



Lawyers for the
Creative Arts

Nourishing the Creative Spark![®]

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Legal Issues Involved in the Music Industry

MUSIC COPYRIGHTS

What is a Copyright?

Copyright is a form of legal protection given to many kinds of created works such as musical compositions or songs, lyrics, records (CDs, LPs, singles, 45s, cassettes, DAT, etc.) poems, books, films, TV shows, computer software and even commercials. For a work to be protected under copyright, it must be: 1) "original" which means that it was not copied from any other source; 2) "fixed in a tangible medium of expression" which means that it exists in some reasonably permanent or stable form so that a person can perceive it and reproduce it; and 3) have a minimum degree of creativity.

For the musician, copyrights can protect both songs (which usually consists of a melody and includes lyrics if the song has words) and recordings (CDs, mp3s, LPs, cassettes, DAT, and any other recording). The "fixed" requirement means that there is no protection for a song that is only in your head. A song may be "fixed" by writing it down, recording it (even on a handheld recorder), or saving it to a hard drive on a computer. Playing a song live does not meet the "fixed" requirement. But, if you record the live performance, you have now "fixed" the song.

Once an original work is fixed in a tangible medium, the creator has copyright protection automatically. Though registering the work with the Copyright Office may be desirable, it is not required to obtain copyright protection.

The Rights of the Copyright Owner:

The owner of a copyright has the exclusive rights to do the following:

- 1) **Reproduce the Work:** The rights to make copies of the work, such as the right to manufacture compact discs containing copyrighted sound recordings.
- 2) **Distribute Copies of the Work:** The right to distribute and sell copies of the work to the public.
- 3) **Perform Works Publicly:** Copyright owners of songs (but not owners of sound recording copyrights) control the rights to have their song performed publicly. Performance of a song generally means playing it in a nightclub or live venue, on the radio, on television, in commercial establishments, elevators or anywhere else where music is publicly heard.
- 4) **Make Derivative Works:** A derivative work is a work that is based on another work such as a remix of a previous song or a parody lyric set to a well-known song (a classic example being Weird Al Yankovic's song "Eat It" which combines Michael Jackson's copyrighted original work "Beat It" with a parody lyric "Eat It").
- 5) **Perform Copyrighted Sound Recordings by Means of a Digital Audio Transmission:** This is a right recently added by Congress that gives copyright owners in sound recordings the rights to perform a work by means of a digital audio transmission. Examples of digital audio transmissions include the performance of a song on Internet or satellite radio stations (such as XM or Sirius).
- 6) **Display the Work:** Although this right is rarely applicable to music, one example would be displaying the lyrics and musical notation to a song on a karaoke machine.

No one can do any of the above without the permission or authorization (usually given in a license) of the owner of the copyright.

The Copyright Term: The length of time that a work is protected by copyright for a work first published after January 1, 1978, is the life of the author plus 70 years. That means for the entire lifetime of the author and 70 years after the author dies, the copyright is in force.

The Two Kinds of Music Copyrights: There are two different kinds of music copyrights:

- **Sound Recordings:** A sound recording is a simply a work comprised of recorded sounds. For example, the recorded performance of a song that appears on a compact disc is a sound recording.

- **Musical Works (that is, “Musical Compositions” or “Songs”):** Both the music and the lyrics to a song, or each of them separately, can constitute a copyrightable musical work.

Distinguishing Between Copyrights in Sound Recordings and Musical Works: Sound recordings and musical works are separately copyrightable works that can be owned by one or more authors. It is important to be able to distinguish between the two: a musical work, or a song, usually means a melody and often (but not always) lyrics; a sound recording is the actual recorded performance of that song. For example, if a songwriter composes and writes the lyrics to a song and Madonna records a version of the song and includes it on her new album, the songwriter owns the copyrights in the musical work (because she wrote the music and lyrics) and Madonna, or more likely her record label, owns the copyrights in her recorded version of the song (the sound recording) which is contained on a compact disc sold in record stores. The copyrights in sound recordings and musical works create two different revenue streams for their owner(s) in the form of royalties from record sales and music publishing royalties. In the above example, the songwriter would be entitled to the publishing royalties resulting from any performances of Madonna’s version of her song on the radio while Madonna would get the royalties from the actual sales of the compact disc containing her recorded version of the song.

Registering Your Copyright:

Although an author obtains copyright protection the moment the work is written down or recorded, an author can get important additional benefits and protections for his work by registering it with the United States Copyright Office. Copyright registration enables an author to take legal action if someone uses their work without their permission and also makes them eligible to receive statutory damages and attorneys’ fees under certain circumstances. The filing fee for registration is \$30 and the proper forms can be obtained online through the Copyright Office’s website (www.copyright.gov).

The “Poor Man’s Copyright”: The practice of mailing a copy of one’s own work to one’s self is sometimes referred to as a “poor man’s copyright.” There is no provision in the Copyright Act that offers protection for the “poor man’s copyright” and *it is not* a substitute for registration. There is no value to this because it only proves that an envelope has a postmark.

Copyright Notice:

Although music copyright owners are not required to place copyright notices on their releases, it is highly recommended that they do so because: 1) you want fans of the music to be able to contact you with any inquiries regarding licensing, live performances etc; (2) by placing a copyright notice on the album you prevent anyone who has illegally copied the work from claiming that they did so innocently which would enable them to pay reduced damages should a court determine that they have infringed your copyrights. Copyright notices for musical works should include the copyright symbol © (the letter C enclosed in a circle) or

the word “copyright” followed by the year of publication and the name of the copyright claimant (ex: © 2005 Acme Music Publishing). The notice for sound recording copyrights includes a different copyright symbol ® (the letter P enclosed in a circle) followed by the year of publication and the name of the company releasing the record (ex: ® 2005 John Doe Record Company).

Copyright Ownership:

The copyright in the work is owned by the author, who can transfer it to anyone else, but the transfer must be in writing. The owner can also license the work, which means giving someone certain rights to use their music without giving them actual ownership of the copyrights.

The exception to this is a “Work Made for Hire.” If the author creates a work of music while an employee of an employer, and as an integral part of the employment (i.e. it is his job to create the music) then it will be considered a “Work Made for Hire.” The copyright in a “Work Made for Hire” is owned by the employer and will last for 120 years from creation or 95 years from publication, whichever comes first. The second kind of “Work Made for Hire” is a work that is specially ordered or commissioned for use as one of nine types of works identified in the Copyright Act. For musicians, a song that is recorded specifically for inclusion on a compilation or in a motion picture or other audiovisual work *may under certain circumstances* be considered a “Work Made for Hire.”

SAMPLING

What is Sampling?

Sampling occurs when a portion of a prior recording is incorporated into a new recording.

Is Sampling Legal?

When an existing recording is sampled without permission, copyright infringement of both the sound recording (usually owned by the record company) and the song itself (usually owned by the songwriter or the songwriter’s publishing company) occurs. In order to legally use a sample, permission is required from both the copyright owner of the sound recording and the copyright owner of the underlying musical work. License fees for sampling vary greatly depending on: (1) how much of the music is sampled; (2) the popularity of the music you intend to sample; and (3) the intended use of the sample in your song (if your entire song is based upon a sample it will be more costly than a minor use of the sample). License fees for samples can be granted for free, for a percentage of the royalties (i.e. a few cents for each record pressed or sold) or for a flat fee. Because there are no statutory royalty rates for samples, the copyright owner can charge the artist whatever he wants for the use of the sample and can refuse to grant permission to other artists to sample his work.

What are the Penalties for Sampling Another Artist's Song Without Permission?

If an artist uses samples without the copyright owner's permission, a court can force the artist or the artist's record label to recall and destroy all of the records containing the samples and to pay damages to the copyright owner in an amount ranging from \$750 to \$150,000 for each act of infringement. In addition to copyright infringement, artists who sample may also be in violation of their recording contracts. Most recording contracts contain provisions called "Warranties" "Representations" and "Indemnification" in which the artist promises that all of the material on his album is original, and agrees to reimburse the record label for all of its court costs, legal expenses, and attorneys' fees if the label is sued for copyright infringement. Before sampling, no matter how small a portion of the recording is used, permission from the copyright owners of both the recording and the song is required. Do not rely on the myth that you can use a certain number of seconds or bars of someone's song without penalty. Get permission first!

MUSIC PUBLISHING

What is Music Publishing?

Music publishing is simply the business of exploiting a song – that is, finding uses for the song, such as cover versions, film, TV and video games, ringtones, greeting cards and even karaoke machines – and collecting money for such uses, usually in the form of a license fee. Songwriters typically own the copyrights in the music and lyrics to the songs they write and earn money, usually from license fees or royalties from the commercial use of their songs. Publishing income does not come from copyright ownership in sound recordings. It comes from ownership of the copyrights in the songs.

The copyright owner of a song is entitled to certain exclusive rights under the U.S. Copyright Act (see section on the "Rights of the Copyright Owner"). If someone wants to use the song in any way, they must get permission from the copyright owner in the form of a license. Money generated from such licenses is called "publishing income".

What is a Publishing Company?

Because it can be very difficult to keep track of and collect the publishing monies, many songwriters engage or contract with music publishing companies. A publishing company's job is to find uses for a songwriter's music such as issuing licenses, collecting income generated from the licenses and paying all monies due to the songwriter after deducting an agreed-upon fee or percentage of the revenues for the performance of these services. These arrangements between the publisher and the musician are called "publishing agreements." There are several different types of publishing agreements, including: "co-publishing agreements" (where the songwriter or the songwriter's publisher and an administrative publisher jointly own the copyrights in the song), "songwriter agreements" (where the songwriter transfers the copyrights to the publisher) and

“administration agreements” (where the songwriter retains the copyrights in their song). If offered a publishing contract, an artist should consult an attorney to review the agreement, explain its terms and negotiate with the publisher to get the fairest possible deal for the artist.

Sources of Publishing Income:

There are four main sources of publishing income:

Public Performance Royalties:

If a song gets played in public (in nightclubs, at live concerts, on the radio, on television, etc.) the copyright owner of the musical work is entitled to payment for the performance of that song. However, in order to collect performance royalties, the songwriter usually needs to register as a member of a performance rights society, which will collect all royalties from the radio and television stations, nightclubs, live venues and other commercial establishments playing the songwriter’s music.- There are three performance rights societies in the United States that collect performance royalties on behalf of songwriters: ASCAP (www.ascap.com), BMI (www.bmi.com) and SESAC (www.sesac.com). Songwriters can register with a performance rights society as soon as one of their songs is commercially recorded, offered for sale, or publicly performed. Performance rights organizations are not traditional music publishers and are only involved in the collection of performance royalties.

Mechanical Royalties:

Mechanical royalties are fees paid to the copyright owner of a song (usually the songwriter and/or the music publisher) for the right to reproduce the song on a recording. The U.S. Copyright Act provides that once a song has been commercially released, any other artist can record and release their own version of that song in an audio-only format (CD, cassette tape, vinyl, digital download etc) without the copyright owner’s permission so long as they pay the copyright owner or the copyright owner’s publisher the minimum statutory royalty rate for every copy of their version of the song that is pressed and distributed. The minimum statutory (“mechanical”) royalty rate is currently 8.5 cents for each copy of the song that is pressed and distributed but that amount increases periodically and is computed differently if a song is more than five minutes long. Usually, the record label releasing the recorded version of a copyrighted song pays mechanical royalties to the publisher or songwriter according to the terms of a contract called a “mechanical license agreement”. Mechanical licenses can be obtained through the Harry Fox Agency (www.harryfox.com) or can be negotiated directly with the publisher or copyright owner of the song. Mechanical licenses do not apply to dramatic works such as operas, ballet scores, and Broadway musicals.

In the music and record business, the terms statutory or compulsory license refer to a mechanical license obtained under the provisions of the Copyright Act.

Synchronization License Fees:

A synchronization license is required any time the performance of a song is accompanied by visual images. Synchronization licenses are issued when songs are included in audiovisual works such as movies, television shows, TV advertisements, video games, etc. The fees paid for synchronization licenses vary according to the usage and the importance of the song. While a ten-second background use of an unknown instrumental song in a television show may generate a fee of only a few hundred dollars, the fee for the use of a full-length performance of a hit song in a major motion picture or national advertising campaign can be in excess of \$100,000.

Print License Fees:

While performance, mechanical and synchronization royalties are the main sources of publishing income, revenues from the sale of printed music can also be substantial. A songwriter receives royalties from a print license any time sheet music of his song or a folio or collection of his songs is sold. The royalties received from print licensing are usually a few cents per copy printed.

RECORD LABELS AND RECORDING AGREEMENTS

The main function of a record label, or recording company, is to manufacture, distribute, market, promote and sell an artist's music. The artist and the record label enter into a written "recording agreement" which governs their relationship. Some of the key provisions in recording agreements include: the term or duration the agreement, the number of songs or albums to be recorded, the royalties to be paid to the artist, the territory (the countries where the record label can release or sell the album), the budget for recording, marketing and promotion and the general rights that the artist grants to the record label. Recording agreements are often 50 to 80 pages long and contain complex language and terms that are not only difficult to understand but can significantly impact the artist's rights, obligations, and compensation. Accordingly, any time an artist gets offered a recording contract they should consult an attorney to review the agreement, explain its terms to them and negotiate with the record label to get the fairest possible deal for them.

INTERNAL BAND AGREEMENTS

In order to avoid future misunderstandings, a band should have an internal agreement between all of the band members, which sets out how the band is going to conduct business together. This agreement should be created as soon as possible after the band's formation when the band members are on friendly terms and can negotiate in a levelheaded manner. One of the first decisions to be made is whether the band will create a corporation or a limited liability company to operate their business. If so, an internal band agreement will still be required, but it will be described as a "Shareholder Agreement" or "Members Agreement." The agreement should be in writing and cover topics such as:

ownership of the band name, who owns and controls copyrights, the division of the bands assets and income (from live performances, touring, record contacts, publishing deals etc), who, if anyone, is to act as the band's leader, what are the responsibilities of each band member and what happens when there are disputes, someone leaves the band or the band breaks up. A band should consult an attorney to draft a contract reflecting all of the terms agreed upon by the band members and assist with the registration of the business entity if the band elects to form a corporation or limited liability company.

TRADEMARKS

What is a Trademark?

A trademark is a word, name, symbol or device, or combination of them, used by a business in commerce to identify its goods and services and to distinguish them from others. Trademark rights may be used to prevent others from using a confusingly similar mark, but not to prevent others from making the same goods or from selling the same goods or services under a clearly different mark.

Service Marks:

A service mark is a trademark that is used in connection with services. For example a band can obtain a service mark in its name to be used in connection with its live performances (entertainment services) and can also obtain trademarks in its name in connection with the sale of its CDs, t-shirts, posters etc (goods).

Trademark Registration:

A business can obtain trademark rights in the geographic area of use simply by using the mark in the ordinary course of trade or in connection with the sale of goods or services. However, in order to obtain national trademark rights, which serve as evidence of ownership of the mark and enable the owner to sue for infringement in federal court, the owner must first apply to register the mark with the United States Patent and Trademark Office (USPTO). Trademark registration applications can be obtained from the USPTO website (www.uspto.gov) and the applicant must pay a separate filing fee for each class of goods and services for which the applicant wishes to use the mark. For example, if a band wants to obtain a service mark in its name for live performances and a trademark in its name for CD sales the band only has to file a single application but would be required to pay two separate fees. Once a trademark is registered by the USPTO, the owner is entitled to use the mark forever provided that the owner continues to use the mark, satisfies the renewal requirements and pays the appropriate renewal fees.

Use of the TM or SM Symbols:

Use of the symbols "TM" or "SM" (for trademark and service mark, respectively) usually indicate that a party is claiming "common law" rights in the mark. These symbols are often used before federal registration is obtained.

Proper Use of the Federal Registration Symbol ®:

The federal registration symbol *may only be used* once the mark has been registered by the USPTO. While an application is pending, the ® symbol cannot be used until a federal registration has been obtained.

Trademarking Your Band's Name:

Before deciding on a particular band name, it is important to determine whether anyone else is already using that name. A band's rights in its name depend on a few key factors: (1) whether the band used the name first; (2) the geographic area (city, state, region, etc) where the band uses the name; and (3) whether the band actually performs under the name. If the band used the name first it may be able to stop other acts from using the same or a similar name. However, unless the band has obtained a federal trademark registration giving it an exclusive right to use the name throughout the United States, the band would only have the rights to use the name exclusively in the areas where it was the first to use the name. For example, if a local band performed live or sold its CDs only in Chicago, it could not prevent a band in California from using the same name, but could stop the other band from using the name in Chicago if the Chicago band was the first to use the name in that area. Additionally, if a band applied for a federal trademark registration for its name in 2005, it could not prevent another band that started using the name in 2001 from using the name in the geographic area(s) where that band performs or sells its music.

Researching Band Names:

Prior to choosing a band name, artists should conduct a thorough trademark search to ensure that the name they have selected is not being used by another band. A reasonably complete, and free, trademark search can be conducted independently utilizing online resources such as the USPTO website (www.uspto.gov), search engines like Google, Yahoo etc, sites dedicated to listing band names including the Ultimate Band List (www.ubl.com) and Bandname.com (www.bandname.com) and various online music retail sites (Amazon, I-Tunes, Napster, MSN etc). Although these are good starting points, to be as careful as possible not to infringe on another band's name, artists may want to hire an attorney specializing in these matters or a trademark search company to conduct a more comprehensive trademark search.

Protecting Your Band Name:

If a thorough trademark search reveals that their chosen band name is not in use, artists should apply for a federal trademark registration for the band name and consult an attorney to assist them with the registration process, which can involve complex negotiations and correspondence with the staff attorneys at the USPTO. Prior to securing federal registration, artists can protect their band name by keeping records of where and when they perform and sell CDs and any publicity or advertisements including the band's name that establish priority of use of the name in various geographic areas. Artists should also try and register the domain name for their band to secure it for future use as the address for the band's website. You can search available domain names and obtain domain name registrations through www.networksolutions.com. [Note: having a

trademark does not necessarily mean that you have the rights to the domain name, and visa versa]

ARTIST REPRESENTATION IN THE MUSIC INDUSTRY

There are four different kinds of representatives that may represent recording artists, performers, and songwriters in the music industry: personal managers, agents, business managers, and attorneys.

Personal Managers: Personal Managers advise and counsel the artist on virtually all aspects of the artist's career. The duties of a personal manager may include:

- dealing with the artist's publicity, public relations and advertising
- assisting in the selection of the artist's material
- devising plans for the artist's long term career development
- choosing the artist's booking agent, road manager, lawyer, accountant et al and overseeing the artist's relations with each of them
- counseling the artist on what types of employment to accept
- in some instances, acting as a liaison between the artist and the artist's record company

Personal managers are usually paid a commission of 15% to 25% of the artist's gross receipts from all of the artist's activities in the entertainment industry (recording contracts, publishing contracts, endorsements, television and movie work, etc). This commission, which may increase depending upon the artist's success, is in addition to reimbursement of the personal manager's travel and out-of-pocket expenses incurred in representing the artist. In certain states, such as California, a manager may not seek or procure employment for artists, as the artist's agent typically performs this job.

Agents: An employment or booking agent's job is to find work for the artist in the music industry. As compensation for their services, an agent typically receives between 5% and 15% of the artist's gross earnings from any bookings, engagements, or employment secured by the agent. The agent's commission percentage may vary depending on a number of factors, including state laws, the type of work, the length of time and/or the popularity of the artist. The laws in many states (including Illinois) require agents and talent agencies to obtain licenses before they can collect commissions and in some states, such as New York, agents can only charge artists a maximum of 10% for securing engagements.

Business Managers: Business managers, who are often Certified Public Accountants, look after the financial aspects of an artist's career. A business manager's responsibilities can include providing accounting services, paying the artist's bills, advising the artist on investments, helping form corporations etc. As

compensation, business managers typically receive anywhere from 2% to 5% of the artist's gross receipts or may get paid an hourly rate for their services.

Caution: Before managers and agents will represent an artist, they usually require signed contracts. If approached by a manager or agent, an artist should consult an attorney to advise them and to handle any contractual negotiations on their behalf. You will need professional help before signing any agreement to be sure that the terms of the agreement (such as the fees, duration etc.) are fair to the musician.

Lawyers: In addition to reviewing, negotiating and drafting contracts and advising clients about the law, entertainment attorneys also often perform many of the same duties as personal managers, business managers, and agents. Attorneys have to be licensed by the state(s) in which they practice and are either paid an hourly rate for their services or receive a percentage of the deals they negotiate on behalf of their clients.

RESOURCES

All You Need To Know About The Music Business, 4th Edition, by Donald Passman, Simon & Schuster, 2000.

Music, Money and Success, 4th Edition, by Jeffrey Brabec & Todd Brabec, Schirmer Trade Books, 2005.

Kohn on Music Licensing, 2d Edition, by Al Kohn & Bob Kohn, Aspen Law & Business, 2005.

This Business of Music, 9th Edition, by M. William Krasilovsky & Sidney Shemel, Billboard Books, 2003.

U.S. Performing Rights Societies
www.ascap.com
www.bmi.com
www.sesac.com

U.S. Copyright Office
www.loc.gov/copyright/

Harry Fox Agency (for mechanical rights licenses)
www.harryfox.com

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