

Creating Authorized Band Arrangements: A Guide for Band Directors, Concert Bands, Marching Bands, Drum Corps & Arrangers

Music Publishers Association of the United States

“Whenever a copyrighted song is arranged, transcribed or adapted for band, the right to create the band arrangement, transcription or adaptation vests solely with the copyright owner.”

If you want to create a band arrangement, adaptation or transcription of a copyrighted song (for simplicity, we will call all of these “arrangements”), there are important steps to ensure that the proper permission has been obtained to create the arrangement legally. It’s not always clear what rights or permissions are needed, or if any are needed at all. So, let’s start at the beginning:

WHAT THE US COPYRIGHT LAW SAYS:

Whenever a copyrighted song is arranged for band, remember that the right to create an arrangement is held solely by the copyright owner.

Under the US Copyright Act (Title 17 of the United States Code) (the “Copyright Act”) at Section 106(2), the copyright owner is granted the exclusive right “to prepare derivative works based upon the copyrighted work.”

Section 101 of the Copyright Act defines a derivative work as a work based upon one or more preexisting works, such as a translation, musical arrangement, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. Thus, in order to legally create and perform a band arrangement, to legally make copies of the arrangement and distribute them, and then publicly perform the arrangement, you need to get permission from the copyright owner.

SEEKING PERMISSION

Every copyrighted song has one or more owners (which might be the songwriter(s) or, more typically, a music publisher) or administrator(s) (usually also a music publisher) who is empowered to handle licensing inquiries on behalf of the owner(s). The best place to start the process of finding the applicable owner(s) or administrator(s) is by looking up the song in the repertory databases on the websites of the performing right organizations (commonly referred to as “PROs”, such as ASCAP, BMI, GMR and SESAC) which will provide contact information for the song’s publisher(s) or administrator(s).

Once you've found the owner(s) or administrator(s), visit their website for the appropriate person or department to contact for licensing. There are also companies that clear music rights in copyrighted songs, including the rights to create and perform derivative works such as band arrangements, on behalf of the owners of the songs.

When you ask for permission to arrange a copyrighted song for band, it's important that you also clarify which rights you are requesting from the copyright owner. There are a number of different rights in a musical composition, and you need to clear each of the rights you want.

Here are some of the rights that may be involved in a request:

- the right to arrange, transcribe and/or adapt a copyrighted song
- the right to print, duplicate, distribute and/or lend, rent and/or sell copies of an arrangement of a copyrighted work
- the right to record a performance of the arrangement in audio-only and/or audio-visual media
- the right to publicly perform the arrangement, whether in live performance or by electronic means such as broadcasting or streaming

Please note that in some cases, not all rights are available from the same party. For example, a music publisher may be able to license an audio-visual recording to be made, but the right of public performance will usually be licensed by the PRO to which the songwriters and publisher belong.

Copyright owners may consider a number of factors when deciding whether or not to grant permission to create a derivative work, including the skill of the arranger, musical style, instrumentation, and the wishes of the songwriters or their heirs. Other elements of a derivative work that a publisher will consider and may not allow include:

- Inclusion of the copyrighted work in a medley with other copyrighted or public domain works;
- Inclusion of the copyrighted work in conjunction with original music created by the arranger;
- Alteration of lyrics or addition of new, original lyrics;
- Changing the key, adding countermelodies or other embellishments, or significantly altering the form or sequence of the work.

If permission to make an arrangement is granted, there may be restrictions on the length of time, context, or usage of the arrangement in live performances, sometimes allowing only for one or more specific events. Please remember that the copyright owner has the legal right to set the terms of use of band arrangements. It is also the copyright owner's legal right to require ownership of the arrangement (since it's a derivative of the copyrighted work) as a condition of granting permission, and then grant nonexclusive usage rights to the arranger under a license. This is often the reality of making an arrangement of someone else's copyrighted work, as compared to creating your own new work.

Can I contact the composer directly for permission?

If you have an established connection to the songwriter or composer whose work you want to arrange, then by all means discuss your idea to create a derivative work. Please keep in mind that for published songwriters and composers, the licensing process will most often need to flow through their publisher or publishing administrator who is empowered to execute these types of licenses on their behalf, even if the songwriter/composer has approved the arrangement.

WHEN A COPYRIGHT OWNER DENIES YOUR REQUEST

There are a many possible reasons why you might not be granted permission to create a band arrangement of a copyrighted song. Some creators and copyright owners may not wish to grant third parties the right to create band arrangements of works in their catalogs or may have other plans for creating derivative works that potentially conflict with your request. Remember, it's the copyright owner's right to grant or withhold permission to create a band arrangement.

“WHAT COULD HAPPEN IF I CREATE AND PERFORM A DERIVATIVE ARRANGEMENT OF A COPYRIGHTED SONG WITHOUT OBTAINING PERMISSION?”

You could be held liable for copyright infringement. Copyright infringement is the act of exercising, without permission or legal authority, one or more of the exclusive rights granted to the copyright owner under Section 106 of the Copyright Act. Copyright infringers may incur civil and criminal penalties. In general, anyone found liable for civil copyright infringement may be ordered to pay either actual damages or, in appropriate cases, “statutory” damages in amounts of not less than \$750 and not more than \$30,000 per work infringed. A court can, in its discretion, also assess costs and attorneys' fees. For “willful” infringement, a court may award up to \$150,000 per work infringed. Willful copyright infringement can also result in criminal penalties, including imprisonment for up to five years and fines of up to \$250,000 per offense.

For details, see the Copyright Act at Sections 504 and 505. For more information, please see the U.S. Copyright Office website, www.copyright.gov, and especially their Frequently Asked Questions at: www.copyright.gov/help/faq.

In addition, the performance of an infringing band arrangement may also exceed the scope of a venue's license agreements with performing rights societies and put the band and others in the position of being copyright infringers as well.

What if I don't receive a reply from the publisher or publishing administrator? Does that mean I can proceed?

No! Approval must be secured in writing. Simply because you did not receive a reply does not mean you are authorized to proceed and is not a legal defense to copyright infringement.

PUBLIC DOMAIN WORKS:

When a work is in the public domain you are free to adapt and arrange it without permission. However, copyright laws in different countries have different terms of protection, so while the work you want to arrange might be in the public domain in one country, it might well be under copyright in another country. It's thus very important to check the worldwide copyright status of a work you believe to be in the public domain, especially if you plan to perform, record or publish it internationally, including by streaming.

FAIR USE:

Fair Use does not cover the unauthorized arrangement of a copyrighted work. You can rearrange, edit, or simplify a copyrighted work for educational purposes, provided you do not change "the fundamental character" of the composition or alter or add lyrics. For more significant alterations, you must contact the publisher in advance for permission. If you are making a recording, see "**WHAT ABOUT MAKING AN ARRANGEMENT ONLY FOR A COVER RECORDING?**" below.

Note: you must seek permission to use any recognizable copyrighted material, regardless of length, for arrangement for use in a performance.

MEDLEYS: For medleys, each copyrighted song counts as a separate song and requires separate permission. Permission of the publisher or publishing administrator of each song is required to create a medley incorporating copyrighted songs.

THE BEST ADVICE FOR BAND DIRECTORS, CONCERT BANDS, MARCHING BANDS, DRUM CORPS & ARRANGERS:

Always ask for and obtain permission before creating and performing an arrangement of a copyrighted song.

Partly because of unauthorized band arrangements that ignore the rights of the songwriters and copyright owners, music publishers are actively enforcing the "arranging right." So, don't rely on anecdotes regarding past practices, or "everyone does it" rationales. A license from the copyright owner allows you to proceed in a manner that respects the rights of everyone in service to great music.

ADDITIONAL INFORMATION

"COVERING" vs. "ARRANGING" A SONG

Arranging, transcribing or adapting a song is different from "covering" a song, and it can be confusing at first to discern the difference. A cover of a song consists of performing the song in substantially the same format and instrumentation as the original. For example, you walk into a

jazz club, and a vocalist is singing a very unique version of Vernon Duke's "Autumn in New York" with a rhythm section. While the singer and rhythm section might interpret the song differently from the original version, the new version or interpretation would not likely rise to the level of being a "derivative work" under the Copyright Act.

It is perfectly legal to perform a cover of a copyrighted song in a public setting, so long as the venue in which the song is performed holds a valid performing rights license (if required – see note below) from the PRO that licenses the song. A PRO has the authority to issue a "blanket license" that grants the right of public performance to venues and organizations for songs registered with, and licensed by, that particular PRO. It's common for a venue such as a club or concert hall to hold blanket licenses from more than one PRO to ensure that all copyrighted songs are properly licensed for public performances.

A band arrangement of a pop song, however, would not typically be considered a "cover", since it involves arranging the song for multiple instruments and preparing a written score and set of instrumental parts. A band arrangement of a copyrighted song constitutes a "derivative work" under Section 106 of the Copyright Act, and thus, permission to create the band arrangement must first be obtained from the copyright owner.

"WHAT ABOUT MAKING AN ARRANGEMENT ONLY FOR A COVER RECORDING?"

Live concert performance license requirements are discussed above but must not be confused with a narrow provision in Section 115(a)(2) of the Copyright Act that describes a limited privilege to interpret works for a cover recording, and clearly reserves derivative work rights to the copyright owner.

Please note, however, that the practices described above in connection with performances and recordings of cover versions of popular songs do **not** apply to classical repertoire. If you wish to make an arrangement of a copyrighted classical work, you must contact the copyright owner for permission.

"MY UNIVERSITY TELLS ME THEY HAVE ASCAP, BMI AND SESAC LICENSES: DOESN'T THAT GIVE ME PERMISSION TO MAKE AN ARRANGEMENT?"

No. The PROs only grant licenses for nondramatic public performances of copyrighted songs in their respective repertoires. Performing a cover of a song is licensed under these performing rights licenses.

However, the PROs do not grant the right to create arrangements of copyrighted works. Only the copyright owner can grant the right to create a derivative work. Further, an unauthorized arrangement of a song performed during a concert at which the song would otherwise be authorized by a license from a PRO may not be covered by the presenter's license agreement with that particular PRO to the extent the unauthorized arrangement is not included in the PROs repertoire.

As an example, ASCAP's Concerts and Recitals Blanket License Agreement states:
"This license does not authorize the performance of any special...arrangements or transcriptions of any musical composition in the ASCAP repertory, unless such arrangements or transcriptions have been copyrighted by members of ASCAP or foreign societies which have granted ASCAP the right to license such performances."

In addition to the public performance right, note that making copies of unauthorized arrangements, and distributing them to bands without permission, are infringements of the copyright owner's exclusive right to reproduce and distribute both the underlying song and derivative works of that song, such as an arrangement.

"SO THERE ARE POTENTIALLY TWO SEPARATE RIGHTS NEEDED TO PERFORM A BAND ARRANGEMENT OF A COPYRIGHTED WORK?"

Yes. Permission of the copyright owner (usually the music publisher, not the original composer) is required to create a band arrangement, in addition to the license (if required – see note below) from the applicable PRO to perform the work publicly. This is because copyright law grants separate and distinct rights to a copyright owner. The practical result is that the right to arrange a copyrighted work is granted by the publisher or other copyright owner, and the right of public performance is usually (though not always) licensed by a PRO to the venue in which the work is being performed.

NOTE ON PERFORMANCE RIGHTS IN SCHOOLS & CHURCHES

Note that religious services and K-12 schools are exempt from the requirement to obtain a performing rights license for *non-dramatic* performances that are part of worship services or instructional activities. (Please note that a performance of a musical, for instance, is a dramatic performance, and not covered under this exemption/. Therefore, a performance license from the copyright owner or its agent is required.) This however does not exempt these organizations from the requirement to obtain other rights (such as the right to create an arrangement) under US copyright law.

Outside performing groups such as non-student orchestras and pop bands performing in schools or churches other than as part of worship services or educational activities are still required to obtain the appropriate performance licenses. These can be obtained by the church or school, or by the performing group.