

Unraveling the Complexity of Music Copyright

John Tooth, Becky Smith, Jeannie Bail¹

Open Shelf October 1, 2015

<http://www.Open-Shelf.ca/151001-music-copyright>



Margaret Ann Wilkinson (mawilk@uwo.ca) is Canadian Library Association Copyright Committee editor for the Copyright Column. These copyright columns are authored or co-authored by members of CLA's Copyright Committee, and are published after peer-review by the rest of the Committee. The opinions expressed in these columns are those of the authors and do not represent the position of the Committee, of CLA or of OLA on any given topic. No column is intended to provide legal advice.

Introduction

In 2014, the Newfoundland and Labrador Department of Education decided that it would like to use the Katy Perry song "Roar" as background music in a video to be created showing how to perform a dance choreographed to "Roar." The plan was to distribute a link to the video to all schools in the province a month before "violence awareness week" and students would learn the dance in physical education class. The song "Roar", which is about being your own best champion ("I went from zero to my own hero..."²), was carefully chosen by the Department (in consultation with the proposed choreographer). It was selected not just for its popularity, but for its message of self-empowerment and standing up for yourself to combat bullying. These sentiments fit perfectly within the violence awareness week's theme of "Find Your Voice, Not Violence." The culmination of the idea was that, during violence awareness week, all K-12 students across the province would perform the dance at the same time, flash-mob style, and thereby be united in a message to stop bullying. The Department was willing to pay to secure the necessary copyright permissions, but, after all copyright holders were identified and contacted, it was unable to create the initial video (setting the proposed choreography to "Roar") as it could not secure permission from Katy Perry's record label, Capitol Records.³ A year later, the Department is still unable to move forward with its choreographed "flash-mob style" idea, hampered by copyright.

While the topic of copyright, in general, tends to be one that raises a lot of confusion and uncertainty, when the issue involves music, a whole new level of complexity is often introduced. Couple the intricacies of copyright in music with the notion that music is meant to be enjoyed and shared, it is not surprising that a large number of copyright infringement cases reported in

¹ The authors would like to thank Margaret Ann Wilkinson for her skillful editorial direction.

² Katy Perry et al. "Roar" *Prism*. (Capitol Records, 2013).

³ Because there were multiple publishers involved, at one point it was suggested to the Department that a music clearance company be hired, due to the difficulty of clearing copyright for music.

the media center on popular music. From the American Napster⁴ lawsuit to the recent American suit in which Pharrell Williams and Robin Thicke's "Blurred Lines" was found to infringe on Marvin Gaye's "Got to Give It Up",⁵ there have been no shortage of examples of high-profile copyright infringement cases involving music.

Even where there is no infringement, the complexity of music copyright is evident: a *New Yorker* article about the streaming music service Spotify reported that CEO Daniel Ek grossly underestimated the amount of time and expertise needed to obtain global licenses from the major music companies: he thought it would take six weeks; it took two years.⁶ If the complexities of music licensing and copyright are enough to boggle the mind of a technologist and music company CEO, what about the rest of us?

In November 2012, the *Copyright Modernization Act*⁷ amended s 29 of the *Copyright Act*⁸ to include "education" as an allowable fair dealing purpose. With the addition of "education," much has been written about the interpretation of fair dealing for educational institutions. However, little guidance has been provided on non-text formats, particularly music. A review of copyright guidelines from the Association of Universities and Colleges of Canada (AUCC)⁹ reveals little information on the treatment of music (and what little it does say is discussed further within this column).¹⁰ The Association of Canadian Community Colleges (ACCC) did have a policy similar to that of the AUCC but, now known as Colleges and Institutes Canada (CICan), it no longer appears to post such a policy on its website.¹¹ However, in 2012, the Council of Ministers of Education, Canada (CMEC) released a 3rd edition of *Copyright Matters!*, which does address questions about the reproduction of musical scores, and the performance of musical works.¹² In general, however, one might expect that the best sources of music copyright information would tend to be from specialized organizations such as the Music Library Association (MLA), which

⁴ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

⁵ *Williams, et al v Bridgeport Music, Inc, et. al*, 2013 U.S. Dist. Ct. Pleadings (C.D. Cal., Aug. 15, 2013) (No. cv-13-06004). This case has resulted in a jury decision in favour of the Gaye family: see Emily Yahr, "Robin Thicke, Pharrell Williams owe Marvin Gaye's family [US] \$7.4 million for "Blurred Lines," jury decides," *Washington Post*, March 10, 2015. <http://www.washingtonpost.com/blogs/style-blog/wp/2015/03/10/robin-thicke-pharrell-williams-owe-marvin-gayes-family-7-4-million-for-blurred-lines-jury-decides/> [Note that in Canada copyright infringement cases do not come before juries.]

⁶ John Seabrook, "Revenue Streams: Is Spotify the Music Industry's Friend or Its Foe?" (24 November, 2014) *The New Yorker* 68.

⁷ SC 2012 c 20.

⁸ RSC 1985 c C-42.

⁹ <http://www.aucc.ca/fair-dealing-policy-for-universities/>

¹⁰ It may be noted that the Canadian Association of University Teachers (CAUT) represents many Canadian university professors and it published its own model "CAUT Guidelines for the Use of Copyrighted Material" which, as revised in 2013 ("Revised CAUT Guidelines for the Use of Copyrighted Material") appear at [http://www.caut.ca/docs/default-source/copyright/revised-caut-guidelines-for-the-use-of-copyrighted-material-\(feb-2013\).pdf](http://www.caut.ca/docs/default-source/copyright/revised-caut-guidelines-for-the-use-of-copyrighted-material-(feb-2013).pdf). This model also deals little with the treatment of music.

¹¹ See Association of Canadian Community Colleges. "Fair Dealing Policy." (30 August, 2012) and see also <http://www.collegesinstitutes.ca>.

¹² Wanda Noel & Jordan Snel. "Copyright Matters! Some Key Questions & Answers for Teachers." (2012), see http://www.cmec.ca/Publications/Lists/Publications/Attachments/291/Copyright_Matters.pdf The authors point out in their Introduction that they "have sought to simplify a very complex subject. The booklet is not a substitute for legal advice, which should be sought in cases where the application of general principles is unclear." The answers provided by the authors for the questions posed sometimes address "schools" and sometimes "educational institutions"—not all schools can access users' rights that are limited under the *Copyright Act* to an "educational institution"(as will be discussed further below).

features a “Copyright for Music Librarians” resource on its website.¹³ However, this resource is U.S.-focused, and is of limited value to educators working with music in Canada, as the copyright laws of the two countries differ. The Canadian Association of Music Libraries, Archives and Documentation Centres (CAML), the Canadian equivalent to MLA, does not provide any resources relating to copyright on its website, although copyright issues are addressed within its membership, either by direct correspondence between members, or via its Listserv.¹⁴

This column, recognizing a gap in information regarding the treatment of music, will address some of the common issues that arise with music copyright in an educational setting.

Addressing the issues

Copyright as it applies to music covers more than just who controls the ability to photocopy scores. It deals with today’s technology of music, covering the digitization and sharing of musical content. In addition to declaring the right to copy as a monopoly belonging to the various copyright holders involved in music, the Canadian *Copyright Act* makes stipulations about who holds the right to perform and communicate to the public both recorded and live music.¹⁵

For those involved in music education at any level, we all eventually experience issues with copyright. While music educators in K-12 have textbooks or curriculum implementation documents which provide some of the printed music they need (and in which others may be presumed to have appropriately cleared the rights for some uses of this material in schools), the responsibility for ascertaining whether any copying or performance of this music is actually permitted lies with the user. Schools continue to struggle with the legal acquisition of musical scores. Music obtained for concerts and other performances (such as performances of musicals), sometimes performed for profit and sometimes not, sometimes before parents and sometimes other audiences, sometimes on school premises and sometimes elsewhere, requires diligent attention to ensure any royalties owed for copyright permissions are paid, if required, by publishers or other rights holders. Such music can take the form of scores played by student musicians or recordings played to support student actors or dancers: copyright issues differ depending upon each case. In many cases, the use of popular music is desired to make connections with students, but, as seen in the above example of “Roar”, popular music can be the most problematic (of all types of music) for which to obtain clearance for either copying or performing such material.

What we call “music” involves various definitions in the *Copyright Act*. Musical scores are considered a “musical work” in the Act: “any work of music or musical composition, with or without words, and includes any compilation...”¹⁶ and all the rights accorded an **author** in the Act arise in the **composer** when a composition is written or created (including the moral

¹³ Music Library Association. “Copyright for Music Librarians.” (n.d.) online: <http://copyright.musiclibraryassoc.org/>

¹⁴ Note: non-members can join the CAML listserv (CANMUS-L). To join, contact canmus-l@yorku.ca

¹⁵ In terms of musical works, see the right to make a sound recording (*Copyright Act*, supra note 8 s 3(1) (d)), the right to present the work in a cinematographic work (s 3(1)(e), and the right to communicate the work to the public by telecommunication (s 3(1)(f)). And, for a sound recording, see the right to communicate it to the public by telecommunication (s 18(1.1)).

¹⁶ Supra s 2 “musical work” (a definition amended in 1993, it no longer includes any notion of a fixation of a musical work in order to be a musical work).

rights).¹⁷ If there are lyrics with the composition, rights as author also arise in the **lyricist**. The copyright holders in a musical work (which may or may not be fixed in a score) have the right to control performance of the work.¹⁸ When such a musical work is performed, a separate set of rights arises in the **performer** which give the performer control over such future uses such as broadcasting or recording that performance and then the making of further uses of any recording or broadcast made.¹⁹ In performances given since the *Copyright Modernization Act* came into force in 2012, a performer also holds moral rights in her or his performance.²⁰ The right to record the musical work itself remains a right of the copyright owners of the musical work.²¹ If a performance of a musical work is recorded, a third separate set of rights is given, under the *Copyright Act*, to the **maker** of that recording, including rights to initially publishing the recording and reproducing the recording.²² Each rightsholder's set of rights continues to co-exist with those of other types of rightsholders as they are added (each for the relevant term set out in the Act). Typically in the music industry the rights are "gathered" together as each product is created: a music producer typically gathers together all the rights involved in making an "album" – and then a film producer will, in turn, gather the rights to all the music (including music from albums) used in a movie.²³ This can make it straightforward for users in the schools to deal with one entity which has acquired all the rights from all those who were originally vested with rights under the statute as each musical work, performance and sound recording comes into being. It is the responsibility of the user to identify and seek out the appropriate rights holders. When getting permissions, it is best to have the party by whom the permission is being provided to you warrant in the permission documentation that it actually does hold all the relevant rights and can grant permission for the use requested.

Copying printed music

One might think that, since copyright in works lasts only for roughly fifty years after the death of the composer,²⁴ compositions by eighteenth or nineteenth century composers can never be found in works currently in copyright. However, most sheet music available today has been extensively edited from the original scores. Editions of works containing substantial editorial contributions create copyright interests in the editor which last for the lifetime of the editor and a further fifty years. Music publishers and distributors are generally relying upon these copyright interests, which means permissions must be sought to make copyrighted uses of these materials.

Where there are not modern editions, because printed music does not have the extra "layers" of copyright that audio collections involve, institutions such as the Library of Congress, Johns Hopkins, and the Eastman School of Music (University of Rochester), among others, have worked to digitize scores (especially of popular music) where copyright on the original score has expired in the jurisdiction where the collection is being digitized.²⁵ Many of these collections have been linked to by the International Music Score Library Project (IMSLP), a project that

¹⁷ See, at least, *supra* s 3, s 14.1 and s 28.2(1).

¹⁸ *Supra* s 3(1).

¹⁹ See *supra* s 15.

²⁰ *Supra* ss 17.1 & 17.2.

²¹ *Supra* s 3(1)(d).

²² See *supra* s 18.

²³ These rights arise under *Copyright Act* *supra* s 3(1)(e).

²⁴ *Supra* s 6.

²⁵ Since only the copyright of the musical score is involved, it is thought to be easier to be certain all copyright interests have expired than in the case of audio recordings.

provides access to digitized scores through wiki software. As it is open source, IMSLP has included copyright notices for the site which are encountered as you attempt to access a given work and which make the distinction that not all of the scores contained within are out of copyright in every nation and that the existence of copyright will depend upon the nation from which one is accessing the site.²⁶ The streaming music providers Naxos and Alexander Street Press (with its Classical Music Library) have also developed collections of digitized scores though some content contained within is universally out of copyright and often already very readily available in library collections.

Fair Dealing for Printed Music

Unless there is a contract in place to the contrary, it is clear that certain uses of printed music can be made under the “fair dealing” users’ rights which all schools, including those operated for-profit, enjoy. Determining exactly how and when such use can be made, however, remains difficult – even though Parliament in 2012 extended the ambit of fair dealing to include use for the purpose of education.

The fair dealing exceptions to the rights of rights holders are legislated in sections 29, 29.1 and 29.2 of the *Copyright Act*. The Supreme Court in 2004 (before “education” was added to this part of the statute) provided direction on how those sections were to be applied.²⁷ Even before “education” was added, it was determined explicitly by the Supreme Court that fair dealing uses were available in schools through the purposes of “research or private study” already legislated as part of fair dealing.²⁸ However, determination of whether a dealing is “fair” involves consideration of a series of factors in addition to the purpose of the dealing,²⁹ one of which is the amount of the dealing involved and another of which is the character of the dealing. The Supreme Court has already confirmed that using short excerpts of works may be fair³⁰ -- and, indeed, indicated that there are cases where using the whole of a work may be fair³¹ – but there are other factors to be considered besides the size of the taking. The authors of *Copyright Matters!* indicate that copying an entire musical score when it is not part of a work containing other musical scores will not be fair but they do not assist in defining a “short excerpt,” nor do they describe when using a short excerpt is fair (for instance, could it be fair if that one use was all the user required and there were not multiple scores involved in the work?).³² Some music publishers consider any copying of a publication to be illegal and thus seek to prevent even the copying of one page to facilitate turning a page while playing the music – but, absent contract, this position seems unreasonable.

The guidelines for fair dealing provided by the Association of Universities and Colleges of Canada (AUCC),³³ do not specifically speak to music, except in the following instances of a “short excerpt”:

²⁶ For instance, while copyright in a musical work expires 50 years after the death of the composer in Canada, it will expire only 70 years after the death of the composer in the United States.

²⁷ *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC13 [CCH]

²⁸ See especially *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* 2012 SCC 37 [Alberta].

²⁹ CCH supra note 26 at para 53.

³⁰ Supra at para 52.

³¹ Supra at para 56.

³² Noel & Snel, supra note 12 at 8.

³³ Supra note 9.

- (a) Up to 10% of a copyright-protected work (including a ... musical score...)
- (f) An entire single ... musical score from a copyright-protected work containing other ... musical scores

The CMEC's "*Copyrights Matters!*" says specifically that "A single copy of a short excerpt from a copyright-protected work may be provided or communicated to each student enrolled in a class or course

- a. as a class handout;
- b. as a posting to a learning or course-management system that is password protected or otherwise restricted to students of a school or postsecondary educational institution;
- c. as part of a coursepack³⁴

These guidelines depend upon the argument that a musical score can be likened to a book and that if one can use (without copyright permission) one chapter of a book, a musical score or any other "entity" (e.g. song) from within any work can be similarly used without permission -- or, if one can use (without permission) 10% from a literary work, one might be able to use 10% of a musical score without permission. None of these guidelines are law and there are at least two problems with relying on such guidelines: first, there is no support in Canadian decided copyright cases for application of such formulas to music (the analysis in the original 2004 Supreme Court case on interpreting fair dealing dealt entirely with textual materials³⁵) and, second, the percentage formulas in these guidelines are not taken from Canadian law (the leading case, even in discussing textual materials, mentioned neither percentages which would be fair nor "chapters" as fair³⁶). As in the case of other works, the test for what constitutes a "substantial" taking of a musical work is qualitative and cannot be definitively expressed quantitatively: a Canadian court has held, for instance, that the first eight bars of a song, the "hook," can constitute a substantial part of a musical work.³⁷

Unfortunately, even if use of a musical score is permitted under users' rights provided in the *Copyright Act*, if the scores have been "rented" from music publishers – or have been otherwise acquired by the school through contract, no one at the school will be able to rely upon the fair dealing right or other users' rights legislated in the *Copyright Act* unless words incorporating that "right" into the contract under which the music has been acquired have been specifically negotiated into the rental agreement or other contract. The users' rights in the *Copyright Act* do not exist as statutory exceptions to the provisions of the contract dealing with copyright interests except where language identical to the users' rights (or referring to them specifically) has been put into the contract between the parties. This is because the copyright holders' rights are specifically made the subject of contract by the wording of the *Copyright Act*³⁸ but users' rights do not override the provisions of contract.³⁹

³⁴ Supra note 12 at 8.

³⁵ CCH supra note 26.

³⁶ CCH supra note 26.

³⁷ *Grignon v Roussel* (1991) 38 CPR(3d) 4 (FCTD).

³⁸ *Copyright Act* supra note 8 s 13(4).

³⁹ Barry Sookman & Dan Glover, "Digital Copying and Libraries: Copyright and Licensing Considerations." (2010) 51(1) *Felicitier* 14-16. Of course, as Lesley Ellen Harris indicates in her book

Videotaping or otherwise recording performances

The educational contracts between schools and their students typically do not include permission to tape students in the classroom or the gymnasium. The videotaping of concerts and musical plays on occasions where students are performing in front of other students, parents or the general public, requires permission from each of the performing students (or their legal representatives). If any of the performing students or parents or guardians say no or do not reply, then you cannot record the event. You will also need permission to distribute the recording you will have made if all participants consented to recording – and further specific permission to post the recording online. Lack of permission from each performer will mean you cannot, for instance, give a DVD-R to any of the performing students or sell a DVD-R at the school, or post the performance on YouTube. If someone else illegally tapes the performance and places it on YouTube, you can demand that YouTube take the performance down⁴⁰ (it may be noted that hundreds of programs disappear daily from YouTube).

Making back up copies of music

The *Copyright Act* now provides that any “educational institution” can make “backup” copies of legally obtained music (both sheet music and recordings) “in case [the original] is lost, damaged or otherwise rendered unusable” – but cannot give such copies away – and can use the copy as an original so long as the institution continues to own or have a license to the original.⁴¹ However, the *Copyright Act* does not override contract law. If there is a contract in place that contains a provision to the contrary,⁴² a school cannot rely upon the *Copyright Act* exception to make a “backup” copy. Nor can a school “go behind” a technological protection measure to make the backup copy.⁴³

Using a recording of music

Sound recordings have been in existence for over 100 years and have gone through a range of forms: wax cylinders, LPs, 8-tracks, cassettes, CDs and, most recently, digital files.

The ease with which the technology of modern recordings physically permits them to be copied was recognized by Parliament in 1997. In that year, s 80 was added to the Act, which creates the following exception for

- (1)... the act of reproducing all or any substantial part of
 - (b) a musical work embodied in a sound recording,
 - (c) a performer’s performance of a musical work embodied in a sound recording, or
 - (d) a sound recording in which a musical work, or a performer’s performance of a musical work, is embodied

Licensing Digital Content: A Practical Guide for Librarians (Chicago, Ill, USA: ALA Editions, 2002, ProQuest ebrary.Web.17 March 2015), if it is possible to negotiate the requisite language into the contract “it is important to ensure that the license does not restrict the fair use/fair dealing of content by your patrons.”

⁴⁰ See YouTube’s *Policy and Safety Hub* to report an illegally taped program.

⁴¹ Copyright Act, supra note 8 s 29.24.

⁴² See further, below, about the relationship between contract law and users’ rights in copyright.

⁴³ *Copyright Act*, supra note 8 s 29.24(1)(c).

onto an audio recording medium for the **private use** of the person who makes the copy does not constitute an infringement of the copyright in the musical work, the performer's performance or the sound recording. [italics added]

But this private copying right does not apply if selling or further distribution (even if free) is involved or communication by telecommunication (e.g. posting to the net) or performance in public. The exception cannot be relied upon by institutions such as schools (although, as private individuals and not as employees, staff and teachers do rely upon this private copying exception to make *themselves* private copies, each for her or his own use).⁴⁴

In education, the study of music requires libraries to provide access to many examples of print and recorded music covering many genres and time periods. Questions arise such as

- Can recordings held by the library in a physical format be played for a class?
- What about playing recordings at a gathering accessed through a streaming music service?
- Can music files be delivered to students via the Learning Management System (LMS)?

If the library holds a legally obtained record or tape or other physical copy of the music, the library in an "educational institution" (that is, not in schools that are owned for-profit)⁴⁵ will be able to provide the music for use in the classroom without worry of copyright infringement because, since 1997, for "educational institutions" as defined in the *Copyright Act*, the law has permitted the live playing of music and the performance of a musical work in the classroom for educational purposes, not for profit, and largely before students.⁴⁶ If the library copy was itself an infringement of copyright, those users' rights do not apply to protect this new use of the recording in an educational institution.

If the school involved is owned for profit, the fair dealing category of "education" may protect this use – but there is no definition of "education" in the *Copyright Act* and, as yet (as mentioned above), no judicial interpretation of its meaning to guide Canadians.

The answer to the second question about use of recordings accessed through a streaming music service will depend on the contract a library or institution has with the vendor or provider of the streaming service. Commercial providers of streamed music include Naxos, offering Naxos Music Library; Alexander Street Press which offers streaming of both audio as well as video such as the package Opera in Video; Smithsonian Global Sound; DRAM which provides

⁴⁴ The amendments also created an entire Canadian process for dealing with private copying (Part VII of the Act), including creating a Levy on Blank Audio Recording Media. Students are not legally part of the schools they attend. If a student wishes to privately copy something made available to him or her through the school, the private copying exception in s 80 of the *Copyright Act* is available for that purpose.

⁴⁵ The relevant portions of *Copyright Act* (supra note 8) s 2 definition of "educational institution" include

- (a) a non-profit institution licensed or recognized by or under an Act of Parliament or the legislature of a province to provide pre-school, elementary, secondary or post-secondary education,
- (b) a non-profit that is directed or controlled by a board of education regulated by or under an Act of the legislature or a province and that provides continuing, professional or vocational education and training
- (c) a department or agency of any order of government, or any non-profit body, that controls or supervises education or training referred to in paragraphs (a) or (b).

⁴⁶ Supra s 29.5 (b).

American music; and others. Many of these providers do allow for the streamed music to be used in the classroom, although it may be necessary to ensure that only authorized users (e.g. only students enrolled in the course) have access. Due to the complexities of securing copyright clearance outlined above, institutions considering digitizing their audio collections to establish a streaming collection or making these now digital music files available online, through a learning management system or otherwise, must proceed with caution. It is evident from the Supreme Court's decision in 2012 in a music streaming case,⁴⁷ that streaming music involves the rights of copyright holders.

If the use being made in your school is “outside of the classroom” – and is, for instance, being made by a visiting organization, on school premises, the users' rights outlined above will not apply to the use. Many non-school performance venues pay licensing fees or royalties to organizations, like SOCAN and Re:Sound, to cover the performance of live or recorded music for the playing of music for general (non-educational) purposes. If your educational institution rents out floor space to outside organizations or events, the playing of music will require licenses from music collectives such as SOCAN or Re:Sound. The cost of these is often based on the amount of floor space and number of participants. Even the use of music as background music, to an audience that is passively listening, can require a license and the need to pay royalties. Educators never play music in classrooms as entertainment or background music but rather as music education related in some manner to their discipline. Music, live or recorded, for non-educational purposes such as sporting events, lunch hours, or breaks will require SOCAN and Re:Sound licenses, as will non-school-related events such as non-school-related assemblies, fashion shows, fairs or sociocultural activities held on school premises but not related to the educational mandate of the school.

In answer to the third question, music files containing whole songs or a substantial portion of any given performance of music can only be delivered to students via Learning Management Systems (LMS) if permission has been received from the copyright holder(s): this will usually involve payment for a license (though written permission can be sought, and may be given, for free) at least to reproduce or make a copy of the music file that is stored in the LMS (a copy which technically enables the LMS to distribute the music to the students). In the 2012 Supreme Court decision involving downloading music for sampling, it was said that the finding that this use of the music by consumers was fair dealing was predicated upon the fact that what was downloaded was “streamed, short, and often of lesser quality than the musical work itself”⁴⁸ and “no copy existed after the preview was heard... each file was automatically deleted.”⁴⁹

Copying a recording

Firstly, as described above, all schools can make “back-up” copies of legally obtained recordings. In addition, schools that are “educational institutions” within the meaning of the *Copyright Act* are allowed to record single copies of lawfully received broadcasts (which may include broadcasts of sound recordings and musical performances) under s 29.7 but can only perform the recording in public (that is, to the school or other audiences) when appropriate royalties are paid. Otherwise, schools historically have not been able to copy a recording.⁵⁰

⁴⁷ Society of Composers, Authors and Music Publishers of Canada v Bell Canada 2012 SCC 36 [Bell].

⁴⁸ Supra para 35.

⁴⁹ Supra para 38.

⁵⁰ Note that the new s 32 exception for persons with perceptual disabilities (either with respect to reading or hearing) applies only to making a copy of a musical work (i.e. sheet music) and not to making copies of

However, as discussed above, both “educational institutions” and schools owned for profit will benefit from the 2012 inclusion of the category of “education” in s 29 – which may protect the copying of a recording as a “fair dealing.” But, the protection of this provision will only be available if the dealing is fair according to the five considerations set out by the Supreme Court.⁵¹ Among other concerns, this begs questions of quantity and quality. When considering “fair dealing” in the context of audio recordings, figuring out what might be a fair taking becomes even more difficult since the copyright interests involved include not only those for the musical works embedded in the recording but also the rights held by the makers of the sound recording and the performers’ performance rights. Again, the 2004 case in which the Supreme Court established the fair dealing criteria did not deal with these kinds of copyright interests – interests in other subject matter than works.⁵²

Conclusion

While the majority of the issues outlined in this column involve the copying of physical items and, to a lesser extent, the performance of musical works, concerns about copyright compliance where digital formats are involved are increasing. One problem with copyright is that technology may appear to be outpacing the law. This is particularly noticeable with music as new business models and ways of delivering music continue to be developed (the abovementioned, music-streaming business Spotify, for one). Many libraries, perhaps particularly libraries in schools and universities, are undertaking projects to digitize music scores in order to preserve them and facilitate research, and teaching and learning. As is necessitated by budget constraints and concerns about copyright, frequently due diligence is being interpreted to mean that only works out of copyright are made accessible once digitized.

The joy and beauty of music is indisputable. Everyone can relate to its power and ability to elicit an emotional response, or complement an event. It has been said that writing about music is like dancing about architecture⁵³ -- one needs to experience music in its original and intended form. Thus, music, not text, is the primary teaching tool for many disciplines, even those traditionally outside music education, such as folklore and anthropology. Understanding the complexities within copyright that arise when using music is essential knowledge for those who wish to share music with a broader audience.

sound recordings (see s 32(1)(a); note subsections (b) and (c) of s 32(1) do not apply to music at all). Even in the case of sheet music or other musical works, exercise of the s 32(1)(a) exception by a librarian or educator must be request-driven unless the organization involved is a non-profit acting for the benefit of the perceptually disabled person. S 32(1)(a) allows a musical work to be reproduced (on request of or for the benefit of the disabled person, as the case may be) in a format specially designed for persons with a disability, either as a copy or as a sound recording (unless there is already on the market such a product (see s 32(3)).

⁵¹ *CCH*, supra note 26 at paras 54-59. As noted by the Supreme Court in the *Bell* case (supra note 47 para 13), the first step in a fair dealing analysis is to decide whether the dealing is for an allowable purpose (factor (i) set out in *CCH*, “the purpose of the dealing” – as the Act has now been amended, “education” is a new allowable purpose); the second step is to apply the five considerations which the Supreme Court established in the *CCH* case (listed in *CCH* as factors (ii) – (vi)) to assess whether the dealing is fair (“the character of the dealing,” “the amount of the dealing,” “alternatives to the dealing,” “the nature of the work,” and “effect of the dealing on the work”).

⁵² *CCH*, supra note 26.

⁵³ The source of this quote is debated. See: <http://quoteinvestigator.com/2010/11/08/writing-about-music/>