The Scoville Series: *Part VI*

To Comply ... Or Not To Comply *Revisited*

By David Karagianis

Thoughts and Horror Stories about the Procedures and Perils Involved in Music Licensing and Their Implications

It's been nearly twenty years since I wrote the following piece discussing the choreographer's quandary with regards to music copyright compliance so when UDEO asked for permission to reprint this my first thought was that it'd be woefully out of date and irrelevant. Haven't the realms of intellectual property and all things media, music and dance related fundamentally transformed in many ways over the past two decades? For example during this interval we've witnessed the exponential growth and world domination of the internet, the Digital Millennium Copyright Act (DMCA) of 1998 addressed numerous copyright related realms and the rise of file-sharing sites such as Napster and social media sites such as YouTube have made intellectual property the subject of numerous headlines. Given all the technological advancements, legal clarifications and visibility one might easily assume that the major problems clouding the choreographer's compliance scenario would have cleared up but, alas, if anything the risks and ambiguities of the process may have actually intensified. Recent major legislation includes the improbably named Sonny Bono Copyright Extension Act, that extended the duration most copyrighted works remain out of the public domain, as well as the DMCA, which reinforced the hold and rights associated intellectual property. Alas, these sweeping changes have strengthened the grip of copyright ownership but have done little to assist the complicated and frequently frustrating process of attempted compliance. Meanwhile, thanks to search engines like Google, copyright violations are much easier detected. None of these developments are bad per se, (as a composer, publisher and copyright holder myself I remain quite appreciative) however as components of a dysfunctional system choreographers and other aspiring users of works which fall under the category of "dramatico-musical work" remain mired in the muck of Grand Rights which continues to maintain a system which rules out blanket licensing. Consequently, while it is now easier than ever to get caught using unlicensed work, DCMA rulings have upheld the rights of copyright holders to name their own price –no matter how unreasonable, and the Sonny Bono Act now keeps more works out of the public domain than ever before. Accordingly choreographers continue find themselves trapped in scenarios where, all too often, attempted compliance is difficult, self defeating and self censoring. Thus the following article, originally written in 1993, remains by and large in tact with the exception of a few minor updates and additions.

To comply, or not to comply? That is the question... raised daily by choreographers, music directors, producers and presenters when attempting to observe laws pertaining to music licensing. On the surface, the basic concept mandating that permission be secured for "Grand Rights" (use of published work for a theatrical purpose beyond the framework of a musical composition's original intent) and "Master Rights" (use of a copywritten recording in a public performance) seems equitable enough. Composers, publishers and record companies all deserve a slice of profits derived from the use of their materials in situations not excluded under the framework of "fair use". Whether the process and demands involved in obtaining such licensing is at all reasonable is far less certain. Perhaps as our world becomes increasingly polarized into the separate camps of "the lawyers" and "everybody else" it comes as no surprise that the contemporary pursuit of licensing has become a labyrinth only a lawyer could love. However, if given a user friendly interface for requesting permission and establishing standards for fees that make proportional sense in relation to the budget of the individual user it is my belief that compliance would become wide spread.

Non-compliance, as a result of calculated risk, procedural difficulty, confusion or total ignorance unfortunately tends to be the present norm. Every week in my locale (the Los Angeles area) alone there are undoubtedly scores of dance, theater and performance art productions presented in colleges and modest venues that are playing "licensing Russian roulette." Multiply that many times and you begin to see the scope of the possible revenues involved. Can it be that the earnest observer of licensing codes is paying the price for their copyright scofflaw brethren? Moreover is the fear and loathing associated with the current process actually creating the contemporary copyright deadbeat? As a veteran of the time consuming and frequently frustrating process of attempting to conform, I confess to a certain degree of empathy for the copyright outlaw.

Personally, my varied involvements with respect to music licensing matters have forced me to view their implications from a variety of different, often conflicting perspectives. As Music Director for universities, dance companies and numerous dance, theater and performance art productions it has become my responsibility to make recommendations with respect to music licensing and/or to secure permission from record and publishing companies for their shows. If this process involved little more than filling out a simple web based form, sending an e-mail, or making a phone call, and the payment of a reasonable fee it would not be problematic. Unfortunately the process so very often gets bogged down at the onset, the attempt to establish and contact the actual publisher and record label. While organizations such as BMI, ASCAP and SESAC are ostensibly able to provide publishing information for artists

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on their rosters, all must frequently be contacted to establish this connection since the proper affiliation is not always available on printed materials that accompany recordings. Likewise, information regarding which individual or office to contact at a record label is frequently not found anywhere on liner notes, artist or record label websites and ASCAP, BMI, etc. don't as a rule provide or profess to having access to this information. Even when provided such information, in my experience, it all too frequently merely becomes the first lead in a wild goose chase of uncertain outcome. I am aware of quite a number cases in which despite the best of intent and an intensive prolonged search contact was never established. Unfortunately, as it has been explained to me, neither a good faith effort resulting in the inability to contact the right party or parties to request permission nor the lack of a timely response or any response at all from the copyright holder constitutes tacit permission.

> "One ought not be dumb and let others benefit from the work that cost him study, care and labor, and surrender all claims for the future."
> *...Wolfgang Amadeus Mozart to his father in 1782*

Contact, when finally established, often worsens matters. The general lack of awareness or understanding posed by publishers and record labels with regard to concert dance and the use of music in small professional or low budget non-profit productions amazes me. Individuals at several companies I have contacted continue to categorize all dance forms as "ballet" and demonstrate an alarmingly weak ability to comprehend and process a licensing request. Other companies perhaps drunk on the "high stakes" revenues associated with music licensing for motion pictures and television conjure up absurdly large fees or draw up thick contractual agreements brimming with all kinds of forbidding verbiage like "indemnities," "termination," "severability," and "most favored nation status". In order to request "Master Rights" for the use of a single song from some record labels a non-profit entity must fork over two hundred dollars simply to fill out and submit the request form! The request alone, however, does not guarantee that permission will indeed be granted or that additional use fees or excessive contractual demands will not be demanded. Many companies fail to understand that the potential expense of proportionately exorbitant licensing fees combined with the time and effort involved in processing and interpreting their, sometimes obtuse, legalese can break a small production budget. My sympathies go out to the many small dance and theater programs out there struggling to establish and maintain some degree of support from already reluctant administrations. The presentation alone of some of the ominous contracts I've encountered to the "wrong" bureaucrat could sufficiently topple the delicate house of cards of many a program's perilous existence. And then, of course, there is always the possibility that permission will be denied. Music that a choreographer originally sought out, purchased, developed a choreographic vision with, may be unceremoniously yanked away at the whim of a publisher, in effect a punishment for intended compliance. More often than not, permission is denied because the publishers simply don't understand the framework of the permission seeking genre. For example, a request to use a four minute song that represents a small fraction of a two hour dance program to be presented two nights only in a 250 seat hall, is misconstrued as a live theatrical presentation of the magnitude of "Cats". Or, consider the distinguished European composer's representatives who denied permission for the use of a two minute composition as part of the same program two days before the premiere because they were uncomfortable with the dance's title!

> "License? We don't need no stinking license."
> *...anonymous contemporary choreographer*

One solution that has been suggested as a remedy to many of the licensing woes that I have made reference to is simply to make a point to seek permission early enough in the process as to avoid using music that is difficult to obtain. Based on the variety of complications I and several colleagues have experienced we once calculated that a theoretically "safe" deadline for choreographer's licensing inquiries might need to begin as much as six months prior to a performance! I have grave reservations, however, about the implications of any such mandate. It could impact the creative processes and working methods of many of our artists-- functioning, in effect, as a form of censorship. Think about how many choreographers you know that, in the process of creating a new work, are secure with their musical choice even six weeks prior to its premiere and you start to see the magnitude of this problem. Can it be that the "rapid deployment-like" freedoms at the core of many of our art forms are, by their very nature, incompatible with this kind of glacial-paced obstructionism?

Should not intellectual property law, at least in theory, exist to support rather than shackle creativity? A published composer myself, I stand to benefit from the protections and services a publisher provides. Revenues that find their way back to the composer stemming from copyright compliance are a wonderful thing. But I question who the real beneficiaries are within the current system. As a composer and sound designer seeking new projects, I am frequently called upon by choreographers, directors and producers to create new music to replace existing music when permission has either been denied, is unobtainable, or is perceived to be unreasonably expensive. Does the five or ten percent of the publisher's revenues I may receive through compliance compensate me for the alternatives a music user may feel driven to explore in lieu of affordable or readily obtainable permission? I am aware of several choreographers who opted to call any one of a number of local composers to create Philip Glass, Arvo Part

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and Steve Reich-like works rather than subject themselves to the jeopardy of possible licensing denial or exorbitant use fee demands. Publishers and record companies wishing to promote non-mainstream clientele in particular run the risk that the creation of "sound-alikes" of their client's work may be viewed as less of a hassle and expense than the potential risks and unpredictable monetary demands involved in contacting record and publishing companies. Frequently, less well known composer's works are not mentioned in concert publicity or programs because the publisher or record company simply could not be reached or wouldn't bother to respond to any inquiry. Many choreographers whose good faith permission inquiries go unanswered, have in desperation gone ahead and used their chosen music, but anguish at the possibility of being detected, or factor in the currently infrequent penalty as an acceptable risk.

As a teacher, audience member, and performing arts advocate I am all too familiar with some of the negative consequences associated with the failure to observe and respect the published and recorded work of composers. Deserving composers go unrewarded. Ignorance and poor aesthetic judgment can lead to less than tasteful uses and alterations of a composer's work. As educators we find ourselves in the untenable position of discouraging our students from cheating while, let's face it, turning a blind eye towards the law. What kind of message is this sending to our students? Ironically, copyright controls can conversely have a negative cultural impact. The familiar (whatever others seem to get away with using) is preferred over the unexplored. The deliberate obfuscation of proper program credits contributes to the regrettable lack of audience recognition for many less than mainstream artists. There are, unfortunately, several fine composers that I have begun steering choreographers clear of as a direct result of the acquired perception that permission to use their music will be hard or unreasonably expensive to secure.

Lawyers aside, I believe all would benefit from the development of more universally applicable and streamlined licensing procedures. Copyright holders could largely ameliorate these problems by establishing reasonable policies for the clearance of their works for non, and low, profit performances and publishing a contact link to each copyrighted work directing prospective users towards a simple compliance process. Indeed, Creative Commons has established this kind of process but until this kind of thing goes mainstream and most, if not all, musical works out there conform, it remains largely inconsequential. Even artists, publishers and record labels that are aware of the presently flawed process are reluctant to develop or conform to any free, or rational clearance pricing and licensing policies for fear of losing theoretically bigger licensing fees should an opportunity arise. Although it, of course, remains their right to manage their works any way they choose, I feel, they shouldn't turn around and whine about real or perceived copyright violations while continuing to subscribe to inscrutable and complicated policies that, all to often, encourage non-compliance. Some form of overview and regulation, or at least publication of information regarding relative fee structures set by artists, publishers and record labels by some agency or organization not beholden to any of the parties involved might go far towards rationalizing licensing fee. While any form of regulation, much less enforcement, against unreasonable licensing fees or demands remains a pipe dream, I can imagine choreographers, directors and producers steering clear of many an eleventh hour crisis armed with knowledge to avoid using unreasonably overpriced works to begin with. A much clearer and comprehensive dissemination of the proper information allowing the licensing process to take place is a must. Many choreographers whose good faith permission inquiries have gone unanswered have, out of desperation, felt forced to weigh the options and chosen to use their music in lieu of permission. Regrettably, potential anguish at the possibility of being detected and penalized for copyright infringement comes with that territory (I've been told there's a 3-year statute of limitations for copyright violations). Perhaps they factor in the, relatively, low odds of getting caught. While big league copyright violations can result in exorbitant penalties they, most likely, keep fingers crossed they'd get off with just a wrist slap either by claiming ignorance or via a modest settlement. Hopefully they don't loose too much sleep ruminating over the possibility of a letter on legal stationary arriving in their mail box months or even years after a premiere...

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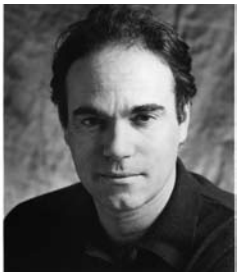

The Scoville Series is a series of articles by Jon Scoville about music for dancers. Previous articles will be available online soon. This article *To comply ...Or not to comply*, was recommended by Jon after the copyright topic was introduced by Raymond Von Mason during our Spring Conference Artist Panel.

Jon also provides an "Ask a Musician" feature for UDEO. If you would like to as Jon a question that only a musician can answer, submit your questions to udeo_webguru@hotmail.com. His response will appear in a future newsletter.