As a professor and attorney, I am often asked what needs to be done with respect to the copyright when making an arrangement of an existing piece of music. As is usually the case with legal inquiries of all natures, the general answer is “it depends.” To answer this question, a number of key fact-specific pieces of information are needed. How those specific pieces combine can lead to a variety of answers. Let’s examine two examples:

(a) Joey Smith wants to make an arrangement of “Yellow Submarine,” credited as written by John Lennon and Paul McCartney, and first published in 1966.

(b) Susie White wants to make an arrangement of “Flight of the Bumblebee,” credited as written by Nikolai Rimsky-Korsakov in 1899–1900.

What Is the Type of Arrangement?

The first piece of information that will influence the answer to the copyright question is how the arrangement specifically modifies the original music. In some cases, the arrangement is the adaptation of a musical work for performance in a different way, such as by instruments different from those for which the work was originally composed. I like to call this a purely adaptive arrangement. A purely adaptive arrangement doesn’t alter the primary or secondary melody of the piece, and it keeps the chord progressions consistent with the original work. If the piece includes lyrics, a purely adaptive arrangement would not alter the lyrics, other than perhaps to change them from one gender perspective to the other.

In other cases, the arrangement uses the original musical work as a foundation, but the arranger adds their own additional creative contribution. I like to call this a contributive arrangement. The writer of a contributive arrangement has somehow changed the character of the original work in such a way that the melody or chord progression is no longer consistent with the original, or the lyrics have been altered. Some people may not use the term arrangement at all when talking about this type of alteration to a musical work. Indeed, the terms adaptation or variation may be more appropriate.

A parody would be considered a contributive arrangement; however, copyright law treats parodies differently from other contributive arrangements. Analysis would be needed to determine whether a so-called parody is actually a parody under copyright law and whether the likelihood of successfully presenting a defense of fair use would eliminate the need to request a license. The topic of parody and fair use is complex enough to warrant its own article.

Is the Work Protected?

The third piece of information is the determination of whether or not the musical work being arranged is entitled to copyright protection under U.S. law. Explaining in detail how to determine the copyright status of a musical work is complex enough to warrant its own article. An Internet search of the words “copyright protection chart” will return a list of websites providing easy-to-read charts. There is a particularly good one on the website of the law firm Brown & Michaels, PC, at www.bpmlegal.com/copyterm.html. To make this analysis easy for our examples, a very quick read of one of these charts would confirm what your gut has probably already told you: “Flight of the Bumblebee” is no longer protected, while “Yellow Submarine” is.

Once these three key pieces of information are determined, we can apply the copyright law to our facts to determine the legal considerations. Let’s look at our two examples again, combined with the additional information.

1. A purely adaptive arrangement of “Yellow Submarine” for live performance.

Permission analysis: Examples of a purely adaptive arrangement of this musical work might be an arrangement for oboe of an audience; (2) for the recording of a performance, whether as an audio-only recording or an audio/video recording, with the intention of distributing the recording; and/or (3) for distribution as sheet music.
with no other changes or an arrangement in the style of reggae. Based on these specific facts, this arrangement may not be publicly performed without permission from the owner of the copyright in the musical work. Obtaining this type of permission, a “public performance license,” is quite easy and has probably already been obtained. Typically, locations where music is performed publicly, such as concert halls, parks, and nightclubs, already have obtained this type of license from the three performing rights organizations (PROs) in the U.S. (ASCAP, BMI, and SESAC) in a blanket way that includes all performances at their location. These three PROs grant these rights on behalf of virtually every music publisher and songwriter in the United States. These licenses are very broad and would include situations where only a portion of the original musical work or arrangement was performed. Therefore, the writer of this arrangement has nothing further to do in terms of obtaining permission for the performance beyond confirming with the location that the blanket licenses are already in place.

Rights of the arranger: Because this is an arrangement of a musical work still under copyright protection, the arranger will not be considered to have established rights in their arrangement without permission from the owner of the copyright in the musical work.

2. Contributive arrangement of “Yellow Submarine” for live performance.

Permission analysis: Examples of a contributive arrangement of this musical work might be the replacement of the lyrics with newly written rap lyrics, or a translation of the original lyrics from English to Spanish. Based on these specific facts, this arrangement may not be publicly performed without permission from the owner of the copyright in the musical work. Because of the nature of a contributive arrangement, which somehow alters the character of the original musical work, the blanket licenses issued by the PROs would not include the performance of this type of arrangement. In this situation, the arranger must go directly to the owner of the copyright in the musical work and ask for permission. The owner may or may not agree to authorize the arrangement and may condition their authorization upon payment of fees when the license is granted, payment of future royalties, or both. Copyright owners of musical works have a particularly difficult time policing this type of use of an unauthorized arrangement because of the transient nature of a live performance.

Rights of the arranger: The analysis for this is exactly the same as in the first example.

3. Purely adaptive arrangement of “Yellow Submarine” for use in a recording.

Permission analysis: Examples of a purely adaptive arrangement of this musical work might be an arrangement for oboe, or an arrangement to support performance in the style of reggae. Based on these specific examples and facts, this arrangement may not be recorded for use in a way that will involve reproducing and distributing the recording, whether for free or not, without permission from the owner of the copyright in the musical work. Since this is a purely adaptive arrangement, obtaining this type of permission, called
a “mechanical license,” is generally not very difficult. There are a few companies that provide this licensing service. One is the Harry Fox Agency, which acts as the mechanical licensing agent on behalf of virtually all music publishers in the United States (www.harryfox.com); the other is Limelight, a mechanical licensing service that you can hire to secure a license for you (www.songclearance.com). The fees charged by both companies are similar.

Rights of the arranger: The analysis for this is exactly the same as in the first example.

4. Contributive arrangement of “Yellow Submarine” for use in a recording.

Permission analysis: Examples of a contributive arrangement of this musical work might be the replacement of the lyrics with newly written rap lyrics, or a translation of the original lyrics from English to Spanish. Based on these specific facts, this arrangement may not be recorded for use in a way that will involve reproducing and distributing the recording, whether for free or not, without permission from the owner of the copyright in the musical work. Since this is a contributory arrangement, this permission cannot be obtained by simply getting a mechanical license. In this situation, the arranger must go directly to the owner of the copyright in the musical work and ask for permission. The owner may or may not agree to authorize the arrangement, and may condition their authorization upon payment of fees at the time of recording, payment of future royalties, or both.

Rights of the arranger: In this case, if authorization is obtained from the owner of the copyright in the musical work, the negotiation leading to the authorization will typically also address whether or not the arranger will be granted any copyright ownership rights to the arrangement and/or rights to receive a share of future revenues generated by additional use of the arrangement.

5. Purely adaptive arrangement or contributive arrangement of “Yellow Submarine” for distribution as sheet music.

Permission analysis: Examples of a purely adaptive arrangement of this musical work might be an arrangement for oboe or an arrangement to support performance in the style of reggae. Based on these specific facts, this arrangement cannot be distributed as sheet music without the permission of the owner of the copyright in the musical work. In this situation, the arranger must go directly to the owner of the copyright in the musical work and ask for permission. The owner may or may not agree to authorize the arrangement and may condition their authorization upon payment of fees when the license is granted, payment of future royalties, or both.

Rights of the arranger: In this case, if authorization is obtained from the owner of the copyright in the musical work, the negotiation leading to the authorization will typically also address whether or not the arranger will be granted any copyright ownership rights to the arrangement and/or rights to receive a share of future revenues generated by additional use of the arrangement.

6. Any type of arrangement of “Flight of the Bumblebee” for any purpose.

Permission analysis: Since this original musical work is no longer entitled to copyright protection, no permission is needed to make any type of arrangement for any purpose.

Rights of the arranger: The arranger, in this case, is entitled to claim copyright protection for their new arrangement. If someone else were to want to publicly perform or record and distribute the arrangement, they would need to obtain permission from the writer or the writer’s music publisher or publisher’s agent (e.g. ASCAP, BMI, SESAC, or Harry Fox Agency).

The above examples are provided to help unravel the complexities of music licensing and copyright. Not understanding the right type of license to get, or how to get one, is not an excuse to commit copyright infringement. Today, more than ever, there are many informative resources, organizations, and service providers available to music educators to help them understand and follow the copyright law.

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January 14: Online Pre-registration Deadline

January 19: Final day to cancel hotel reservations without incurring a $50 penalty

January 20: TMEA Member Housing Reservation Deadline

January 25: Final day to use the TMEA hotel reservation system to make reservation updates

February 9–12: TMEA Clinic/Convention