

# Legal Literacy: A Pedagogical Approach to Law for Musicians

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Professional preparation is a shared core value among college and university music programs. In the twenty-first century, recent music degree graduates engage in highly diverse professional careers, only some of which include traditional performance and teaching jobs. Developing effective, sustainable curricula that successfully prepare students for a rapidly evolving industry is thus an essential, yet complex, task for music pedagogues. These instructors contend with a precarious balance of technical, artistic, academic, and practical objectives in programs that must simultaneously respond to shifting student needs while instilling a lifelong understanding and appreciation for music.

The role of law in students' undergraduate and professional careers presents one manifestation of this pedagogical predicament. From the rehearsal space to the internet, the music industry these students confront is framed by laws that regulate both music and the social interactions surrounding it. The expansive reach and intricacies of the American legal system, however, can often seem mystifying to musicians who may encounter a host of issues in this system over the course of their careers. Outside of music business and industry programs, there is often limited, if any, emphasis in contemporary undergraduate music curricula on skills directed toward critically interpreting, analyzing, and resolving legal issues. This situation renders students less prepared for the inevitable professional challenges they face after graduation.

Understanding how to think and communicate about law is nevertheless pivotal to musical life. Not only should musicians be able to anticipate and analyze legal issues they might encounter personally in their careers, they should also be able to interpret similar issues as they arise in the contemporary music industry. Through the unfolding of the reasoning framework applied by legal

1. This article is derived from my presentation at the College Music Society Summit on 21st Century Music School Design convened in June 2016. My thanks to the Editor for the invitation to prepare this thought piece, as well as to Graeme M. Boone, Katherine Silver Kelly, and Ingrid Mattson for their advice and comments throughout the drafting process.

professionals, commonly known by the acronym “IRAC” (“issue, rule, application, conclusion”), this article proposes rebalancing the music curriculum to include legal studies as a way to offer twenty-first century music students better professional preparation. It outlines methods aimed at demystifying law for music instructors and aiding the development of a one-semester undergraduate course on law for musicians, or what shall be called “legal literacy.”

Rather than attempting to tackle an impossibly comprehensive study of relevant technical laws and industry litigation, this pedagogical model foregrounds practical legal reasoning as a means for music majors to process common legal issues they may encounter, either in their own creative and scholarly lives or in the music industry writ large, as well as to locate and evaluate sources of legal information. Because such a course would emphasize interdisciplinary reasoning, critical thinking, and writing skills, it would present opportunities for tangible connections between course content and social issues, both contemporary and historical. This article advocates for the musicology area to serve as one possible content area where this course might be incorporated. No matter where the legal literacy course fits into the curriculum, its inclusion would offer students an invaluable opportunity to enrich their understanding of music in its cultural contexts and cultivate essential professional preparation.

### **Issue: Professionalism and Literacy**

The National Association of Schools of Music (NASM), charged with instituting standards for undergraduate music degrees across the United States, emphasizes professionalism as a key criteria of undergraduate music degrees:<sup>2</sup>

Students enrolled in professional undergraduate degrees in music are expected to develop *the knowledge, skills, concepts, and sensitivities essential to the professional life* of the musician. To fulfill various professional responsibilities, *the musician must exhibit not only technical competence, but also broad knowledge of music and music literature, the ability to integrate musical knowledge and skills, sensitivity to musical styles, and an insight into the role of music in intellectual and cultural life.*

At graduation, the accrediting body expects that music students are able to “demonstrate achievement of professional, entry-level competence in the major area, including significant technical mastery, capability to produce work and *solve professional problems* independently.”<sup>3</sup> These objectives are necessarily multi-faceted and intentionally broad, and they are undoubtedly intended to

2. National Association of Schools of Music, *Handbook 2016–17* (Reston, VA: National Association of Schools of Music, 2016), 96 (emphasis added).

3. NASM *Handbook 2016–17*, 99 (emphasis added).

encompass the fifteen NASM-recognized professional majors in music that range from performance and teaching to scholarship and industry management. Despite these objectives, music pedagogues have questioned whether, and how, current music curricula effectively prepare students for their professions (currently understood to be represented by major areas) even while their existing major requirements appear to meet NASM standards.<sup>4</sup> However, the diversity of available programs and majors, as well as the diversity among music students' careers after graduation, indicate a growing need for professional training beyond competencies in technical musicianship and pedagogical methods.<sup>5</sup>

Concepts of literacy, or students' abilities to interact with texts through reading, writing, and speaking, pervade both the NASM standards and scholarly concerns regarding competency standards. Music pedagogues have looked to the liberal arts and humanities disciplines as a means of analogizing concepts and methods of language literacy to music literacy, which in turn serve as justification for teaching students to read and write music through composition.<sup>6</sup> Enhancing students' ability to both interpret and communicate about musical texts is understood to complement and improve musicianship competencies. Literacy among music students, however, should not be limited to print and digital media used in academic classrooms, or to music history, theory, and literature as a supplement to performance. Rather, these ideas and goals should extend across the undergraduate music curriculum to include essential interpretive skills applicable across music careers, including legal literacy.

The study of musical-legal issues is already a central part of some music programs. A growing number of colleges and universities across the United States offer undergraduate courses, minors, and even majors in music business and industry that integrate legal components into their curricula. These programs (and specifically their legal issues courses) often focus on matters pertaining to careers in music industry management, particularly introductions to relevant business and intellectual property laws that students are sure to encounter.<sup>7</sup> Graduate and professional school programs similarly tend to focus on central

4. See Pamela D. Pike, "The Ninth Semester: Preparing Undergraduates to Function as Professional Musicians in the 21st Century," *College Music Symposium* 55 (2015). See also Janis Weller, "Composed and Improvised," in *Life in the Real World: How To Make Music Graduates Employable*, ed. Dawn Bennett (Champaign: Common Ground, 2012), 55–59, for a discussion of debate regarding the need for career training in an already overburdened curriculum and ways to offer professional preparation.

5. Pike, "The Ninth Semester"; see also Rosie Perkins, "Rethinking 'Career' for Music Students," in *Life in the Real World: How to Make Music Graduates Employable*, ed. Dawn Bennett (Champaign: Common Ground, 2012), 12–14.

6. David Waller, "Language Literacy and Music Literacy: A Pedagogical Asymmetry," *Journal of Research in Music Education* 18, no. 1 (Spring 2010): 26–44.

7. NASM *Handbook 2016–17*, 188–89.

matters in music business and law, if not entertainment law broadly conceived. Although such courses and programs provide practical training for musicians regardless of specialty, they are typically targeted toward students seeking careers in music business as distinct from performance, education, or scholarship careers. For these entrepreneurial students, an array of statutory and common laws are essential to their professional arsenal, including competencies in business management, ethics, marketing, and public relations. For music students pursuing other concentrations, however, such courses often remain a daunting elective option that unsuccessfully competes for precious credit hours against degree requirements, ensembles, and special-topic seminars.

Rather than integrating technical legal study with leadership and promotion models in an attempt to establish expertise, a legal literacy course would prioritize awareness and accountability by presenting students across music specialties with an opportunity to encounter a variety of legal issues.<sup>8</sup> To that end, students would not be responsible for vast quantities of laws intended to be applied as tools used by legal or business professionals. Instead, students would focus on comparatively few, yet still relevant, laws that would serve as objects intended for practicing more fundamental reasoning and problem-solving skills. Students would thus cultivate legal literacy by following problem-solving processes necessary to interpret, navigate, and communicate about a wide variety of musical-legal situations, from copyright licensing and contract negotiation to interpreting historical and contemporary musical-legal events.

Such a course in law for musicians would therefore offer invaluable professional preparation across music sub-disciplines, or major areas, and it would respond to both student needs and existing NASM standards. On the one hand, it would offer an awareness of legal issues that music majors may personally encounter in their careers, along with the problem-solving skills to navigate them. On the other hand, these same skills empower students to gain insight into the relationship between music and law in broad cultural contexts.

### **Rule(s): Pedagogical Foundation**

Although important, one common reason for neglecting legal studies is a matter of perceived competency: instructors outside entertainment law or music business and industry programs likely feel unqualified or ill-equipped to teach even basic introductions to legal reasoning and are concerned that some students might share this suspicion. However, teaching a legal literacy course does not necessarily require an M.B.A. or a doctorate in law (*Juris Doctor*, or J.D.).

8. See also Katie Buehner, "Copyright in the Classroom: Raising Awareness through Engagement," this *Journal*, 4, no. 1 (2013): 179–81, concerning promoting the goal of "awareness, not expertise" by studying copyright for purposes of professional preparation.

Designing and executing a syllabus that draws influence from the liberal arts and emphasizes reasoning skills over content expertise instead requires many of the same pedagogical techniques that most music instructors have already developed: most importantly, the ability to master relevant methodology and course content through research, study, and source evaluation. By applying the same fundamental reasoning model as legal practitioners, an instructor and his or her students can successfully execute a legal skills course, even without extensive legal experience.

### Fundamental Problem-Solving and the “IRAC” Frame

Critical thinking and reasoning skills are essential to twenty-first century learning among music students.<sup>9</sup> Courses across the music curriculum teach students various methods to take an active role in analyzing, evaluating, and resolving problems that arise in music systematically, from rehearsal spaces to the theory classroom. Students are taught critical thinking skills through a variety of problem-solving processes that entail establishing goals, identifying issues or questions, gathering relevant information, applying it to a given situation, and then drawing appropriate conclusions.<sup>10</sup> For all that music students learn to interpret a score marking in critical ways that are historically-informed and sensitive to the performance ensemble, few students are taught to cultivate critical thinking skills applicable to the extramusical aspects of their professions. As a result, they may be highly qualified for the rehearsal space, yet ill-equipped to negotiate the legal aspects of the performances for which they rehearse.

Like many discipline-specific problem-solving methods that students may encounter, law has its own processes, but the underlying critical thinking principles can transfer across disciplines. Much of legal writing is grounded in paradigmatic forms used both as analytical methods and organizational schemes that reflect foundational critical thinking concepts.<sup>11</sup> Although there are many variations, a practitioner will identify the central issues in a given situation,

9. See Ryan D. Shaw, “How Critical is Critical Thinking?,” *Music Educator’s Journal* 101, no. 2 (December 2014): 65–70, 65; Erin E. Knyt, “Rethinking the Music History Research Paper Assignment,” this *Journal* 4, no. 1 (Fall 2013), 23–37; Jennifer L. Hund, “Writing about Music in Large Music Appreciation Classrooms Using Active Learning, Discipline-Specific Skills, and Peer Review,” this *Journal* 2, no. 2 (Spring 2012), 117–32; James A. Davis, “Classroom Discussion and the Community of Music Majors,” this *Journal* 1, no. 1 (Fall 2010), 5–17.

10. For a model of elements of thought, see Richard Paul and Linda Elder, *The Miniature Guide to Critical Thinking: Concepts and Tools* (Tomales, CA: Foundation for Critical Thinking, 2008), 3 (also available at <https://www.criticalthinking.org/>).

11. See Diana Donahoe and Julie Ross, *Legal Writing Pedagogy: Commenting, Conferencing* (New York: Press Books, 2013). To compare IRAC to critical thinking schemes, see e.g., Paul and Elder, *The Miniature Guide to Critical Thinking*, 17.

locate and then apply the relevant legal rules given the facts, and finally draw conclusions—or “IRAC” (issue, rule, application, conclusion).<sup>12</sup> Law students are taught to use this model as a foundation for their law school education and their future careers, both of which will center on analyzing a variety of legal problems. IRAC therefore has the flexibility to transfer across law classes into different areas of legal practice and beyond.

Reliance on IRAC as a strict formula can often lead to unsuccessful results. Despite the prevalent use of this framework, legal scholars, pedagogues, and practitioners have recognized its defects, from its neglect of preliminary analysis prior to issue identification to its failure to account for the complexities of what is called “rule synthesis.”<sup>13</sup> Applying IRAC as a sequential method thus can generate more confusion than resolution; for example, in some instances understanding the language used to construct a legal rule must precede the ability to understand the full complexity of an issue, thereby requiring oscillation between I and R. For these reasons (and a myriad of others), contemporary legal practitioners and professors have sought to revise the four-part scheme. Some common variations expand the frame to accommodate greater methodological precision, leading to schemes like CRAC or CREAC, where “C” would stand both for introductory and final assertions called “Conclusion,” and the interior “E” would introduce Explanations and analogous Examples of each Rule before Applying them to a given scenario.<sup>14</sup> Other revisions have resulted in even more elaborate acronyms, including IREAC and RREACC, which account for both general rules and the specific rules that qualify it based on a given situation; IRAAAC, which accounts for multiple sub-issues; and more.<sup>15</sup> Each scheme serves as an attempt to represent most accurately a systematized approach to legal reasoning, problem-solving, and writing. No matter the iteration, however, most of the same fundamental critical thinking concepts apply.

The pedagogical value of IRAC instead lies more in its general, flexible framework to guide the logic of the legal reasoning process.<sup>16</sup> The model also

12. There are relevant parallels to inquiry-based learning. See, for example, Suzanne L. Burton, “Where Do We Begin with Inquiry-Based Degree Programs?” *Journal of Music Teacher Education* 30 (Fall 2004): 27–33.

13. See Lauren Graham, “Why-Rac? Revisiting the Traditional Paradigm for Writing About Legal Analysis,” *Kansas Law Review* 63 (2015): 681–715, 690.

14. For further discussion of CREAC and its application, see Diane B. Kraft, “CREAC in the Real World,” *Cleveland State University Law Review* 65 (2015): 567–97.

15. See Graham, “Why-Rac? Revisiting the Traditional Paradigm,” 692; and Tracy Turner, “Finding Consensus in Legal Writing Discourse Regarding Organizational Structure: A Review and Analysis of the Use of IRAC and its Progenies,” *Legal Communication & Rhetoric: JALWD* 9 (2012): 351–64.

16. “Good legal writing does not require a dogmatic adherence to a particular acronym. Acronyms can be useful but are merely tools to help the legal writer remember the core principles of effective organization.” Turner, “Finding Consensus,” 364.



serves as a set of preliminary problem-solving criteria: in order to solve a problem, one must spot the issue(s), find the rule(s), and apply it specifically to the given facts in order to arrive at an analytically-sound conclusion(s). The process may then be repeated as an organizational or rhetorical frame for communicating about the problem, its contours, and its solutions. The IRAC framework, although tailored to accommodate legal practitioners, thus represents fundamental problem-solving that is not unique to law, but rather may be mastered and applied by individuals across disciplines.

### Legal Resources

For non-legal professionals or scholars, including many music instructors, locating and interpreting legal rules is likely the most mystifying portion of preparing a course in law for musicians. The rapidity with which laws can change, the overall complexities of the American legal system, and the precision of legal language all contribute to such unnecessary bewilderment. While secondary legal sources can seem comparably challenging in their vastness, diversity, and frequent revisions in pace with the legal system, many provide clear-language explanations and illustrations of laws with hypotheticals or actual lawsuits. In so doing, these texts provide pre-synthesized legal rules and demonstrate for readers, often by way of analogy, how to identify and critically analyze discrete legal issues.

Of particular interest to music instructors might be introductory procedural and legal writing texts, ostensibly written for first-year law students, which can serve to orient any reader to the American legal system. These textbooks include explanations of the IRAC framework and related variants, as well as glosses on the American court system and ways to interpret laws. Although designed to teach future attorneys how to conduct research and prepare legal documents, these publications are a vital resource because their authors assume little to no prior knowledge regarding the judicial branch of American government, its divisions into state and federal systems, sources and hierarchies of law, and the general procedure that a legal matter might follow.<sup>17</sup>

Other secondary sources impart further detail on specific topic-areas in law and should be consulted according to the topics selected for a legal skills syllabus. In the area of music copyright, for example, current texts include introductory material written for non-expert music professionals, course supplements for law students and instructors specializing in copyright, as well as guides for

17. See Amy E. Sloan, *Basic Legal Research: Tools and Strategies*, 5th ed. (Austin: Wolters Kluwer, 2012); Deborah E. Bouchoux, *Concise Guide to Legal Research and Writing* (Austin: Walters Kluwer, 2011); and Linda Edwards, *Legal Writing: Process, Analysis, and Organization*, 5th ed. (Austin: Walters Kluwer, 2010).

industry professionals.<sup>18</sup> Other sources focus on specific issues in copyright law, such as licensing or digital distribution.<sup>19</sup>

Similar texts have been prepared by music industry professionals, but these can present mixed information regarding music law. On the one hand, some texts offer advice on navigating the challenges of careers in music. In their effort to offer comprehensive success guides for what often amounts to careers in freelance performance or digital production, these texts lack substantive discussion of legal issues. They instead dispense seemingly common-sense legal advice, such as the generic need to execute a contract for a gig, and favor broad reminders that musicians are generally accountable to the legal system and that creators should seek copyright protection and permission when necessary.<sup>20</sup> On the other hand, more comprehensive books prepared by industry professionals offer comparable legal detail to texts prepared by legal professionals, sometimes even including statutes and explanations specific to music.<sup>21</sup> These sources often provide valuable professional insight from a musical perspective, but are inconsistent in their depth of legal exposition.

Instructors might also look within their own academic and professional communities for interdisciplinary collaboration. Such partnerships might begin with legally-trained faculty in other academic departments to co-design, or even co-teach, a course, but collaborations might also extend to staff in non-attorney positions, such as librarians, human resource managers, and administrators. Local independent attorneys may also be willing to serve as guest speakers. Although only some of these individuals can provide licensed

18. See, for example Richard Stim, *Music Law: How to Run Your Band's Business*, 8th ed. (Berkeley: NOLO, 2015); and David J. Moser and Cheryl L. Slay, *Music Copyright Law* (Boston: Cengage, 2012). Further examples of such guides may be found in Richard Stim, *Getting Permission: How to License & Clear Copyrighted Materials*, 5th ed. (Berkeley: NOLO, 2013); and Thomas O. Tremblay, ed., *Music Licensing Rights and Royalty Issues* (New York: Nova Science Publishers, Inc., 2011). For sources directed toward industry professionals or entertainment law professionals, see Thomas R. Leavens, *Music Law for the General Practitioner* (Chicago: American Bar Association, 2013); and Ronald Rosen, *Music and Copyright* (Oxford: Oxford University Press, 2008).

19. Allen Bargfrede and Cecily Mak, *Music Law in the Digital Age* (Berklee, MA: Berklee Press, 2009).

20. For examples, see Simon Cann, *Building a Successful 21st Century Music Career* (Boston: Thomson, 2007), 13–14 (noting that laws differ by region); Angela Myles Beeching, *Beyond Talent: Creating a Successful Career in Music* (Oxford: Oxford University Press, 2005), 162–63, which outlines elements to include in a gig contract; and Bruce Haring, *How Not To Destroy Your Career in Music: Avoiding the Common Mistakes Most Musicians Make* (Los Angeles: Lone Eagle, 2005), which includes a chapter on licensing, but without discussing legal contours of copyright or contracts.

21. See Donald S. Passman, *All You Need to Know About the Music Business*, 9th ed. (New York: Simon & Schuster, 2015); and M. Willam Krasilovsky and Sydney Shemel, *This Business of Music: The Definitive Guide to the Music Industry*, 10th ed. (New York: Billboard Books, 2007).



legal advice, their expertise in legal reasoning, research, and writing can be instrumental. When considered together, these resources, most of which are readily accessible, can assist any music instructor in successfully preparing and executing a legal literacy curriculum.

### **Application: Course Model**

Cultivating legal literacy would occur ideally during a full-semester course as a required class for music majors. As music programs nationwide seek to rebalance curricula in ways that adapt to twenty-first century student needs, allocating these valuable credit hours would allow students to encounter a variety of legal issues and contexts. Although reducing legal reasoning to one unit in a pre-existing professionalism course, entrepreneurship class, or special topics seminar might seem to offer students the benefit of “IRAC” without disrupting existing curricula, such an approach would lack the necessary variety and reinforcement to master core reasoning skills. With such limited exposure, a single unit would offer students more of an easily-forgotten curiosity than an effective means of career preparation. Even using the one-semester model, it is impossible to create an inclusive approach to every legal issue that musicians face. As a result, each specific unit topic should be researched and selected by the instructor based on the issues that seem most relevant to students at his or her institution.

The course could begin with foundational knowledge of the legal system, at which time students are introduced to notions of general legal accountability. The remainder of the course would then focus on a series of units tailored to fit the student population. Following the IRAC framework, each unit would be oriented around a hypothetical, derived from actual litigation, legal sources, or newly-created by the instructor (either alone or in collaboration).<sup>22</sup> The structure of each hypothetical, whether selected or adapted from a pre-existing source or devised specifically for the course, would depend on the legal concept and reasoning skill the instructor seeks to emphasize in that unit.

Hypothetical design is critical to the success of each unit, particularly in creating scenarios that have a definite number of clearly-identifiable issues. Often one core issue will give rise to multiple sub-issues based on variables introduced by the facts of the scenario. In each hypothetical, there will usually be

22. For the pedagogy of designing legal problems, see Gail Anne Kintzer, Maureen Straub Kordesh, and C. Ann Sheehan, “Rule Based Legal Writing Problems: A Pedagogical Approach,” *Legal Writing: The Journal of the Legal Writing Institute* 3 (1997): 143–62. Sources used to prepare the course often include ready-made hypotheticals, or vignettes describing actual litigation that may also serve as legal problems. See Amber Nicole Shavers, *The Little Book of Music Law* (Chicago: American Bar Association, 2013).

two positions, much like there would be two sides—or parties—in any lawsuit. Issue-spotting is thus dependent on the students' perspective as directed by the instructor. The instructor might choose for students to approach the hypothetical according to how one particular party should proceed, permit the students to select one side or the other, or even to have students work through both sides in succession. Students would begin each unit by being introduced to the hypothetical, from which they would identify potential legal issues. Instructors might assign reading from current events or other relevant publications that orient the students' thinking with the problem they encounter, but such outside assignments are not necessary. After the hypothetical has been presented, the "issue-spotting" process could commence with an inquiry-driven discussion of the scenario and its potential issues, followed by a transition into collaborative work among students or individual research.<sup>23</sup>

Once the issues have been isolated, students discover the applicable rules through any number of means, including selected readings, lectures, individual research, guest speakers/co-teaching, or a combination thereof. In the context of legal writing, it is at this point that law students and practitioners would employ research strategies to locate relevant statutory law and common law precedents established by judges according to jurisdiction, from which they would synthesize a combined rule. For music students, any such synthesis would be left to legal specialists, either in consultation with the instructor or in an already-published secondary source about law. Instead, pre-established rules, both general and specific, would serve as substance to be applied to the underlying reasoning concepts. Whether taught by the instructor or located by students as part of a lesson in evaluating the reliability of non-expert legal sources, these rules serve as the axis around which the rest of the unit will revolve.

With the hypothetical and the relevant rules established, each unit would progress to application, in which students critically evaluate the facts relevant to the issue they located based on the rules. While the beginning process of application can be guided by in-class discussion, this is the point at which instructors could assign individual writing assignments designed for students to practice legal analysis and writing "real world" documents, such as a Cease and Desist business letter or an email negotiating revisions of a contract. These assignments generate opportunities for students to practice using professional language and style. The goal of each assignment would be for students to apply the IRAC framework and the specific facts of the hypothetical in ways that

23. For a discussion of the integration of the Socratic method into the legal writing classroom for the purpose of learning IRAC, including how to issue spot, see Mary Kate Kearney and Mary Beth Beazley, "Teaching Students how to 'Think Like Lawyers': Integrating Socratic Method with the Writing Process," *Temple Law Review* 64, no. 4 (Winter 1991): 885–908.

demonstrate their understanding of the issue and the ways in which the rules fit a given scenario.

Based on this application, students then arrive at a conclusion that presents a suitable resolution for each issue, but not necessarily its outcome. Unlike practical legal training that focuses on persuasive reasoning to lobby for a desired outcome, conclusions from music students should instead focus on the strategies they would take to self-assess the legal risk in a situation and to seek resolution. Most conclusions in this course will result, therefore, in either needing to seek legal assistance and how to find it—usually from a local non-profit legal aid organization, an attorney or firm, a union, or even a business clinic operated through a local law school—or in the individuals in the hypothetical being able to resolve the problem on their own.

### Sample Unit: Copyright Licensing

While a legal skills course should also address issues beyond intellectual property, seeking permission to use copyrighted music is a common, and commonly misunderstood, issue for contemporary music professionals. From performing or sampling songs to posting music online, music students should have at least a general understanding of when to obtain (or require) a license for copyright material. Many music students will undoubtedly enter this course with various notions about fair use and their “right” to use someone else’s material based on quantity estimations—“I only used a few seconds of their beat”—or perceived disparate relationships between the student and the creator—“it’s not like [Famous Artist] would really lose any money just because I’m borrowing a tiny bit of her song—and I’m broke anyway!” The goal of this unit is to educate students regarding fair use, not so that they understand the complexities of the defense that arise only in situations where copyright infringement litigation has already commenced, but so that they take a more pro-active approach to licensing and successfully avoid such legal risks altogether.<sup>24</sup> In this unit, students should gain an awareness of the legal importance of obtaining permission, not simply to avoid litigation, but to approach music-making in ethical ways.

### Hypothetical

Pete wants to record a self-produced video to practice for his voice lessons that includes songs from the hit musical *Hamilton*, in addition to public domain

24. See Limitations on Exclusive Rights: Fair Use, 17 U.S.C. § 107 (2010), which outlines the contours of fair use defense as limitations on a copyright holder’s exclusive rights. For explanations of fair use, see, for example Moser and Slay, *Music and Copyright Law*, 206–19; Rosen, *Music and Copyright*, 251–82; and Stim, *Music Law*, 178.

opera arias arranged for tenor and piano accompaniment. He intends to post audio clips of individual songs on his promotional website, the links to which he plans to submit for auditions. To defray his webhosting costs, Pete also hopes to sell the audio for each song online.

This simplified hypothetical attempts to capture a common scenario for many performance students or hopeful industry professionals, and one to which some students may believe they already have an answer. Through even the most basic analogies, this hypothetical can be relevant to music educators as well, who might need to advise students or who find themselves in similar situations with the K-12 ensembles they lead; it can also apply to scholars, who may be interested in producing a recording of archival sheet music as an online supplement to their forthcoming research document. Regardless of students' sub-disciplines, this hypothetical will likely conjure notions of "fair use" and the public domain among students, but will ultimately compel them to evaluate the situations where legal permission to record music, as well as to make and sell video, may be required. It will also encourage consideration of the potential risks of failing to obtain such legal permission.

There are many possible variations to this hypothetical, not simply in the names, titles, venues, or even analogous situations. In an alternative scenario, Pete may plan to livestream his performance of these songs at his senior recital, which would raise a host of related, but separate, privacy and performance issues. Pete might want to use his video as part of a multimedia production project in his film course; whether he decides to sell the final project or simply to show the film during a university festival would dictate whether or not he would require permission to record and perform the songs, and if so, what kind of license he might need. Each of these variations still addresses the fundamental pedagogical and legal issues of determining whether permission is necessary and when that is the case, how to obtain it, but emphasizes different kinds of challenges and different legal processes. Regardless of the facts, or the students' own trepidation approaching this scenario, IRAC serves as the orienting frame for the problem-solving process.

### **Issue(s)**

Whether Pete needs to obtain permission to record a video of the selected music and release audio from it online.

Whether Pete must obtain permission from the copyright holders to release songs from *Hamilton*.

Whether Pete must obtain permission from the arrangers of the opera arias.

Students should begin by isolating each issue in the hypothetical. The main issue is intentionally simple and likely to be readily identifiable by most music students. The perspective in this hypothetical is focused on Pete, thereby leading students to interpret the issue around his actions, but the reciprocal issue concerns the rights of any copyright holders to sue for infringement (if Pete does not obtain permission). The sub-issues, however, require further information about the complexities of copyright licensing, which will be specific to Pete's situation given the hypothetical. It is at this point that flexibility in the IRAC frame is crucial, because as students begin to consider the applicable rules, they will need to move fluidly between Issue, Rule, and Application. Questions should arise about the difference between making video to evaluate one's own practice and selling audio from it online, which pose issues about public release and monetary gain; the difference between copyrighted material and copyrighted arrangements of public domain compositions; the implications of those differences for the kinds of permissions Pete may need to seek; and what might happen if Pete does not obtain permission. While the main issue covers the entire scenario, students should isolate each separate sub-issue and evaluate them according to applicable specific rules in turn.

### Rule(s)

A performer must obtain permission from the copyright holder to publicly release, or sell, a recorded performance of that song.<sup>25</sup>

When locating and interpreting rules, students should move from the general to the specific.

Much like the issue(s), most students will likely know, or be able to ascertain, the general rule that responds to the broad issue at hand—that performers should seek permission to record and release copyrighted material for sale.<sup>26</sup> The subsequent identification of more specific rules that respond to each sub-issue, or to isolating the relevant contours of copyright licensing, depends on the details of the hypothetical. In the above scenario, Pete plans to make, post, and sell recordings of two types of music: songs from *Hamilton: An American Musical*, which students should discover are protected by copyright; and public domain

25. See Exclusive Rights in Copyrighted Works, 17 U.S.C. § 106 (2010), which outlines the exclusive rights of copyright holders, including the right to reproduce or authorize the reproduction of copyrighted works. See also Moser and Slay, *Music and Copyright Law*, 75–91; Stim, *Music Law*, 170; Brian T. Yeh, “Copyright Licensing in Music Distribution, Reproduction, and Public Performance,” in *Music Licensing Rights and Royalty Issues*, Thomas O. Tremblay, ed. (New York: Nova Science Publishers, 2011), 5.

26. See Moser and Slay, *Music and Copyright Law*, 77; and Stim, *Music Law*, 173.

opera arias, which have been arranged for tenor and piano from their original scoring and which may or may not be copyright protected.

Students would then consider more specific rules governing each category of musical work. For copyrighted material, a performer may obtain permission in one of two ways, usually negotiated through a licensing agreement. The performer may seek a compulsory license and pay the mechanical royalty, a predetermined fee for use of a copyrighted song without the copyright holder's permission, or, a performer might negotiate written permission and the mechanical royalty directly with the copyright holder.<sup>27</sup> Music in the public domain, most commonly including music published before 1923 such as nineteenth-century opera arias, may be copied freely.<sup>28</sup> Arrangements of music otherwise in the public domain, however, might be protected under a separate copyright held by the arranger, thereby requiring permission to be obtained for the arias as well.

The rules relevant to this unit, while addressing Pete's situation, do not comprehensively address copyright licensing schemes or the procedures to obtain a license. A technical intellectual property or business law course for music industry students might study these licenses, their contours, the procedures to obtain them, and even changes to royalty rates, in more detail. The goal in a law for musicians course, in contrast, is for students to develop a general awareness of the potential need to obtain a license by learning to evaluate their professional activities critically and to learn where to find legal information, the appropriate channels to follow in order to seek written permission or apply for a license, and legal assistance when necessary.

## Application

Pete is recording copyrighted songs. When Pete decided to post and sell clips online, he made those recordings available through public release and he stands to receive monetary gains as a result.

When students apply the relevant rules to the facts of the hypothetical, they may likely be tempted to claim that because the recording is being made "for school," given that Pete intends to use video clips to practice for his lessons, the recording is protected by "educational use," and therefore Pete does not need permission.

27. For compulsory licenses, see Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords, 17 U.S.C. § 115 (2010); see also Moser and Slay, *Music and Copyright Law*, 77–79; Stim, *Getting Permission*, 172.

28. See Definitions, 17 U.S.C. § 101 (2011) and Subject Matter of Copyright: Compilations and Derivative Works, 17 U.S.C. § 103 (1997) (this includes derivative works, like arrangements, under the scope of copyright); see also Moser and Slay, *Music and Copyright Law*, 145–46; and Stim, *Music Law*, 176.



They might also suggest that Pete's projected sales will be "low enough" not to require seeking a license. These and other similar arguments reflect students analogizing between the hypothetical and their own knowledge, beliefs, or value judgments regarding copyright. While these policy-driven ideas are valid, through the application of IRAC, the instructor should be able to guide students to consider the legally-binding rule(s) before assuming an outcome, and thereby students should learn to distinguish ideological responses from the legal structure and reasoning crucial to resolving each scenario. Student opinions are indeed important, but should be directed toward, and developed during, policy-centric portions of the unit and the course.

What students should discover through an application of the rule(s) in Pete's situation is that his activities trigger a legal need to seek permission. While the need for permission to perform and record the songs from *Hamilton* is likely straightforward, students will likely need to do further investigation to determine whether the aria arrangements are copyright-protected according to information printed in the score. This offers an opportunity for students to learn not only about various kinds of copyright protections, but how to conduct research as performers and scholars into the protection status of a work.

## Conclusion

Pete should obtain permission from the music publisher or copyright holders to perform and release the recorded audio online and for sale. He can do this on his own or by seeking legal assistance from [state bar association, musicians' union, or university student legal services].

Although Pete's activities might go undetected by the copyright holders, simply relying on "not getting caught" or "objecting to the system" —options that students may suggest—would constitute an illegal course of action. If Pete does not obtain permission, his actions would still violate current copyright law and would place him at risk of legal action and significant penalties if he did "get caught." Students should eventually conclude based on the specific rules for obtaining permission that, while requiring effort, seeking a license is not necessarily time- or cost-preclusive. In addition to assessing Pete's risk, students should also determine whether Pete can obtain permission on his own or if he requires assistance from a legal professional. In this hypothetical, Pete does not necessarily need an attorney, but he could contact an attorney or his local legal aid association for assistance in completing this process. Students may alternatively conclude that Pete should simply not post or sell the audio and reserve the video clips for his personal use, thereby attempting to avoid legal risk altogether.

## Assessment

The manner in which the IRAC framework is applied depends on the instructor's objectives and goals for each unit. The process may be conducted entirely through Socratic methods, or through a combination of collaborative and independent learning activities. Students may demonstrate their understanding through class discussion, but also through a variety of written assignments, including preparing form documents (such as a "Notice of Intention to Obtain Compulsory License for Making and Distributing Sound Recordings") intended to be sent to a copyright holder.<sup>29</sup> Students could alternatively prepare a letter outlining Pete's situation and requesting permission and a mechanical royalty, according to IRAC conventions. Depending on variations in the facts of the hypothetical, students might also practice drafting a professional email to legal aid requesting assistance in a way that applies IRAC as an organizational frame. Students should be qualitatively assessed according to their understanding and analysis of the hypothetical and the quality of synthesis demonstrated through each step of IRAC. Depending on the placement of the course within each degree program, students might also be evaluated according to their language, grammar, style, and research.

## Contract Formation and Negotiation

While Pete's problem releasing his recordings for sale exists as a discrete unit that explores facets of copyright law, it serves as one part of a broader course. Pete's hypothetical has the capacity to open policy-based discussions regarding the costs, benefits, and effects of the current copyright system on the music industry. It can also dovetail with practical units regarding contract formation and negotiation. Students could continue Pete's earlier hypothetical most readily by preparing a contract for the copyright holders. Alternatively, in the following hypothetical, students would apply their awareness of copyright licensing issues to a circumstance that allows them to examine contracts:

An independent filmmaker approaches Pete, requesting that he receive permission to use one of Pete's original songs featured on his promotional website. Pete is excited about the potential exposure for his music, but does not want to give his music away for free.

Students would likely identify the licensing issue that precipitates the hypothetical, specifically that the filmmaker is lawfully seeking to negotiate

29. For a sample form document, see Stim, *Music Law*, 174–75; see also <https://www.nolo.com/>.

permission to use Pete's work. They might also identify that Pete has legal agency to grant or deny permission, although based on the facts, Pete probably wants to grant permission. The central legal issue here is not whether there needs to be permission, but the process by which Pete might negotiate it.

This scenario provides opportunities for students to learn foundational concepts regarding contracts that are applicable to their careers as musicians, not only as creators and potential licensors but as employees. The subsequent contract negotiation process offers an opportunity to critically examine contract formation and language. This hypothetical lends itself well to students preparing a contract (or revising one provided by the instructor). They could also practice writing either a professional email negotiating their desired changes with the filmmaker or working in conjunction with a legal professional through the negotiation process.

Like contracts issues, additional topics for the course syllabus might address other aspects of copyright and contract law, such as designating song authorship in a collaborative rock band setting, but could also reach into other areas of the law relevant to the students' local music communities. Business-related legal issues, such as zoning for private music studios or tax preparation for independent performers and teachers, create opportunities for connections with other pre-professional, entrepreneurial courses directed toward student success after graduation. There does not have to be a single way to determine the topics covered, except that they address the needs of the students at the instructor's institution.

### **Musicology and Creating Tangible Connections**

For many readers, the practicalities of fitting yet another course within existing, or even rebalanced, music curricula remains a significantly limiting problem to realizing a legal literacy course. Such decisions ultimately lie with the individual college or university and depend on both its content areas and the specific issues to be covered in the course. Often legal reasoning is most readily learned through practical scenarios that compel students to conduct critical analysis according to legal rules, thus the course would lend itself well to content areas that encompass professional preparation. Legal literacy, however, reaches beyond students' abilities to evaluate and resolve real-world problems to include matters of public policy: it offers innovative perspectives on music in its cultural contexts. As such, the course could also be placed alongside more traditional music history content. At this twenty-first century intersection of entrepreneurship and musicology, a legal skills course could generate "tangible

connections” to matters of style, biography, culture, and chronological narrative while simultaneously reinforcing critical thinking and writing skills.<sup>30</sup>

To this end, units in a legal literacy class might seek to apply the IRAC framework, perhaps even more flexibly, in ways that cultivate students’ ability to interpret the social, historical, and creative implications of law on music. Taking inspiration from liberal arts approaches to legal studies, instructors might design and present hypotheticals throughout the semester that pose public policy-driven questions.<sup>31</sup> Students could consider the effect of copyright law on artistic creativity as an addition to a more practically-focused IRAC unit, or they could balance the interests and rights of authors and publishers in both historical and contemporary contexts. Thus, rather than simply learning to professionally troubleshoot, students gain a broader awareness about the structure and policies that ground laws, specifically as they relate to musical life.

As with any other unit, hypotheticals may come from a variety of sources, from current litigation to historical accounts. Highly-publicized cases, such as copyright infringement lawsuits involving the songs “Blurred Lines” in *Williams v. Bridgeport Music* and “Stairway to Heaven” in *Skidmore v. Led Zeppelin*, offer opportunities for students to consider contemporary problems in the music industry.<sup>32</sup> Although few students are likely to encounter similar legal stakes in their own careers, these cases provide pre-constructed hypotheticals with real legal stakes and policy questions as a way to investigate the relationships between music, law, and contemporary society. Rather than seeking to answer whether one party or the other should prevail, students might have an opportunity to apply IRAC as a means to isolate core issues that address the underlying philosophic concerns that each case presents and to evaluate critically the impact that existing laws can, and do, have on music. Using the above cases, for example, students might focus on weighing the parties’ stakes in matters regarding the rationales or purposes for copyright law that are upheld through statutory and judicial law; who, and what, copyright is intended to protect or practically protects; and the ramifications of the case outcomes on the commercial music industry and the future of artistic creativity. It is in this context that students learn to channel their ideas about law into cogent, policy-driven arguments.

Students might also consider legal-historical issues as a means to enrich their understanding of historical narratives and draw parallels to their work

30. Melanie Lowe, “Teaching Music History Today: Making Tangible Connections to Here and Now,” this *Journal* 1, no. 1 (Fall, 2010): 45–59.

31. See generally Austin Sarat, ed., *Law in the Liberal Arts* (Ithaca: Cornell University Press, 2004).

32. Media coverage on these lawsuits is vast. For court records, see for example *Skidmore v. Led Zeppelin*, 2016 WL 1442461 (C.D. Cal. Apr. 8, 2016); *Williams v. Bridgeport Music, Inc.*, 2015 WL 4479500 \*1 (C.D. Cal. July 14, 2015).

on contemporary legal problems. Whether introduced by the instructor for class-wide research and discussion or developed through independent projects, students might consider topics such as significant past copyright lawsuits as a means to construct musical-legal narratives about authorship or publication, engage in interest-balancing for historical artists' contract negotiations, or discuss the policies regarding rights of publicity.<sup>33</sup> Such discussions could extend to read existing scholarship on legal transactions throughout music history, from publication to performance.<sup>34</sup> Here, historical issues and rules have been identified by scholars, but students may analyze them based on policy concerns or compare them to contemporary equivalents that they have studied. These historical issues apply and reinforce core legal reasoning while simultaneously bridging historical and contemporary content in tangible, practically relevant ways.

Examining legal issues for their social, historical, and creative implications, thereby looking beyond their hypothetical resolution, presents students with opportunities to examine law critically as a social and cultural influence on the creation of music and interactions surrounding it. Students across major areas would not learn simply how to understand a law, but also how to analyze its underlying purposes and social values in all areas of music culture that they may pursue after graduation—that is, legal literacy. In this way, laws may be interpreted as objects interacting with music-making and not simply as controls on the music industry, ultimately leading students to have greater sensitivities to “the role of music in intellectual and cultural life.”<sup>35</sup>

### **Conclusion: The Value of Legal Literacy**

No matter where it appears in the curriculum or what topics an instructor opts to cover, by the end of one semester in a course on law for musicians, students will not have a comprehensive knowledge of practical law. While they will have gained a basic understanding of the American legal system and an awareness

33. For right of publicity, see *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (involving Tom Waits and a radio advertisement for SalsaRio Doritos); and *Midler v. Young & Rubicam Inc.*, 944 F.2d 909 (9th Cir. 1991) (involving Bette Midler and a Ford vehicle television commercial). For further discussion, see Mark C. Samples, “Timbre and Legal Likeness: The Case of Tom Waits” in Robert Fink et al., eds.: *The Relentless Pursuit of Tone: Timbre in Popular Music* (New York: Oxford University Press, 2017).

34. For further examples, see Mark Everist, “Theatres of Litigation: Stage music at the Theatre de la Renaissance, 1838–1840,” *Cambridge Opera Journal* 16, no. 2 (2004): 133–61; Rebecca Wagner Oettinger, “Berg v. Gerlach: Prit and Lasso’s Imperial Privilege of 1582,” *Fontes Artis Musicae* 51, no. 1 (March 2004): 111–134. Gretchen Peters, “Urban musical culture in late medieval southern France: Evidence from private notarial contracts,” *Early Music* 25, no. 3 (1997): 403–10.

35. NASM *Handbook 2016–17*, 99.

of at least a few legal concepts, students instead should be able to anticipate, evaluate, and to critically analyze legal problems, as well as to locate and evaluate reliable sources of information and legal assistance. Students will also have gained an ability to assess some facets of the relationship between music and law in contemporary, and historical, contexts. As a result, they will have cultivated legal literacy that can be carried into their professions in the classroom, the boardroom, and beyond.

Teaching legal literacy therefore offers invaluable professional competency to interpret, and if necessary even resolve, real-world legal issues. In so doing, a course in law for musicians that follows a design such as the one outlined here responds to the pedagogical call for improved professional preparation among undergraduate music students and addresses a current weakness in music curricula. In addition to practical professional development that empowers new graduates to resolve problems independently, students that cultivate legal literacy have the ability to gain insight into the relationship between music and the laws that surround it, leading them to deeper understandings of music and its role in the twenty-first century.