



Creating, Licensing and Distributing Authorized Orchestral Arrangements, Orchestrations and Transcriptions:

An International Guide for Orchestras, Venues, Conductors, Orchestrators & Arrangers in Presenting Licensed Orchestral Film and Non-Traditional (“Pops”) Concerts

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1. BACKGROUND

The number of non-classical (or non-traditional) symphonic concerts (including orchestral pops and film concerts) has grown significantly worldwide in recent years. The reasons are many, but at the heart of this growth is the desire of orchestras to continue to fulfill their missions by connecting with audiences. Publishers support this growing and important development in the orchestral world and assist its growth by licensing and distributing new orchestral arrangements and ensuring that composers and songwriters are fairly and properly compensated for these new adaptations.

Arrangements, orchestrations and transcriptions of copyright songs and film scores are often a significant component in non-traditional orchestral concerts and other orchestral programming. Unlike original symphonic repertoire composed specifically for orchestra, the mere definition of an orchestral “pops” concert tells you that something’s likely to be different. We might just hear “Paperback Writer” by The Beatles at an orchestral pops concert, but it likely won’t be performed with just four musicians on stage: it’s going to be arranged, transcribed, or adapted for orchestra.

For the creators of these concerts (whether you are a producer, arranger, conductor, or presenter), there are important steps to ensure that the proper rights have been obtained for orchestral arrangements of copyrighted songs.

2. WHAT THIS ARTICLE COVERS

This article addresses what rights, laws and permissions are needed to legally:

- a) Create a derivative arrangement, orchestration or transcription of a copyrighted song or film score.
- b) Duplicate, distribute, rent/hire a copyrighted arrangement, orchestration, or transcription.

3. WHAT COPYRIGHT LAW SAYS

Whenever a copyrighted song is arranged, orchestrated, transcribed, or adapted for orchestra, the right to reproduce the copyrighted song, create the orchestral arrangement, transcription, or adaptation and the right to distribute those arrangements via sale or hire/rental vests solely with the copyright owner worldwide. This is a legal foundation that allows music publishers to protect the rights, and the income, of the composers, lyricists, and songwriters they represent.

Throughout the world, in all 181 countries (out of 195 countries in the world) that are signatories to the Berne Convention for the Protection of Literary and Artistic Rights (1979), it is an infringement of copyright law to create or distribute an orchestral arrangement, orchestration, or transcription of a copyright work (regardless of genre) without the copyright owner's consent.

Specifically, 181 countries agreed to the following:

“Article 2 (3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.”

“Article 12 [Right of Adaptation, Arrangement and Other Alteration] Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.”

The Berne Convention requires its parties to recognize the protection of works of authors from other parties to the convention at least as well as those of its own nationals.

Here are a few examples of how the right of adaptation, arrangement and other alternation, as embodied in the Berne Convention and protected in the Copyright Law of the United States, is applied in copyright law for a few key countries/territories:

USA

In the USA under the 1976 US Copyright Act [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 derivative works as including musical arrangements. Thus, to legally create and perform the orchestral arrangement, transcription, or adaptation, and to legally make copies of the arrangement and distribute them, and then publicly perform the arrangement, permission from the copyright owner is required.

UK

In the United Kingdom, the Copyright Designs and Patents Act Section 16(1)(e) describes the acts restricted by copyright as including the right “...to make an adaptation of the work or do any of the above in relation to an adaptation (see section 21). Section 21(3)(b) of the CDPA defines an “adaptation” in relation to a musical work as “an arrangement or transcription of the work.”

FRANCE

French copyright law, Article L 112-3 IPC provides that: The authors of translations, adaptations, transformations, or arrangements of works of the mind shall enjoy the protection afforded by this Code, without prejudice to the rights of the author of the original work.

In other countries that are party to the Berne Convention, similar copyright laws protect the copyright owners’ right to determine what arrangements can be created and under what business and economic terms, all in support of protecting the rights of the original creators of those works.

While this article mostly references Copyright Law as it applies in the United States, the basic principles of creating licensed derivative arrangements, orchestrations, and transcriptions and obtaining authorization to create and distribute orchestral scores and parts apply worldwide.

4. “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, and typically with a smaller combo without a written score and parts. For example, you walk into a jazz club, and a vocalist is singing a unique version of Vernon Duke’s “Autumn in New York” with rhythm section playing and semi-improvising. 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 being a “derivative work” under the US 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 from the song's performing rights organization (commonly referred to as a "PRO", such as ASCAP, BMI, PRS or GEMA). 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 not uncommon 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.

An orchestral arrangement of a pop song, however, would not typically be considered a "cover", since common practice for orchestral pops concerts involves actually copying the music for the score and parts and also substantially altering the original song by creating a written arrangement, transcription, or adaptation for orchestra. In addition to being a potentially unauthorized copy of the music, an orchestral arrangement of a standard "pop" song constitutes a "derivative work" under Section §106 of the US Copyright Act, and thus, permission to create the orchestral arrangement, transcription or adaptation must first be obtained from the copyright owner.

5. DOESN'T AN ASCAP, BMI or other licenses from other PERFORMING RIGHTS SOCIETIES (such as GEMA, SACEM and PRS) GIVE ME PERMISSION TO ARRANGE, ORCHESTRATE, TRANSCRIBE A COPYRIGHTED WORK?

Performing Rights Societies (PROs) only grant licenses for nondramatic public performances of copyrighted songs in their respective repertoires (in certain territories outside the United States, the PROs may also grant the right to dramatic performances as well). However, the PROs do not grant the right to create arrangements, transcriptions, or adaptations 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 performing rights organization may not be covered by the presenter's license agreement with that particular PRO.

As an example, ASCAP's Concerts and Recitals Blanket License Agreement states:

"This license does not authorize the performance of any special orchestral 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 orchestras without permission, are infringements of the copyright owner's exclusive right to reproduce and distribute both the underlying song and the derivative work arrangement.

6. WHAT ABOUT MAKING AN ARRANGEMENT ONLY FOR A COVER RECORDING? DOESN'T A MECHANICAL LICENSE GIVE ME PERMISSION TO CREATE ARRANGEMENTS, ORCHESTRATIONS, TRANSCRIPTIONS?

Live concert performance license requirements are discussed above but must not be confused with a narrow provision in Section 115(a)(2) of the US Copyright Act that describes a limited privilege to interpret works for a cover recording, and clearly reserves derivative work rights to the copyright owner. It's important to note that obtaining a mechanical license for the purposes of making a cover recording does not include the right to create an authorized arrangement, orchestration, or transcription for public performance outside the special privilege in the recording studio, nor does it convey the right to copy, duplicate, sell, or distribute it in the form of sheet music.

7. SO, I NEED TWO SEPARATE RIGHTS TO PERFORM AN ORCHESTRAL ARRANGEMENT OF A COPYRIGHTED SONG?

You need the permission of the copyright owner (usually the music publisher, not the original composer) to create the derivative orchestral arrangement, transcription, or adaptation, in addition to the license from the respective PRO to perform the work publicly. This is because copyright law grants separate, multiple rights to a copyright owner. The practical result is that the right to arrange a copyrighted work is granted by the publisher, and the right of public performance is usually (though not always) licensed by a PRO.

8. SEEKING PERMISSION

Every copyrighted song has an owner, which might be the author or, more typically, a music publisher who is the copyright owner or exclusive administrator. The best place to start the process is by looking up the song on the ASCAP, BMI or SESAC websites, which will provide contact information for the song's publisher or administrator.

Once you've found the owner, publisher or administrator, you can visit the Music Publishers Association website and download the "[Request for Permission to Arrange](#)" form that can be filled out and sent to the song's publisher.

When you ask for permission to arrange, transcribe, or adapt a copyrighted song for orchestra, it's important that you also clarify what rights the copyright owner is granting to you.

Copyright owners may consider several factors when deciding whether 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 estates, especially where arrangements are part of full evening shows that may deceptively appear to be authorized by the songwriter or artist. Other elements of a derivative work that a publisher considers and may not allow include:

- Inclusion of the copyrighted work in a medley with other copyrighted 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/sequence of the work.

Where permission is granted, there may be restrictions on the length of time, context, or usage of the derivative work in live performances, sometimes allowing only for specific one-time events. It is the right of the copyright owner to allow or restrict such usage of orchestral arrangements, transcriptions, and adaptations.

Note that it is common practice for publishers to insist on owning the arrangement as a work made for hire. It is, after all, based on their copyrighted work, and copyright owners normally do not allow dozens or hundreds of arrangers to become independent “owners” of some portion or derivative of the publisher’s copyright, no matter how good the arrangement may be.

Customarily, the publisher will then consent to performances of authorized arrangements by granting nonexclusive usage rights to the arranger or other performers under a license. This is the reality of making an arrangement of someone else’s copyrighted work, as compared to creating your own new work.

9. WHAT ABOUT COMPANIES THAT AUTHORIZE THE CREATION AND DISTRIBUTION OF ORCHESTRAL ARRANGEMENTS?

There are companies such as [Tresona Music](#) and Hal Leonard’s [ArrangeMe](#) which provide authorization to arrange copyrighted songs for various uses and ensembles. It’s important however to check the terms of your license agreement in utilizing a third-party company regarding what authorizations are granted. For instance, Hal Leonard’s ArrangeMe’s [Terms of Use](#) clearly states that arrangements “...may not be sold, leased, lent, rented, or otherwise distributed for explicit use by a professional symphony.”

10. WHAT ABOUT THIRD-PARTY COMPANIES THAT CLAIM TO OFFER CURATORIAL SERVICES, INCLUDING THE DELIVERY OF ORCHESTRAL SCORES AND PARTS TO ORCHESTRAS?

There are companies that offer to curate, package, and assist in creating film or pops concerts for orchestras. Assisting an orchestra in curating, locating, or helping to obtain/license/purchase/rent or hire copyrighted music from the authorized publisher for a concert is perfectly legal. However, the creation, sale, rental/hire and distribution of copyrighted scores and parts without the permission of the copyright owner is not.

All the major music publishers (including Sony, Universal, Warner, BMG and others) work with the major international classical music publishing companies to ensure their music is properly licensed for orchestral performances via an international network of sub-publisher hire/rental agents. Orchestras and venues should ensure that the companies and agents representing copyrighted music (whether it is classical, commercial or film music) in fact have the legal authority to create and distribute orchestral scores and parts to copyrighted songs and film scores. When in doubt, contact one of the leading orchestral publishers and/or rental agents to confirm “at the source.” In many cases the “pops program” might be listed in the publisher’s catalog or web site, and the orchestral materials will be provided from that same source, not a third party.

Copyrighted orchestral scores and parts are primarily distributed through a network of publishers, sub-publishers, and authorized rental/hire agents. These rental/hire agents are listed on the major classical publisher websites. If an unrecognized company offers to supply you with copyrighted scores and parts for a fee (whether it is a usage, hire/rental, or other fee), ask them if they are authorized to legally distribute and duplicate copyrighted orchestral scores and parts. It is highly unusual for a non-music publishing company to have rights to rent/hire/sell copyrighted orchestral music.

11. WHAT ABOUT THEMED SYMPHONIC PACKAGES SOLD TO ORCHESTRAS? WHAT ABOUT USE OF PHOTOS, VIDEO AND NAME & LIKENESS?

There has been an increase in packaged themed concerts sold to orchestras by third-party companies. These comprehensive packages may include services of a conductor, vocal soloists, and additional elements to enhance the musical experience. However, if a packager is providing copyrighted scores and parts, and there is not a customary rental/hire transaction with a reputable publisher or concert producer, exercising caution is prudent. Legitimate packages will explicitly indicate the authorization and use of performance materials, typically sourced from established publishers' rental/hire departments. Beware of packages offering materials through unconventional means like PDF downloads or printed materials lacking the hallmark of a trusted publisher's rental/hire service.

Branding concerts is a prime concern for orchestras, but where the branding falsely implies the concert is somehow sponsored by, endorsed by, or affiliated with an artist or their estate, there could be infringement of two non-copyright rights. Branding and advertising that emphasizes the celebrity’s name and image prominently or exclusively, when done without consent, gives consumers a false impression and is confusing to consumers, which are the central tenets of trademark law. In addition, celebrities have an additional right that controls commercial use of their name and likeness in advertising. With music concerts, it can be difficult to determine when mere acknowledgment of a songwriter or artist crosses the line into false advertising that implies their endorsement. But where a program is sold primarily based on an artist’s name or

reputation, and that name is the key reason tickets are purchased, it's important to confirm that those focused prominent uses are authorized.

There can also be trademark issues arising from a "catchy" branding name for a full evening concert: it's possible that the original producer has trademarked the show title. If an online search reveals that a catchy show title is used by more than one presenter, it's a good idea to confirm the title is not proprietary.

12. WHEN A COPYRIGHT OWNER DENIES YOUR REQUEST

There is a myriad of possible reasons why you might not be granted permission to create an orchestral arrangement, transcription, or adaptation of a copyrighted song. Some authors and copyright owners may not wish to grant third parties the right to create derivative orchestral 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 an orchestral arrangement, transcription, or adaptation.

13. 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. In the USA, 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 (Title 17 of the United States Code). 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 "statutory" damages in amounts of not less than \$750 and not more than \$30,000 per work infringed. For "willful" infringement, a court may award up to \$150,000 per work infringed. A court can, in its discretion, also assess costs and attorneys' fees.

For details, see Title 17, United States Code, Sections 504, 505. 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 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 illegal orchestral arrangement may also exceed the scope of a concert presenter's license agreements with performing rights societies and put the orchestra and others in the position of being copyright infringers as well.

14. THE BEST ADVICE FOR ORCHESTRAS & VENUES, ALONG WITH ARRANGERS & CONDUCTORS WHO CREATE AND/OR PRESENT ORCHESTRAL NON-CLASSICAL, POPS AND FILM CONCERTS

Always ask for and obtain permission first before creating and performing a derivative arrangement, transcription, or adaptation of a copyrighted song. If an orchestra and/or venue books a pre-packaged pops concert program from a third- party agent or manager, the orchestra and/or venue must ensure that all licensing and permissions are in place and documented for the derivative arrangements used in the concert. The presenting orchestra organization or venue that books such a program could discover that they are, in fact, engaging in multiple acts of copyright infringement for which they share potential liability and damages with the infringing presenter or management company.

Partly because of unauthorized symphonic concert programs 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, “everyone does it” rationales, or misrepresentations of how copyright law actually works (for example misrepresenting that the special arranging privilege for sound recordings also applies in the concert hall). A license from the copyright owner allows you to proceed in a manner that respects the rights of everyone in service to great music.

ADDENDA: RESOURCES

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