes no difference that no charge is made or that the presenter is an amateur or a charity or that the presentation is for charitable purposes – the permission of the copyright owner must be obtained in advance. The artist may, of course, assign that right to another, so that, for example, someone who writes a short story for a magazine may by contract pass the copyright in the story to the magazine, and a musical composer may assign his rights to a music publisher.

This right persists for **70 years** after the death of the artist. Any arrangement, updating or revision of a work which would otherwise be out of copyright because the original artist died more than 70 years ago is still in copyright if the arranger etc. is alive or died less than 70 years ago. To the extent of the arrangement etc. he is 'the artist'.

The collection of royalties.

In the music industry practical arrangements have emerged to make the policing of public performance and the issue of licences easier – it would be a nightmare if every time someone sang a song or played a record in public an application had to be made to the individual copyright owner. Non-profitmaking organisations called 'collecting societies' have been formed to grant licences and collect royalties on a block basis and distribute net collections among relevant copyright owners. To this end the collecting societies ask, in appropriate cases, for 'play lists' of music used in performances, although they do not require any return of music played, for example, as background music in a bar. The societies pay out net royalties using statistical methods based on actual performance information.

Collecting royalties for those who wrote the music.

Two societies control the use of the music itself – **The Performing Right Society (PRS)** and the **Mechanical-Copyright Protection Society (MCPS)**.

The MCPS controls the recording of copyright music onto CD etc., and **they will have to be approached if you want to make a sound recording of music**. This paper deals no further with that (and does not deal at all with the making of video recordings, except to say that they are prohibited almost without exception.)

The PRS, Performing Right Society's Scheme.

It is the creators of music (composers, songwriters, lyricists and arrangers) and music publishers who can and do subscribe to the PRS, for a fee. The PRS and those dealing with it proceed on the practical assumption that the PRS has the right to do the things which it is empowered to do on behalf of all music copyright owners – neither side seems to enquire whether the PRS has in fact been mandated by each actual owner, so universal is its apparent mandate.

Broadly the PRS has the power to licence the use of copyright music in the following ways which are commonly relevant to LTG members (which in the PRS' scheme are classed as 'permanent repertory theatres') – as some guidance we show the rough amounts (inc. VAT) paid under various heads by Bolton Little Theatre for its licensing year to 5 March 2002:

- ***Overture, Entr'acte and Exit Music*** – this is not defined in the PRS literature, but we take it to mean any music played in the auditorium while an audience is assembling and leaving and at intervals. This is an annual licence for a flat fee – see *PRS Tariff 'T' Theatrical Presentations (£108)*.
- ***Incidental or 'Curtain' Music to Plays*** – this is music heard by the theatre audiences as an accompaniment to a play – the music we use to set a play – but which is not performed by or intended

to be heard by any of the characters in the play. This is an annual licence paid on the basis of a weekly royalty for weeks of performance – see *PRS Tariff 'T' (12 weeks, £82)*.

- **Interpolated Music in Plays** – this is music not specially written for a theatrical production (and not in the two categories above) and which is performed by or intended to be audible to one or more characters in it. This is play-dependent and is calculated as a percentage of box-office receipts, the proportion of the performance time which includes the music, and the size of the theatre – see *PRS Tariff 'T' (Nil)*.
- **Background Music in Bars etc.** – there may be some overlap here with music under the first item above. This is a fixed royalty based on room size and type of 'broadcasting' – see *PRS Tariff 'GP' General Purpose (Nil)*.
- **Musical Entertainments** – for example, a band or group in a performance space or bar. This is calculated as 2% of gross receipts, discounted proportionately where the music occupies only a quarter, a half or three-quarters of the show, or a fixed fee dependent on expenditure on performers and house capacity – see *PRS Tariff 'V' Variety Shows or Tariff GP (£7 per band night under GP)*.
- **Variety Shows, Pantomimes, Music Halls etc.** – excluding those consisting entirely of words and music specially written for them – as above, see *Tariff 'V' or Tariff 'GP' (Christmas Variety Show £78, "Trotters" – a home created musical using some copyright tunes - £57, both GP)*. Note that the inclusion of even a single copyright number will bring this head into play.
- **Songs from the Shows** – this is an area where misunderstanding is widespread, replete with misleading folklore. It is important to understand that the PRS does not deal with what are usually referred to as 'grand rights' – that is performances of dramatico-musical works whose music is specially written for them – operettas, musicals etc.; these are licensed in full and separately by the copyright owners themselves or their agents, in the usual way. The PRS does, however, have power to license the performance of an excerpt from a show or a performance of show songs, provided they are not in any sense presented as the show itself – so to be eligible for licensing by the PRS the presentation from any one show must:
 - Not be longer than 25 minutes;
 - Not be a complete act of the show;
 - Not constitute a potted version of the show;
 - Not be in plot order;
 - Be performed without any change to music or lyrics;
 - Be performed using only published or authorised musical arrangements;
 - Not be dramatised – that is, not use any scenery, costume, choreography, staging, character representation or special lighting.

There is no right to do 'Songs from the Shows' without any licence at all – as above, see *PRS Tariff 'V' or 'GP'*.

PRS licences should be obtained in advance; higher royalties are charged if licences are applied for in arrear – in particular the percentage reductions under Tariff 'V' are not available for *post hoc* applications. Royalties are adjusted annually on 6 January for inflation, and are subject to VAT.

Collecting royalties for those who recorded the music.

There is separate copyright in a *recording* of a musical work, which normally (as a result of various contractual arrangements) rests with the record company. The licensing of the use of copyright recorded work is dealt with by the UK record industry's collecting society, **PPL Phonographic Performance Limited**.

Where recorded works are used, including in any of the specified ways listed above for the PRS licensing, **a PPL licence is *prima facie* also required**. It is an annual licence, costing an LTG Theatre about £50.

In October 2002 Bolton Little Theatre told PPL that it did not think it required a PPL licence thanks to the provisions of Section 67 Copyright, Designs and Patents Act 1988. This reads:

Playing of sound recordings for purposes of club, society etc.

- (1) It is not an infringement of the copyright in a sound recording to play it as part of the activities of, or for the benefit of, a club, society or other organisation if the following conditions are met.
- (2) The conditions are –
 - a) that the organisation is not established or conducted for profit and its main objects are charitable or otherwise concerned with the advancement of religion, education or social welfare, and
 - b) that the proceeds of any charge for admission to the place where the recording is to be heard are applied solely for the purpose of the organisation.

PPL replied that it saw Bolton Little Theatre's point of view, denied that under the terms of the Act a theatre could be considered a club, society or organisation (so that section 67 was not applicable and the theatre could not, by definition, be exempt) but "acknowledged the work that [BLT did and was] prepared at this time to waive future fees". Bolton Little Theatre reserved its position on the technicality.

It might at first flush be thought that this exemption applies to relieve an LTG Theatre from the need for a PRS licence as well, in so far as the music used is recorded, but it does not. The exemption applies only in relation to copyright in the recording and not (which is what PRS is concerned with) in the music itself.

This paper does not cover the allied questions of copying musical scripts or altering or adapting musical works, nor does it cover the licensing of premises for the performance of music, presently under intense discussion in the context of the Licensing Bill before Parliament – for useful up-to-date information on this go to www.musiciansunion.org.uk

Addresses:

The Performing Right Society Limited,
29/33 Berners Street,
London W1P 4AA
0845 300 6033 (T) 0207306 4550 (F)
www.prs.co.uk

Phonographic Performance Limited,
1 Upper James Street,
London W1F 9DE
020 7534 1000 (T) 020 7534 1111 (F)
www.ppluk.com

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