

An Orchestra Musician's Guide to Licensing of Online Content

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The very first step when considering an online musical performance is to determine whether the work to be performed is [copyright-protected](#)^[1] or in the [public domain](#)^[3]. Any [public performance](#)^[7] of copyright-protected music requires some kind of license and payment of fees, however music that is in the public domain (not under copyright) is free to use in any form and by any means. The principles of copyright protection are fairly consistent, but the [duration of protection](#)^[2] varies depending on the [territory](#)^[4] in which the performance will reach the public. When an orchestra tours, it must license its live performances in the territories in which they will be heard. Online performances must be licensed according to the rules of the territories in which they can be accessed. *If you want to avoid licensing issues and expenses, simply perform only music that is in the public domain in the countries whose people you wish to reach.*

For copyright-protected music, licensing is the means whereby performing musicians share the [value](#)^[5] of their performance with the [creators](#)^[6] of the work that is performed. Performers, be they soloists, chamber ensembles, orchestras, opera or ballet companies, [communicate with the public](#)^[7] through various means: [live performance](#)^[8], [broadcast](#)^[9], [recording](#)^[10], [online streaming](#)^[11] or [online posting](#)^[12]. These modes of communication exist on various [platforms](#)^[13], and each requires a different kind of [license](#)^[14] with [fees](#)^[16] that vary according to the value of the performance. Licenses are designed to share that value among the participating entities.

Copyright protection is afforded to the original creators, but its administration can (and often is) assigned to an agent that specializes in that area. Print and distribution rights may be assigned to a publisher or music rental agent. Performance and recording rights likewise have their specialty [agents](#)^[15].

If your public performance will include a work that is copyright-protected, you will need to obtain an appropriate license from the designated agent. In order to determine the fee of a license, the agent will ask you to [provide information](#)^[17] as to the revenue-earning potential of your performance.

Under normal circumstances, the process of licensing can take several weeks. This time of isolation due to COVID-19 has created an urgent need for musicians to create online content. It is nonetheless prudent to obtain licenses prior to releasing content since fees can be difficult to predict.

Today's rapidly advancing technology finds representatives of copyright scrambling to keep pace. Before everyone had a video camera on their phone, film, TV and commercial video were the undertakings of larger companies and relatively easy to track. Synchronization licenses derive their name from the synchronization of musical sounds with visual images. By far the largest part of the "Synch" industry involves the use of a pre-existing recording on a newly-made video. (In this scenario, synch licensing protects the property of the performers and recording artists. *It goes without saying that any posting of a performer should be with their permission also!*)

The public's desire to share audio-video content online has been capitalized upon by internet platforms offering shortcuts to licensing. [YouTube](#)^[18], for instance, has its own licenses for the distribution of its content as well as a means of sharing its advertising revenue with copyright holders.

Orchestras or performers that post content on proprietary websites must obtain their own licenses.

1. COPYRIGHT PROTECTION – THE PRINCIPLES

Copyright is a patent on Intellectual Property (IP) or an idea that can be fixed in a tangible medium of expression. (If you can see it, read it, hear it or watch it, it can be protected by copyright law.) Copyright entitles the creator to a bundle of four rights:

1. The right to make a derivative work (arrangement).
2. The right to reproduce or make copies.
3. The right to distribute (by sale or rental).
4. The right to exhibit or perform in public (either live or as a recording).

Useful Link: <https://www.youtube.com/watch?v=GNRdK4IVYFM>

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2. COPYRIGHT DURATION

Copyright Duration varies according to the laws of the territory or country.

- In Canada – 50 years after the death of the last creator (the work becomes Public Domain on January 1 of the 51st year after the last creator's death). This term will increase to 70 years after death when the new CUSMA trade agreement is ratified. (The work becomes Public Domain on January 1 of the 51st/71st year after the last creator's death.)
- In Europe and Russia – 70 years.
- In the U.S. – either 70 years after the death of the last creator or 95 years after publication. (It's confusing.)

See this link to get an idea of copyright variation worldwide. [Don't spend too much time here. Just look at the chart.]

https://commons.wikimedia.org/wiki/Commons:Copyright_rules_by_territory

Here is a practical link for copyright duration in Canada, the U.S. and Europe.

https://imslp.org/wiki/IMSLP:Copyright_Made_Simple

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3. PUBLIC DOMAIN

This link describes Public Domain in three major territories. Note that Canada and Europe remain constant in all charts. The U.S. is much more confusing.

https://imslp.org/wiki/Public_domain

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4. TERRITORY

The countries whose public have access to the performance. Online content can be restricted to particular territories (geoblocked). These restrictions can be designated by the creator of that content. This can allow performers located in countries with shorter copyright durations such as Canada to avoid the fees for licensing in countries with longer copyright durations. The disadvantage is that the content does not reach the widest possible audience.

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5. VALUE

The value of communicating to the public can be financial (ticket sales or advertising) or promotional. A *performance that enhances the status of the performer has positive value, even if no financial exchange (monetization) takes place at the time. In contrast, an [inferior] arrangement could be viewed as damaging (having negative value) to the brand of the creator. Both positive and negative values can prompt the need for some sort of financial settlement.*

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6. CREATORS

Creators are the artistic contributors. For musical works, this is typically a composer and a librettist or lyricist. It is important to understand that copyright extends from after the death of the last artistic contributor. For example, George and Ira Gershwin wrote songs together. George died in 1937, Ira in 1983. Therefore, in Canada, *Rhapsody in Blue* and *American in Paris*, (orchestral works that George wrote alone) are Public Domain, but *I Got Rhythm* and *Embraceable You* (which were collaborations by George and Ira) are still copyright-protected.

Death dates are easily found online.

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7. PUBLIC PERFORMANCE / COMMUNICATION WITH THE PUBLIC

You can perform any work you want in the privacy of your home, car or boat, but any performance of a copyright-protected work that reaches a wider public requires a license according to how that performance reaches the public.

Important terms are:

Platform

The means by which the audience or end user has access to the performance (radio, TV, internet).

Non-Interactive

The performance (either live or recorded) is transmitted in real-time and is only available to those who tune in at that time. (The “audience.”)

Interactive

The performance is recorded and made available for listening (with starting, stopping and backing up) at any time by the viewer / listener. (The “end user.”)

Revenue Generation (“Monetization,” “Behind a Paywall”)

This can be through tickets or advertising.

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8. LIVE PERFORMANCE

An audience attends a live performance (Non-Interactive, obviously).

Revenue is through ticket sales.

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9. BROADCAST

The broadcast of a performance can be live or pre-recorded.

In the time of radio and TV (audiences), this term was understood to be non-interactive.

Revenue is through advertising.

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10. RECORDING

There used to be a clearer separation between live and recorded performances, but now many orchestras are making “Live Recordings” (intended for distribution) and “Archival Recordings” (not intended for distribution). A license is required when making a recording with intent to distribute *or when an archival recording is repurposed for distribution or communication to the public.*

Mechanical License for audio only

Synchronization License for Audio-Video

Recording introduces the likelihood that the performance will be interactive or on demand. (A CD can be played any time, likewise with an online post.)

Revenue is generated according to distribution – sale of CDs or downloads – or advertising on platforms of access (radio, TV, internet).

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11. ONLINE STREAMING

Strictly speaking, “Streaming” is the term for real-time (non-interactive) distribution on the internet.

Audio Only – as when still images accompany the sound.

Audio-Video – The performers are visible. Video is added to the audio work (Synchronization License).

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12. ONLINE POSTING

“Posting” is the preferred term for a performance that has been recorded and can be accessed at the end user’s discretion (interactive).

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13. PLATFORMS

This is the “stage” upon which the performance takes place – an actual stage for live performance, a CD, a radio or TV broadcast, or website (Proprietary website, YouTube, Instagram, Facebook, Twitter...).

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14. TYPES OF LICENSES

Type of Performance	Performing License Required	Source Canada	Source U.S.
Live	Performing License	SOCAN	ASCAP, BMI, SESAC
Audio Recording	Mechanical License	CMRRA	Harry Fox Agency
Audio-Video Recording	Synchronization License	Copyright Holder via Publisher or Synch Agent	Copyright Holder via Publisher or Synch Agent
Make an Arrangement	Create a Derivative Work	Copyright Holder via Publisher	Copyright Holder via Publisher

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15. TYPES OF LICENSES AND AGENCIES

PERFORMANCE LICENSES entitle performers to “communicate to the public” and are specific to the performance platform. These are administered by Performing Rights Organizations (PROs). In Canada – SOCAN / Entandem. In the U.S. – ASCAP, BMI or SESAC.

SOCAN’s 4B2 license for live performance is typically granted as a blanket license on an annual basis. A per-concert fee is determined by the organization’s annual budget then multiplied by the number of concerts given in the year.

SOCAN also offers a 22.D.1 license for “Online Audiovisual Services” accessed in Canada. It costs only \$15.00 per year “for a service with no revenue,” but establishes the mechanism for reporting and paying additional fees for revenue-generating online content. *Direct contact with the copyright holder or publisher is still required for recording or synchronization.*

MECHANICAL LICENSES are administered by the CMRRA (Canadian Musical Reproduction Rights Agency) in Canada and the Harry Fox Agency in the U.S. Fees are based on the revenue-generating potential of the project. (Number of CDs or downloads sold or sometimes the number of hits on a website.)

Synchronization Licenses are obtained from the copyright holder, but may be administered by the publisher or a synch agent. If music has been rented, the rental agency will issue an “enhanced rental agreement.” For music that has been purchased, search on the composer (and lyricist) name and publisher listed on the printed music.

The license to make an arrangement is usually administered by the publisher or rental agent of the printed music, but these agents are often obliged to obtain permission directly from the copyright holder. This process can be time-consuming.

HOW TO FIND THE COPYRIGHT HOLDER OR APPROPRIATE AGENCY

This can be the most difficult part of the process. Useful websites are:

<https://www.cmr.ca/repertoire>

<http://www.socan.com> (See “SOCAN Repertoire”)

<https://www.ascap.com/repertory>

<http://repertoire.bmi.com/StartPage.aspx>

<https://www.sesac.com/#!/repertory/search>

<https://www.mpa.org/streaming-live-music-covid-19-what-you-need-to-know>

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16. FEES

Copyright-protection entitles creators to a portion of the income generated by their works. Whether the value of a public performance is financial or promotional, compensation will most always be financial. Antitrust law prohibits copyright holders or their designated agents from comparing or setting fees. That’s why publishers and agents never talk about their fees and performers find it difficult to get reliable information on which to estimate what licensing costs will be.

While fees are generally not negotiable, the performer’s best approach is to represent their project accurately according to the parameters that influence costs:

- Duration of the performance – longer costs more.
- Size of ensemble – larger costs more.
- A recording costs more than a non-recorded broadcast of a live event.
- An audio-visual performance costs more than audio only.
- On-demand access [interactive] costs more than one-time streaming [non-interactive].
- Availability on platforms – the potential to reach more people will cost more than reaching fewer.
- Duration of availability on platforms – longer costs more [usually 1 year increments].
- Revenue Generation (Are you charging for access? Is the performance behind a paywall?) This will cost more than free access.

Giving complete information with your initial request will speed the issuance of your license and insure accuracy of the fees.

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17. INFORMATION YOU WILL NEED TO PROVIDE

- Your Organization and contact information (website)
- Title of the work
- Composer, Lyricist
- Is this an Audio Only or Audio-Video performance?
- If Audio-Video, is it a performance of a concert work with video of the performers only – or is it a staged work with dancers or actors [ballet or opera]?
- What is the duration of the piece to be performed? [Are there cuts?]
- What is the date of broadcast / stream / post?
- Is it a one-time (non-interactive) stream or a post (interactive) that can be accessed at any time by the end user?
- If a post, for how long will it be available?
- On what platforms will the stream or post be available?
- In what territories can the stream or post be accessed?
- Will there be a fee charged for access? (Paywall)
- What are the names of the performers or ensemble and conductor?

Here is a site that illustrates the process of an online license request:

<http://www.troessexmusic.com/licensing>

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18. YOUTUBE (Information is Power)

This section contains personal opinion and is given with the caveat – “I am not a lawyer” (IANAL).

YouTube has become the dominant force in online content distribution through its strategies of:

- Free posting for its contributors.
- Developing mechanisms through which content contributors can make money through sponsorships, affiliate marketing, and offering services or merchandise.
- Gathering information about its viewership (which it does not share with its content contributors).
- Targeted advertising to its viewership based on what they watch.
- Developing algorithms such as “Content ID” that efficiently (and favourably) share its advertising revenue with copyright holders.

Much like COSTCO, YouTube has used sheer volume to deliver low-priced services to its customers. Contributors of online content are drawn to YouTube to avoid direct contact with and payment to copyright holders – or at least to create a “firewall” between themselves and copyright holders.

This firewall exists because YouTube has developed a means whereby copyright holders can review postings. When YouTube’s “Content ID” algorithm identifies a work that has been claimed by a copyright holder, the copyright holder is given the options of having the post taken down or sharing in the advertising revenue-generated by the number of views. When a post is taken down, its contributor receives a “copyright strike.” There is typically no further action taken by the copyright holder (hence the “firewall,”) however any content contributor that receives three copyright strikes, loses their YouTube privileges.

Copyright Strike

<https://support.google.com/youtube/answer/2814000?hl=en>

In posting on YouTube, content contributors give up the direct link to their viewers offered by a proprietary website. Orchestras or performers that post content on their private websites must obtain their own licenses.

YouTube is also a great source for information about copyright and licensing. Here are some really useful links:

“Know how music rights are managed on YouTube”

<https://creatoracademy.youtube.com/page/lesson/artist-copyright>

“Music and Copyright”

<https://www.youtube.com/watch?v=qe17meaudTI&vl=en>

“Copyright Permissions”

<https://www.youtube.com/watch?v=6pgMtJHg9gg&vl=en>

“Copyright Takedown and Content ID”

<https://www.youtube.com/watch?v=4qfV0PRsCrs&list=PLpjK416fmKwRnRbv72ksHRYEknNSaAFkd>

“Content ID Disputes”

https://www.youtube.com/watch?v=_rdUXBad_LU&list=PLpjK416fmKwRnRbv72ksHRYEknNSaAFkd&index=8

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