National Dance Coaches Association

FAQ About Copyright Law and Dance Teams

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When was the last major change to United States copyright law?

Although there have been some recent amendments extending the term of the copyrights and clarifying protections in certain electronic mediums – **the fundamental rights of those who write and record music and the rules governing derivative works (edited music) have not changed since 1976.** Fundamental change to U.S. copyright law is very rare - the last time it was changed prior to 1976 was in 1909! Recent discussions about "rapidly changing copyright laws" are misleading. Although existing copyright law continues to be applied to new technologies, dance teams dancing to edited music is definitely not a new technology. For a longer explanation of the purpose of copyright law and why that matters to dance teams see "*What is the purpose of U.S. copyright law and why does the historical purpose matter to dance teams?*" below.

If copyright law has not changed in any fundamental respects since 1976, why is there so much attention now?

Any competition company can enact whatever rules they want about music use at their competitions based on their own business decisions, which may include an evaluation of legal risks applicable to that company based on permissions they have failed to or chosen not to obtain in the past. Teams are free to attend such a competition or not. But there are no new "laws" of any consequence that would require such a change for individual teams or other companies.

What kinds of things are subject to copyright protection?

Copyright protects "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." This definition is directly taken from the U.S. Copyright Act of 1976. Of course, for dance teams it means that music, photos, choreographic works (yes, your dances) and written works (yes, even your team Constitution) are all protected by copyright once they are saved in any way. For example, if you make up portions of a dance in practice and someone records it on their cell phone, you have created a copyrightable work even if no one ever watches the video! **Although copyrights of others in music has been the sole focus of dance team discussion recently, remember that dance teams are also constantly creating copyrightable work and usually are not asked for permission to use their copyrighted work.** See "*How do we as dance teams or choreographers protect our copyrightable work?*" below.

What rights does a holder of copyright have?

The holder of a copyright is granted the exclusive rights of copying their work, displaying their work, public performances of their work, selling their work, and producing "derivative" versions of their work. Derivative versions include things like editing music or broadcasting your dances without music or to music other than the music to which it was originally choreographed. **Similarly, copies of your routines, the**

public display of your routines and the sale of your routines on DVDs are all covered by copyright and you have the exclusive right to grant permissions for others to do that.

Do I have to register my copyright in order for my copyrightable work to be protected?

No. As of 1976, you do not have to register your work in order to have a copyright. Registration does, however, make it easier to defend copyrightable work in court and allows you to potentially make a claim for more damages. If your work has not been registered, you cannot make a claim for certain automatic penalties. See "*What are the possible penalties for copyright infringement?"* below for a discussion of these penalties.

Do I need a license to use or edit music?

Saying that you need a "license" is misleading. A license is just one way that the holder of a copyright can grant you permission to use their work, if permission is required for your intended use. For example, verbal permission is also permission although, of course, it is much more difficult to prove the existence of verbal permission if your use of a copyrightable work is challenged. Moreover, even if you have no explicit verbal permission, you may still have a right to use a work if permission can be inferred from the conduct of the parties. For example, if you tweet a video of your routine to a copyright holder and they retweet it with the message "kids getting down to my music!" you could argue that they have consented to the use of their music. Use of these types of permission is obviously harder to prove which is why people may choose to seek written permissions - including permission in the form of a license.

Generally speaking, there are two main types of copyrights involved in any piece of music: (1) the copyright of the recording artist, and (2) the copyright of the songwriter.

Is it possible to get permission to edit/mix music? From whom?

Of course it is. And, as noted above, the permission does not have to be written - although obviously written permission has certain advantages, as detailed above. However, in order to get written permission, you will have to track down the holders of the copyrights and there is no uniform license to create derivative works (edited music) as there are for other types of licenses. **Interestingly, though, the fact there is no easily obtainable license may strengthen a "fair use" argument, especially when (as is the case for many dance teams) a non-profit educational institution making use of the copyrightable work.** See discussion of fair use below.

What is the specific license that allows a music production company to create "covers"?

One quirk of current copyright law is than once a musician records and publishes a song, anyone is free to do their own cover version of that song, without the artist's permission, by obtaining a mechanical or "compulsory" license and paying the statutory royalty fee for that song (currently about 9.1 cents per song times the number of digital or physical units sold). The person who created the cover version (for as little as 9 cents!) can then grant you the rights to edit their recording of the song. **There are currently no compulsory licenses for creating edits or mash-ups**, but, it is interesting to note (1) the very low cost of a license to make a cover, and (2) that it is based on number of copies of the cover sold. This means there is a higher license fee if you are trying to sell the cover commercially versus just making the cover for your own use. **USA Cheer references only the maximum statutory penalty of $150,000 in their guidelines but that**

maximum penalty is only available under certain circumstances and is the very high end of available penalties that start at $200. Even the $200 penalty is only available if certain conditions are met. Referencing only maximum penalties creates a distorted view of the risk involved especially since historically copyright holders have not sought to enforce any rights against dance teams that use edited music for non-commercial purposes.

Many people are now advocating for compulsory licenses for derivative works as well. That would mean that anyone would be allowed to edit any piece of music without further permission as long as they paid a standard fee.

Why is it legal to mix/edit "cover" music and not "original/real" music?

It is no more "legal" to mix/edit "cover" music than music by original artists. Both involve potentially securing permission from the recording artist(s) and the songwriter(s). It may be easier for you to get permission from "cover" recording artists than the "original" recording artists to create derivative works because they might sell you the cover recording and the license to edit in one package. Note, however, that at least one major record label already grants blanket permissions for non-commercial uses of its recordings on YouTube because those permissions were granted so routinely for no fee.

But, what about the songwriter? A songwriter's rights generally do not include the right to determine how their song is recorded and by whom. The songwriter's rights are for things like the chord structure, melody and lyrics. This is why you probably do not need their permission to do things like speed up or slow down a recording of their song or to record it in different ways such as by playing on a piano, guitar, steel drum, cowbell or trash can lid. However, the songwriter's rights would prevent you from significantly altering their song into a different song and that is why the notion that you can edit "covers" but not "original" recordings is misleading. If you really wanted to be in 100% compliance with copyright law, you would obtain permissions from each recording artist as well as each songwriter.

Overall, songwriters may have less incentive to seek additional license fees from dance team music companies because songwriters are generally getting paid from the public performance of their work through ASCAP/BMI and SESAC license fees (even if the "license" costs just fractions of a penny per use). This is in contrast to the music labels, which generally are the copyright holders of the recordings of songs and generally have not been paid anything by cheer mix companies. Of course, they also do not provide people with an easy way to obtain permission to create derivative works of their recordings, which is why cover music companies have jumped in to try to get this revenue stream from dance team editing companies.

Is there any music that can be edited/mixed legally according to copyright laws and used for public performances?

All music can. However, depending on the types of edits and mixes, it may be prudent to secure permission to use music in that fashion.

If my music editor or the competition company obtained a license to edit a piece of music and play that edited music, would that license cover the dance team?

Yes, generally speaking it would.

What about these cases I have heard about with Sony music and Extreme TRAXX (a cheer mix company) as well as show choirs? Shouldn't I be concerned that the same thing could happen to my team and me?

Both of these cases are helpful in putting the reality of a copyright lawsuit in context. In the Sony case, one of the defendants was Extreme TRAXX (a cheer mix company) which charged as much as $1500 per mix to edit and play the copyrightable music of other people. The other defendants were other cheer mix companies and individuals associated with those companies. They advertised using the names of popular artists as well as samples of the music of these artists. When Sony contacted them by letter, they either ignored Sony or failed to negotiate a license fee with Sony. Ultimately the final disposition of the case was for $160,000 – arguably low considering the cost teams paid them per mix and the thousands of copyright violations the companies committed for profit. **Notably, Sony did not pursue any of the hundreds of cheer and dance teams that bought mixes from Extreme TRAXX or the other cheer mixes in this litigation, despite having access to all of their customer lists.** A copy of the complaint from Sony is here.

In the Burbank Show Choir case, the publishing company tried for two years to negotiate a proper licensing fee from the Burbank Show Choir. In this time, representatives of the school allegedly promised to negotiate a fee and then allegedly later backed away from their promise. In their complaint, the publisher noted the significant dollar amounts of money the Burbank Show Choir made from their events as well as the dollar amounts of money they paid for other services such as costumes – essentially making the argument that the show choir spent lavishly on everything but refused to pay for its music. A copy of that complaint is here.

What these two cases show you is that even when using the copyrightable work for commercial gain, being "slapped with a lawsuit" is not really a reality. Generally, to the extent that the copyright owner is concerned that you are violating their copyright, they will begin a process of negotiating with you for a fee or simply request that you stop using their material. **Consider the thousands - possibly millions - of daily uses of music that are technical copyright violations and how many cases have actually been litigated.**

Do dance teams/coaches run the risk of lawsuit if they use original/real music at any events?

First of all, the same risk of lawsuit applies to all music – including cover music. Second, anyone can sue you at any time for any reason. If your child throws a ball into the neighbor's yard and you don't have a license agreement with your neighbor giving you permission to throw things in their yard (and then retrieve them as well), you could be liable for trespass. **So, yes, in theory, you risk a lawsuit if you play any copyrightable music that is not yours, but this risk is no different than the risk dance teams have lived with for the past 40 years.** In addition, thanks to the Internet, more people edit and perform derivative work than ever before, which means that owners of copyright have far more potential targets to theoretically police than they have ever had before.

It is also important to remember that most copyright infringement cases – even those involving people making commercial uses of copyright material usually start with a letter requesting that the infringer stop infringing the copyright. This may be followed by a more formal cease and desist letter from an attorney – which is still just a request to stop using the copyrightable material despite its scary sounding language. **In both the Extreme TRAXX case and the Burbank Show Choir case, the copyright owners did not get to any lawsuit until after years of being ignored or failed attempts to negotiate license fees.**

What is the ideal method to obtain permission to use/edit a piece of music?

It really will depend on the situation. Remember that a copyright holder has discretion to determine whether or not to enforce its rights just as you have discretion to enforce the rights you hold with respect to your copyrightable material. The major music companies have had this right for about 40 years. You may find, that when you approach a copyright holder for permission that may communicate permission to you verbally in such a fashion that alleviates any concerns you may have about obtaining further permissions. You may also get email or other written permission. You might also request that your music editor, choreographer or competition company secure the permission.

What do I tell my administration to show them I am complying with copyright laws?

Copyright rules are not new and compliance is a complicated mix of facts and circumstances. The fact that you are educating yourself on the general parameters of copyright law so that you can apply them to the facts of your situation is very important. **As with many legal issues, proving 100% compliance is generally impossible and following general guidelines from an organization with different circumstances than you is not a substitute for your own good judgment. Reassuring your administrator that you are educated on the issues, that the basic rules have not changed since 1976, that you paid for your music, that competition companies have licenses to play music as well as other licenses and that you made good faith efforts to secure permission (or ensure that others have secured permission) to edit any copyrightable work for which permission may be prudent will likely alleviate a lot of concern.**

What else should dance coaches look out for with respect to copyright?

Regrettably, all of the recent attention some spirit companies have given this issue may make dance teams vulnerable to "copyright trolls." These trolls can come in two main types: (1) companies that send you letters (or emails) demanding payment for copyright violations, and (2) companies that offer to navigate the licensing requirements on your behalf, promising to secure licenses for you and perhaps even defending you in court. The problem with the former is that the companies will exaggerate their licensing rights or the potential penalties in order to scare you into settling with them for a fee that would exceed anything that a judge evaluating the reality of the situation would award them. If it were that easy to win major damages by bringing cases against high school dance teams for dancing to edited music it would have happened by now. The problem with the latter companies is that they are effectively trying to sell you overpriced insurance that you may not need - as with any insurance policy, you must assess the real (as opposed to theoretical) risk of a copyright claim by a music company and determine if the "premium" you would be charged by the license navigating company is worth it. And, unlike actual insurance companies they are not regulated meaning you have no guarantee that they actually obtained any permission or that they actually have the money to defend you if the situation occurred.

What legal rights do coaches have to protect themselves if pressure is brought to bear by the owner of a copyright?

If you are sure that the "pressure" is coming from a legitimate source and not a "troll," you could either stop the infringement or negotiate permission to use the material. Generally the copyright owner is concerned about people profiting commercially off their work and they may ultimately be more interested in the company that sold you the mix than they are in you. Furthermore, it is to everyone's advantage to work

toward an amicable solution. **Simply pointing out that (1) you legitimately purchased the music, (2) you are not editing it for commercial gain, (3) you would have happily paid for the right to edit it if such a license were readily available for a reasonable price may be all you need to do.** Overall, if the pressure is from a legitimate source your most effective approach is working amicably toward a solution.

What are the possible penalties for copyright infringement?

First of all, keep in mind that enforcement of copyright infringement is almost always the responsibility of the copyright holder and they always have the discretion to enforce those rights or not – just as you do with respect to your copyrightable work. Most importantly, competition companies have no right to enforce copyright laws against each other. The types of penalties that any copyright holder (including you) has available to them have not changed materially since 1976. Under that Copyright Act of 1976, penalties for copyright infringement may include: (1) stopping the infringer from future use, copying or distribution of the copyrighted works, (2) destruction of infringing copies or (3) money damages - either actual damages based on the your profits from using their work or lost sales (which would be very minimal in a case against a high school dance team), or statutory damages which are set amounts that a court can award at their discretion and that start at about $200 and go up to $150,000. Orders not to use the copyrightable material in the future or money damages would be generally be the most likely results.

I hear all of this talk about public domain. If something is freely available on the Internet, isn't the work free of copyright protection? Isn't it in the public domain?

No. Works on the Internet are almost all covered by copyright. You should not assume a work is in the public domain just because the work is on the Internet or is not marked as being copyrighted by anyone. Remember, as of 1976, work does not need to be registered in order to be protected by copyright. Frankly, because even copies of very old songs may have new copyright protections available to them, very few things are actually in the public domain.

What is fair use and can it help me defend against a claim of copyright infringement?

The Copyright Act of 1976 allows use of copyrightable material if the use is considered "fair" and identified four factors to consider. However, it is important to understand that these factors are only guidelines that courts are free to adapt to particular situations on a case-by-case basis. In other words, a judge has a great deal of freedom when making a fair use determination, so the outcome in any given case can be hard to predict. **Unfortunately, the only way to get a definite answer as to whether use of a copyrightable work is "fair" is to litigate the issue in federal court.** Nevertheless, because most copyright disputes will be resolved before a lawsuit is even filed, it can be helpful to understand what courts have considered to be fair use in order to further your discussions or negotiations with the copyright holder.
The four factors judges consider are: (i) are you transforming the original work (the more aesthetic value you add to the original work by transforming it -- the more likely it will be considered fair use) (ii) the nature of the copyrighted work (your argument for fair use is actually better if it is widely available), (iii) the amount and substantiality of the portion taken (using a smaller portion of the work is generally better), and (iv) the effect of the use upon the potential market (is it for your commercial gain or for a nonprofit purpose). **Keep in mind also that the lack of availability of a license weights in favor of fair use.** This last point is especially useful in the context of negotiations with a holder of copyright. Surely, you would have paid for a license if

one were readily available at a commercially reasonable price considering that the cost of making a copy of a recording is less than ten cents and the cost of public performing a recording is literally fractions of a penny.

How do we as dance teams or choreographers protect our copyrightable work?

Good question. **Very little of the recent attention to copyright law has considered it from the perspective of copyrightable work created by dance teams. All of these companies are talking about how you are an infringer but not surprisingly ignoring how they are infringing on your copyrights. One of the best ways to protect your copyrightable work – which may be especially important to do now as leverage against the scare tactics being used against dance teams -- is never to sign over ownership of your copyrightable work.** Furthermore, to the extent you grant permission to use your copyrightable work, you should make sure it is properly limited in scope. Choreographers may want to provide choreography only with a permission for the team to use their choreography in every way possible (including creating derivative works) but not allow teams to grant permissions to others (such as competition companies) to use their choreography.

Are public displays of our choreography with no sound or with different music violations of our copyrights as dance teams and/or choreographers?

Yes. Most commenters would say they are because changing the musical accompaniment of your choreography (including by having no music) is a "derivative work" – the same kind you have been hearing about with music edits. The choice of a particular musical accompaniment for a certain combination of steps would generally be considered an original element of a choreographic design and any change to that is a "derivative work." This would also apply when your choreography is shown edited or when DVDs of your original dances were sold to you and others for a profit. These are all violations of your copyright that are enforceable by you.

What is joint ownership of copyright and why does it matter for dance teams?

Joint ownership of copyright is generally defined as work prepared by two or more people with the intention that their contributions be merged into one work. First, each contributor must provide copyrightable content to the work, and second, the contributors must have intended to create a joint work. This will apply frequently to dances choreographed jointly by dance teams and their choreographers.

When a copyright is owned jointly, each owner may exercise any or all of the rights of copyright. An individual owner may use the entire work as he or she wishes and may also grant non-exclusive rights to others. However, a single owner may not grant an exclusive right to anyone without the consent of all joint owners. So, if you are worried that your team mom or coach can sign away the rights to your choreography or photos without you knowing it – they can't.

What is the purpose of U.S. copyright law and why does the historical purpose matter to dance teams?

This is actually a debated point but important to understand when thinking about copyright and potential violations in general. Copyright protection is actually part of the United States Constitution, which was ratified in 1788. **The stated purpose of U.S. copyright law enshrined in the Constitution is "to promote the progress of science and useful arts."** The U.S. Constitution proposed to do that by allowing Congress to

write laws that secure "for limited times to authors and inventors the exclusive right to their respective writings and discoveries." It is important to remember that the United States Constitution does not establish specific copyright protections, but provides that Congress shall have the power to grant such rights if it thinks best. This, of course, means that such protections can be taken away if the copyright laws do not serve the Constitutional purpose of promoting the progress of science and useful arts.

Because of this Constitutional language, some commentors have argued that copyright law exists for the public benefit and must be considered in that context. These commenters highlight that the Constitution states both a purpose (promotion of progress) and a method (securing exclusive rights). Stated a different way, the Constitution grants the power to Congress to create copyright law -- but for a specific purpose: "to promote the progress of science and useful arts." The language of the Constitution does not appear to suggest, nor even hint at, the idea that copyright's purpose is to benefit creators. Rather, copyright protections appear to be the method to advance the public purpose of progress. Creators are given incentives to create, in order to further the public good of vibrant scientific and artistic discovery. However, other commenters argue that copyright laws protect property rights and nothing more. Certain statements of Congress and the Supreme Court suggest that this is always a balance.

For example, in passing the copyright laws of 1909, Congress stated "in enacting a copyright law, Congress must consider two questions: First, how much will the legislation stimulate the producer and so benefit the public; and second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights under the proper terms and conditions confers a benefit upon the public that outweighs the evils of the temporary monopoly."

Similarly, in the case of Feist v. Rural, the United States Supreme Court stated "It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not 'some unforeseen byproduct of a statutory scheme.'... It is, rather, 'the essence of copyright,' ... and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but 'to promote the progress of science and useful arts.'"

Why does all of this history about the purpose of copyright law matter to dance teams? Because it is helpful to remember that at its origin copyright law is meant to promote creativity. This does matter when you are thinking about big picture questions of whether uses of copyrightable work for non-commercial purposes are "wrong." That is why doctrines like "fair use" also exist. **Copyright law is meant to balance the public good of encouraging creativity with certain private rights granted to creators to encourage them to create.** But, if these private rights start to stifle creativity, as many people argue they currently do, then legislators, judges and the Supreme Court would have to give consideration to how the public benefits (or, more importantly, is hurt) from specific aspects of copyright law.