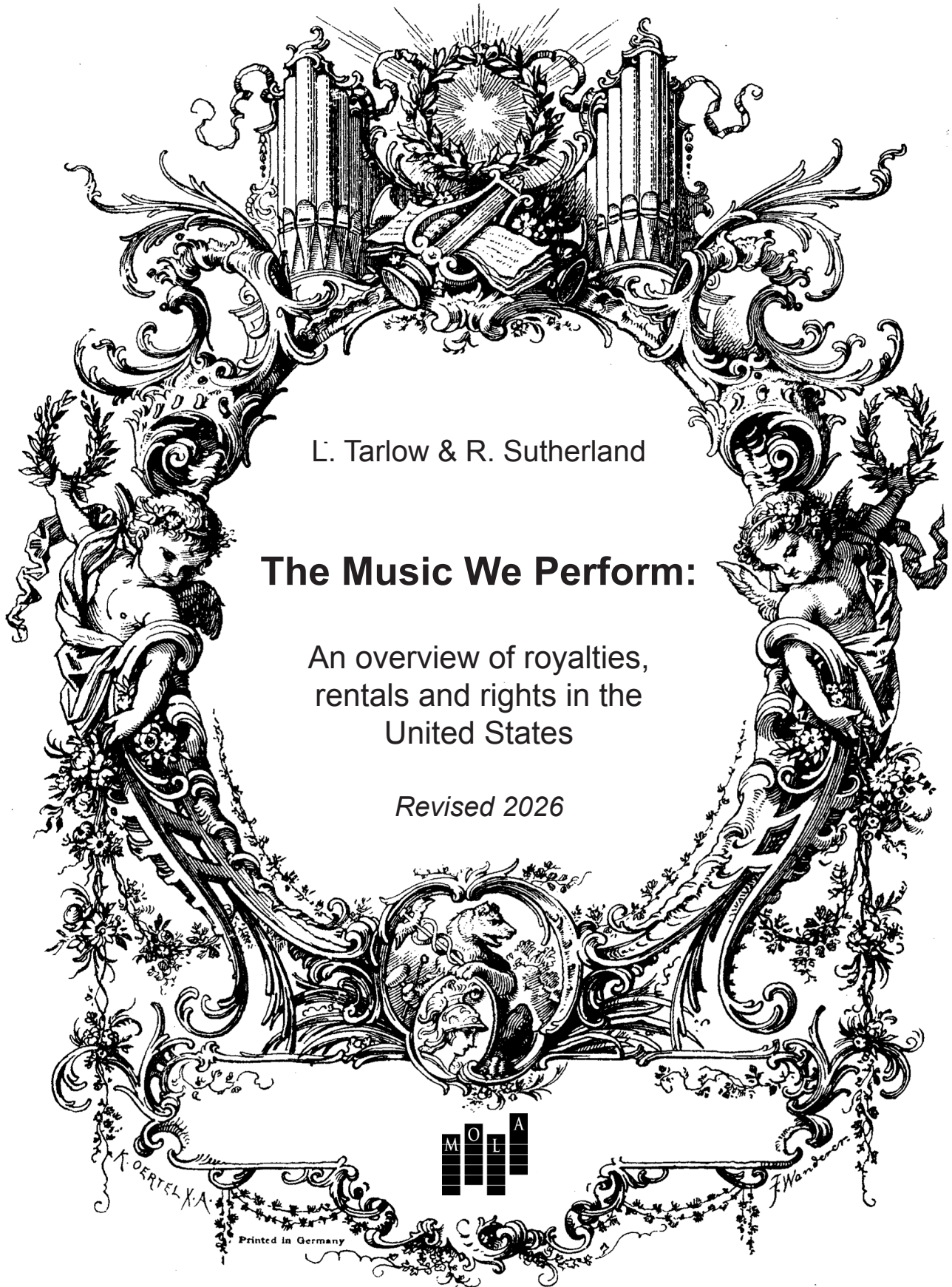


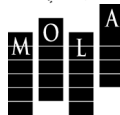


L. Tarlow & R. Sutherland

The Music We Perform:

An overview of royalties,
rentals and rights in the
United States

Revised 2026



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The Music We Perform:

An overview of royalties, rentals and rights

The ensemble is tuned and on stage, a hush comes over the hall, and the music begins to a program set some time before. The music has been obtained, the program advertised, and seats sold. It seems simple enough but what of the composers who created the works being performed? Why is their music sometimes for sale or sometimes only available on a rental basis? Why do our ensembles have to pay so much for one piece and not for another? Why should we have to deal with a difficult publisher when we can photocopy music from another source?

Composers and other creative individuals are encouraged in their endeavors by the protection they receive for their intellectual property through the Berne Convention which was incorporated as a part of the U.S. Copyright Law effective March 1, 1989. This law grants creators of “original works of authorship” such as composers, authors, poets, dramatists, choreographers and others certain exclusive rights to do and to authorize the following (17 U.S. Code § 106):

1. to reproduce the copyrighted work in copies or phonorecords;
2. to prepare derivative works based upon the copyrighted work;
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending;
4. in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly, and
5. in the case of literary, musical, dramatic, and choreographic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

It is illegal to violate these rights provided to the owner of copyright under the Berne Convention, but the rights do have some limitations in certain specific instances. One such limitation is the concept of “fair use” which appeared for the first time in statutory terms in the United States with the passing of the 1978 Copyright Law. Another takes the form of “compulsory license” under which certain limited uses of copyrighted works are permitted upon payment of certain royalties and compliance with specified conditions. Furthermore, there is a time limit after which these rights no longer apply and the work is said to be in the “public domain”.

It is dealing with these issues of when a royalty is payable to a copyright owner or their agent for an intellectual work, when a rental fee is payable for use of the physical materials upon which the work exists, and when a work is considered to be in the public domain that shall be addressed in this publication.

To this end, a basic knowledge of the applicable copyright laws of one’s country is invaluable.

BRIEF OVERVIEW OF THE BERNE CONVENTION

The Berne Convention for the Protection of Literary and Artistic Works is an international agreement that lays out minimum standards for copyright protections. It was adopted in Berne, Switzerland on September 9, 1886, and has been amended and revised several times since. Most of the world's countries are signatory to this agreement. The provisions of the Berne convention are currently administered by the WIPO (World Intellectual Property Organization)

Some key principles of the Berne Convention:

- Works originating in one member country must be given the same copyright protection in all other member countries as those countries give to their own citizens.
- Copyright protection is granted automatically when a work is created, without the need for formal registration.
- There are minimum levels of protection. Copyright must last at least 50 years after the author's death (most countries provide longer duration) and protection must cover literary, artistic, and musical works, among others.
- Creators also have moral rights – the right to claim authorship of the work and the right to object to derogatory treatments of their work that could harm their reputation.

For a more extensive overview of the Berne Convention, see <https://www.wipo.int/en/web/copyright> and more specifically https://www.wipo.int/en/web/treaties/ip/berne/summary_berne

OVERVIEW OF UNITED STATES COPYRIGHT LAW

American copyright law can be thought of in two parts – pre-1978 and post-1978. Until 1989, the U.S. was not a party to the Berne copyright convention, and our copyright law differed markedly from that of the rest of the western world. Our copyrights were for a fixed term and renewal period, rather than being based on the life of the author plus a certain additional period of protection, as was the case in Berne Convention countries. Until 1978, copyright protection existed only for works officially registered with the Copyright Office, and was for an initial period of 28 years, with a 28-year renewal term available to those who submitted the proper form and fee to the Copyright Office. Thus, the maximum term of copyright protection available in the United States to the author of an original work was 56 years.

However, it became clear that this was inherently unfair to creators of intellectual property. If authors lived suitably long, they could outlive their copyrights and find themselves in the odd position of being unable to realize income from their creative output. Recordings could be made and distributed, performances could be given, arrangements could be made and distributed, and exact reprint copies of their original copyrighted materials could be made, all without their realizing any compensation whatsoever from their creative output.

For this reason, in 1976 the copyright law was revised, with the revisions taking effect January 1, 1978. Simply put, any work protected after January 1, 1978, would have as its term, the life of the author plus 50 years. In addition, all terms of copyright protection end now on December 31 of the term-ending year, rather than 50 or 75 years to the day on which protection began. Even though these changes in law brought the U.S. into agreement with the Berne Convention concept of author's-life-plus for copyright protection, the U.S. did not officially join the Berne Convention until March 1, 1989.

When the U.S. finally joined the Berne Convention, several other issues came into play. With the ratification of the Berne Convention, the U.S. recognized that copyright exists from the moment of creation, not from the moment of registration. In fact, the need for registration of copyright no longer exists. One can claim a valid copyright without having ever registered the copyright. However, one cannot collect statutory damages without registration. It is also no longer required that works bear a copyright notification (© with date and copyright owner) to claim copyright protection. It is certainly a good idea to have the notification, but it is no longer required.

Further changes in American copyright law occurred December 4, 1994, when the President signed the "Uruguay Round Agreements Act" which implements the General Agreement on Tariffs and Trade [the GATT treaty]. In the agreement was the provision that signatories should recognize each other's copyright laws. This meant that works by foreign authors whose copyrights either were not recognized by the U.S. (Soviet copyrights before 1975 form the bulk of this category), or whose copyrights had lapsed on account of a failure to file the proper paperwork to claim a renewal term could have copyright protection restored. This restoration of protection took effect on January 1, 1996, and is valid until the copyright would normally expire under U.S. law. To regain protection, the claimant merely needed to file a notice of intent to enforce with the copyright office, and for the most part, U.S. publishers with works that fell into this category have done so. Some frequently performed composers whose works fall into this category include Prokofiev, Shostakovich, and Stravinsky.

The Sonny Bono Copyright Extension Act was enacted in 1998. It extended the existing duration of copyright to match those adopted by the European Union. For works created before 1978, it added 20 years to the duration of copyright protection, protecting those works for 95 years from the date of publication. For works created after Jan 1, 1978, the term of copyright was lengthened to the life of the creator plus 70 years. This law applied retroactively, meaning that existing works that were still under copyright in 1998 also received the longer protection. This effectively "froze" the entry of new works into the public domain for 20 years – from 1998 to 2019.

See the chart below, "Materials protected by copyright, and available for purchase" for information on how this affects use of materials.

PERFORMANCE RIGHTS

As our programs often include music still under copyright, we face the question of performance rights: the rights granted to the performing organization by the owner or administrator of the intellectual property. These are largely determined by the manner in which the composer's work is performed.

There are two types of performance rights – small (or concert) rights and grand (or dramatic) rights. Small rights are the rights to give concert performances of music – musicians giving a performance of musical sounds only with no extra-musical aspects – there is no dance, staging, acting or other interpretive device associated with the performance. These rights are granted to ensembles and venues by performing rights organizations. Each country has its own performing rights organizations (PROs). It is assumed that music librarians are aware of the appropriate organization for their particular country. In the United States, rights are currently granted by six PROs. The ones MOLA members chiefly deal with are ASCAP, BMI, and to a lesser extent, SESAC. American musical organizations often have blanket licenses that grant the right to give concert performances of copyrighted music anywhere in the United States. Some ensembles or venues may find it better to obtain per-performance licenses for individual performances of copyrighted music. Per-performance licenses are also granted by ASCAP, BMI, and SESAC for the works they control. Note that no license is required for performance of any sort of works not protected by copyright (works said to be in the public domain).

GRAND RIGHTS

Grand rights, on the other hand, are the rights to give a performance which contains literary or visual elements that go beyond the performance of musical sounds alone. These can include non-musical plays with incidental music added after the play was written, plays where music is an integral part of the play as written, revues comprising stage presentations of separate musical numbers and dramatico-musical works. Dramatico-musical works are works in which the music is used to carry the action of the story forward. Opera, operetta, musicals, cabarets, and ballet fall under this heading.

The owner of the copyright for these works has the exclusive right of performance and so their permission is required before a public performance can be legally given. The performing rights organizations listed above have the right to license *only* non-dramatic performances of the music in their repertoire. The copyright owner or their agent, often a music publisher, retains the right to license all other uses of the music, including grand rights.

Unlike small rights, where performing rights organizations may grant licenses, grand rights involve negotiating directly with the copyright owner or their assigned agent. They usually involve fees based on a percentage of the gross box office revenues and can contain both royalty fees, for use of the intellectual property, and rental fees, for use of the physical material which represents the intellectual property. The size of the venue, anticipated audience, mean ticket price, number of performances and stature of the company performing the work can influence the ultimate fee for royalties payable. In

addition some publishers will add a rental fee per performance for use of the necessary musical materials. All aspects of the grand rights license agreement an organization makes with a copyright owner or their agents is negotiable. Good luck!

It is important to remember that adding any element (costumes, props, stage movement, etc) to a performance of a copyrighted work may violate the current licensing status of the performance, thus incurring additional royalties

It is also important to remember that when a grand rights license has been obtained, the income and performance information should not be included in the performing rights organization (PRO) reports that are submitted for non-dramatic performances.

Concert performances of ballets or operas in which the singers appear in regular concert dress, do not act or address each other, and in which there is an absence of scenery do not require a grand rights license. There have occasionally been disputes with music publishers on these types of performances. This is an area which has rarely been defined through litigation and as such is subject to negotiation. When in doubt, contact the rental agent to see if what you're planning reaches the threshold of requiring grand rights. Sometimes organizations may be asked to pay a smaller "enhanced performance fee" in lieu of full grand rights depending on what visual elements are being included in the performance.

FAIR USE

Fair use is a legal doctrine in U.S. copyright law that permits limited use of copyrighted material without permission as long as the use fits the criteria of criticism, commentary, scholarship, education, or transformative creativity. Fair use is codified in Section 107 of the U.S. Copyright Act and is intentionally flexible (thus rather ambiguous), requiring case-by-case evaluation by weighing the following four statutory factors.

The first factor, **the purpose and character of the use**, considers whether the use is commercial or nonprofit and more importantly, whether it is *transformative*. A transformative use alters the original work by adding new expression or meaning - such as through parody, commentary, or scholarly analysis.

The second factor, **the nature of the copyrighted work**, recognizes that highly creative works - such as musical compositions and sound recordings - are entitled to strong protection. This usually results in weighing against fair use in music cases vs. cases involving copyrighted material that is scientific or factual.

The third factor, **the amount and substantiality of the excerpt used**, analyzes both the quantitative and qualitative significance of the material. Using a shorter excerpt of a copyrighted work does not automatically favor fair use if the portion used captures the most recognizable element of the work, for example. Conversely, it's quite possible to argue that using a large portion of a copyrighted work is justified if it achieves a transformative purpose.

Lastly, the fourth factor, **the effect of the use on the potential market**, assesses whether the ancillary use acts as a substitute for the original or undermines current or future licensing markets.

PRACTICAL APPLICATIONS OF COPYRIGHT

What effect does copyright law have on my ensemble? The first thing to bear in mind is that acquisition of materials does not give one a license to perform. All works protected by copyright need a performance license as discussed above in **Performance Rights**. Works in the public domain (not protected by copyright) do not require a license.

Apart from performance licenses, there are a myriad of dos and don'ts with regard to the actual printed parts your ensemble will be using. For performances in the U.S., the following charts and commentary are a summary of the issues involved.

Materials in the public domain, and available for purchase:

Acquire	Duplicate	Perform	Broadcast/Livestream	Video Upload*	Audio Record
from your preferred music dealer, internet download, etc.	no restrictions	no license required	no license required	no license required <i>*post performance upload</i>	no license required (includes distribution)

Materials protected by copyright, and available for purchase:

Acquire	Duplicate	Perform	Broadcast/Livestream	Video Upload*	Audio Record
from your preferred music dealer, internet download, etc. [See Note 1]	not permitted [See Note 2]	license required	requires license from applicable performing rights organization; broadcast stations should have blanket license from performing rights organization	synchronization license required <i>*post performance upload</i>	mechanical license required for distribution

Materials protected by copyright, and only available on rental:

Acquire	Duplicate	Perform	Broadcast/Livestream	Video Upload*	Audio Record
can only be acquired from copyright owner or agent [See Note 3]	not permitted	license required	often requires an additional fee; broadcast stations should have blanket license from performing rights organization	often requires an additional fee and/or synchronization license <i>*post performance upload</i>	often requires an additional fee; mechanical license required for distribution

Materials in the public domain, but available only on rental:

Acquire	Duplicate	Perform	Broadcast/Livestream	Video Upload*	Audio Record
from whomever has them	not permitted [See Note 4]	no license required	no license required [See Note 5]	no license required [See Note 5] <i>*post performance upload</i>	no license required [See Note 5]

Note 1: In the United States, the vast bulk of works with restored copyright protection by the GATT treaty fall into this category. Most of them are no longer purchasable and are only available as rentals, but if your library had purchased them while they were in the public domain they would be in this category.

Note 2: U.S. copyright law permits the duplication of materials protected by copyright under certain specific conditions. If a legally purchased set is on order, your ensemble is permitted to make copies provided that these copies are destroyed once the purchased materials arrive. It may also be allowed if one is replacing worn-out materials and the copyright owner will not make replacement materials available at a reasonable cost. This does not change the copyright status of the work, and licenses are still required to perform, broadcast, or record. This is a fine point of law - you would be advised to check the applicable regulations in your own country.

Note 3: Certain protected works have at one time been available for purchase and are now rental-only works. In some cases, these works can be obtained from a dealer who acquired these materials when they were available for purchase and now rents them. In those cases, the chart for materials protected by copyright and available for purchase would apply, except for the acquisition column.

Note 4: Duplication of materials in the public domain is permitted unless the rental agreement contains a prohibition against duplication or distribution.

Note 5: Broadcast or recording of works in the public domain is permitted unless the rental agreement contains a prohibition against broadcast or recording. An additional fee could be charged, but this is not a licensing fee.

TOURING

If your ensemble is touring in another country there are other issues to consider. Certain works that are clearly in the public domain in one country may be protected in other countries. These are generally works whose U.S. copyrights lapsed naturally after the old 56-year term, but whose authors lived into the middle of the 20th century, making their “life-plus” term works still protected in other countries. One example of this is Igor Stravinsky’s *l’Histoire du soldat* which was published in 1924 and has been in the public domain in the United States for several years. However, Stravinsky died in 1971, so his works are still protected for the time-being in life-plus-70 countries. For this reason, the use of an American edition (reprint or new type-set) may not be permitted outside the U.S.. Conversely, the works of composers such as Arnold Schoenberg or Florence Price who passed in the 1950s are in the public domain in life-plus-70 countries but many of their later compositions will remain under copyright in the United States until 95 years after publication. This means that while Richard Strauss’ *Second Horn Concerto* entered the public domain in the EU in 2020, it remains under copyright in the U.S. until 2046. In general, when performing such works, the traveling group notifies their home agency for the foreign copyright owner of the performances and pays a fee in order to use these materials in a country where they would normally be prohibited. If your organization can perform from the original copyrighted home-country-published parts for such a work, there is no fee payable.

Another issue regarding touring is the acquisition of the proper performance licenses. Performance licenses from ASCAP, BMI, SESAC, etc. are valid only in the U.S. Ensembles touring outside their own country should include in their contract with the presenter language that makes the presenter responsible for the performance licenses. It is common for the travelling ensemble to be responsible for rental fees.

Conversely, if your organization is presenting a foreign group on tour in your country, your blanket performing license may cover these presentations. If you do not have such a license, it is possible that the venue has its own license which will cover all performances in that venue. Again, the foreign group should be responsible for all rental fees, and the presenter should be responsible for licenses.

ARRANGEMENTS AND DERIVATIVE WORKS

The creation of an arrangement or derivative work from copyrighted material requires an arrangement license. An example of this would be arranging an orchestral work for wind ensemble or creating a pops arrangement for orchestra. These are typically acquired directly from the rights holder or publisher although there are 3rd party companies that will do this on your behalf for a fee. There is an excellent guide published by the Music Publishers Association that goes into this process in depth:

<https://www.mpa.org/arrangements/>

FUTURE CONSIDERATIONS

The approach to intellectual property is evolving rapidly alongside emerging technologies. Copyright law is also adapting in an effort to keep pace with these developments and anticipate future innovations. Historically, copyright law tends to lag behind technological change, often scrambling to respond to new advancements. The widespread adoption of music-reading devices and tablets has created new challenges for both music publishers and librarians. At the same time, artificial intelligence (AI) is introducing additional complexities into the copyright landscape, as governments and legal systems work to define and regulate its use. Organizations such as the World Intellectual Property Organization continue to address these issues as they arise. Further updates are likely as this area continues to develop.

USEFUL INTERNET LINKS FOR COPYRIGHT INFORMATION

The following links to organizations and laws discussed in this paper might be of use to MOLA librarians:

World Intellectual Property Rights Organization

- The United Nations organization that administers, among other treaties, the Berne Convention. Their website has Arabic-, Chinese-, English-, French-, Russian-, and Spanish-language versions, including searchable full text versions of the Berne Convention. This link is to their homepage; users need to select their preferred language.

Berne Convention for the Protection of Literary and Artistic Works

- searchable English-language full text: <https://www.wipo.int/wipolex/en/text/283693>
- use WIPO site for links to Berne Convention text in WIPO languages

United States Code, Title 17 (US Copyright Law)

- <https://www.copyright.gov/title17/>

European Copyright Platform (link is in English but users can navigate to any EU language)

https://europa.eu/youreurope/business/intellectual-property/copyright/index_en.htm

These non-governmental links might also be useful:

Songview

- A comprehensive searchable database of all major United States PROs' repertoire. This is an extremely useful way to determine the rights holder of a work (there's also a version on BMI's website)

<https://www.ascap.com/repertory#/>

Symphony Orchestra Library

- A useful site for orchestra librarians

<https://orchestralibrary.com/>

Music Library Association

- Copyright for Music Librarians

<https://copyright.wp.musiclibraryassoc.org/>

Hirtle Chart (Cornell University)

- The definitive chart to determining the public domain status of U.S. works

<https://guides.library.cornell.edu/copyright/publicdomain>

Duke University Center for the Study of the Public Domain

- Links to a list of prominent works entering the public domain in the U.S. each year

<https://web.law.duke.edu/cspd/>

International Performing Rights Organizations

- These sites, on the ASCAP and BMI websites display foreign performing rights organizations with whom they have reciprocity
<https://www.ascap.com/help/international/affiliated-foreign-societies>
https://www.bmi.com/international/entry/reciprocal_representation_agreements_foreign_performing_rights_societies

MPA Directory

- A searchable directory that displays the contact info and rights holder for any publisher imprint
<https://www.mpa.org/directory/>

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