



## Creating Authorized Orchestral Pops Arrangements

### A Guide for Orchestras, Venues, Conductors & Arrangers

**T**he number of orchestral pops concerts in the USA has grown significantly in the past decade. For the creators of these concerts (whether you are a producer, arranger,

Arrangements of pops songs are often a significant component in orchestral pops concerts. Unlike original symphonic repertoire composed specifically for orchestra, the

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conductor or presenter), there are important steps to insure that the proper rights have been cleared if songs contained within a symphonic pops concert are copyrighted. It’s not always clear what rights or permissions are needed, or if they’re needed at all. So, let’s start at the beginning:

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.

## US COPYRIGHT LAW

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**“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, in order 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.”**

## WHAT THE LAW SAYS:

Whenever a copyrighted song is arranged, transcribed or adapted for orchestra, the right to create the orchestral arrangement, transcription or adaptation vests solely with the copyright owner. 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, in order 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.

## “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 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 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 or SESAC). 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 insure 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 substantially altering the original song by creating a written arrangement, transcription or adaptation for orchestra. 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.

## “DOESN'T AN ASCAP, BMI & SESAC LICENSE COVER EVERYTHING?”

No. ASCAP, BMI and SESAC only grant licenses for nondramatic public performances of copyrighted songs in their respective repertoires. The PROs, however, 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.

## “SO I NEED TWO SEPARATE RIGHTS TO PERFORM AN ORCHESTRAL ARRANGEMENT OF A COPYRIGHTED SONG?”

Yes. 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.

## “HOW DO I SEEK PERMISSION?”

Every copyrighted song has an owner (which might be the author, or more typically, a music publisher) or administrator (also a music publisher). The best place to start the process is by looking up the song on the ASCAP, BMI or SESAC website, 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 at [www.mpa.org](http://www.mpa.org), click on “copyright resources” and download the “Request for Permission to Arrange” form that can be filled out and sent to the song’s publisher. There are also companies that clear music rights, including the rights to create and perform derivative works such as orchestral arrangements.

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 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 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 (it is, after all, based on their copyrighted work), and then granting 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.

## WHEN A COPYRIGHT OWNER DENIES YOUR REQUEST.

There are 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.

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

**Y**ou 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 (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](http://www.copyright.gov), and especially their Frequently Asked Questions at [www.copyright.gov/help/faq](http://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.

**“WHAT ABOUT MAKING AN ARRANGEMENT ONLY FOR A COVER RECORDING?”**

**L**ive 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.

**“WHAT'S THE BEST ADVICE FOR ORCHESTRAS & VENUES, ALONG WITH ARRANGERS & CONDUCTORS WHO CREATE AND/OR PRESENT ORCHESTRAL POPS CONCERTS?”**

**A**lways 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 insure 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 pops 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, 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.

## About the MPA



Founded in 1895, the Music Publishers Association is the oldest music trade organization in the United States, fostering communication among publishers, dealers, music educators, and all ultimate users of music.

This non-profit association addresses itself to issues pertaining to every area of music publishing with an emphasis on the issues relevant to the publishers of print music for concert and educational purposes.

The MPA serves the industry through its presence at and cooperation with other organizations such as, the American Choral Directors Association, the American Music Center, the American Music Conference, the League of American Orchestras, the Church Music Publishers Association, the International Confederation of Music Publishers, the International Federation of Serious Music Publishers, the Music Library Association, the Major Orchestra Librarians' Association, the National Association for Music Education, the National Orchestra Association, the Music Teachers National Association, and the Retail Print Music Dealers Association.

In addition, MPA members belong to and work cooperatively with the National Music Publishers Association, the Harry Fox Agency and, the performance rights organizations: ASCAP, BMI, and SESAC.

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