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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: ®2016 John Smith 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 costlier 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!