

# Copyright – Most Commonly Misunderstood

If you've ever played a gig without making sure you were covered by a performance license or been tempted to change someone else's song to create a parody, here's what you need to know.

## 1. The performance right

Many musicians believe they have the right to perform any song, in any place, at any time. The right to perform songs actually belongs to the individual song owners, and not to performers. **Song owners are entitled to collect royalties for all public performances of their songs, which means that performers need licenses to perform them.**

For gigging musicians, performing cover songs often feels like a free right because many venues pay for broad performance licenses from the performance rights organizations. The performance right also affects people who want to play pre-recorded music for the public, including the music you hear on hold or even piped into malls and restaurants. Business owners and musicians are required to pay for performance licenses if they want to play music for their customers, and if your band ends up doing gigs at bars, restaurants, or parties, then you need to make sure that the venue has paid for a performance license before you play any cover songs.

## 2. The right to make changes to others' songs

Making clever changes to the lyrics or melody of a song may seem like a great way to make your mark and demonstrate your artistic prowess, but many musicians don't realize that they actually need permission from song owners before changing inherent parts of the song. The need to get permission for major changes applies whether you're performing a cover song or making a recording of a cover song. **There are some things, such as tempo and key, that you can change as a way of taking artistic license, but anything that alters the fundamental bones of the song, including changes to the lyrics or melody, requires that you get in contact with the song owners first.** Be aware that getting permission to make changes often requires paying a fee for the privilege, so plan ahead.

## 3. Fair use

Contrary to popular belief, there are no hard and fast rules about what is "fair use" and what is not, making fair use one of the most commonly misunderstood parts of copyright law. Instead of clearly defined rules, the courts evaluate "fair use" on a case-by-case basis, weighing four factors to determine if something is fair use. Determining fair use includes considerations like whether the use is for commercial or non-profit/educational purposes and how the use will affect the value of the original work.

Fair use myths often include the belief that using a specific limited amount of someone else's work is legal, and you'll often hear people give false statements such as, "You're allowed to sample up to 15 seconds of a song," or, "It's okay to copy one page of a score." But the fact is that **there are no clearly defined rules saying that this is fair use, and whenever you use someone else's copyrighted work without getting the appropriate licenses/permissions, you may be doing something illegal.**

There are some things that musicians do which are clearly not fair use, such as providing friends with copies of sheet music or recordings, since such copying and sharing means that the copyright owners will sell fewer copies of their music. But what about parody? The freedom to make social commentary through parody creates lots of grey area where copyright law is concerned. Shows such as *Saturday Night Live* and late-night talk shows constantly parody the work of artists, but when parodies have a commercial benefit for the creators, they are often denounced as attempts to piggyback off of the work and success of the original artist.

**The bottom line is that whenever you make a lot of money or gain fame and influence by borrowing someone else's idea, there's a good chance that someone will take legal action against you arguing that your work was illegal rather than fair use. Play it safe and always ask for permission before making changes to someone else's work.**

## 4 factors involved in determining “fair use”

***Purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes:*** Courts look at how the party claiming fair use is using the copyrighted work, and are more likely to find that nonprofit educational and noncommercial uses are fair. This does not mean, however, that all nonprofit education and noncommercial uses are fair and all commercial uses are not fair; instead, courts will balance the purpose and character of the use against the other factors below. Additionally, “transformative” uses are more likely to be considered fair. Transformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the work.

***Nature of the copyrighted work:*** This factor analyzes the degree to which the work that was used relates to copyright’s purpose of encouraging creative expression. Thus, using a more creative or imaginative work (such as a novel, movie, or song) is less likely to support a claim of a fair use than using a factual work (such as a technical article or news item). In addition, use of an unpublished work is less likely to be considered fair.

***Amount and substantiality of the portion used in relation to the copyrighted work as a whole:*** Under this factor, courts look at both the quantity and quality of the copyrighted material that was used. If the use includes a large portion of the copyrighted work, fair use is less likely to be found; if the use employs only a small amount of copyrighted material, fair use is more likely. That said, some courts have found use of an entire work to be fair under certain circumstances. And in other contexts, using even a small amount of a copyrighted work was determined not to be fair because the selection was an important part—or the “heart”—of the work.

***Effect of the use upon the potential market for or value of the copyrighted work:*** Here, courts review whether, and to what extent, the unlicensed use harms the existing or future market for the copyright owner’s original work. In assessing this factor, courts consider whether the use is hurting the current market for the original work (for example, by displacing sales of the original) and/or whether the use could cause substantial harm if it were to become widespread.