
Rock 'n' Roll Law: Music Copyright through Led Zeppelin

Reference Manual
Volume No. 22-292

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Rock 'n' Roll Law: Music Copyright through Led Zeppelin

Vol. # 22-292

6.0 CLE Credit Hours (including 2.5 Hours of Professional Conduct)

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Featuring:

Jim Jesse, Esq.; Rock N' Roll Law; Lawrence, Kansas

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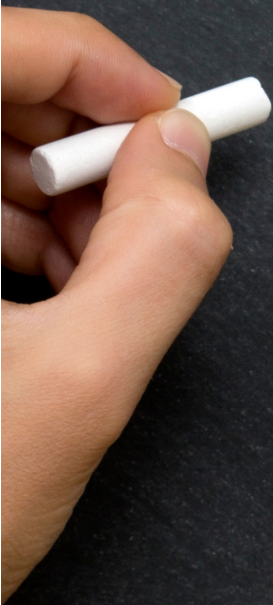
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9:00	Introduction to Copyright Concepts • What a copyright is and how to obtain one • The two copyrights in every song • How to register your song • Copyright duration
10:30	Break
10:40	Exclusive Rights That Come with a Copyright (Part 1) • Rights of reproduction • Rights of distribution • Derivative works
11:40	Break
11:45	Exclusive Rights That Come with a Copyright (Part 2) • Rights of performance and display • Wrapping up the exclusive rights • Works made for hire and joint authorship
12:45	Lunch break <i>The afternoon sessions will cover the ethical issues encountered when representing a rock band. (2.5 Professional Conduct Hours)</i>
1:15	Rock Band Organization as a Client—Model Rules of Professional Conduct (MRPC) 113
1:45	Ethical Considerations When Representing a Rock Band—MRPC 1.14
2:15	Ethical Issues and Conflicts of Interest Representing Competing Interests in a Group—MRPC 1.7, 2.1
2:30	Break
2:40	Conflicts of Interest, Copyright Infringement, and “My Sweet Lord” and “Stairway to Heaven” Ethical Issues
3:55pm	Seminar Concludes



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Speaker Biography

Jim Jesse, Esq.

Rock N' Roll Law

Lawrence, Kansas

Mr. Jesse is the founder of Rock N' Roll Law, and his passion is spreading music law through continuing legal education. Prior to starting Rock N' Roll Law, he was the General Counsel for Cool Music Network (THE COOL TV), a 24-hour-a-day music video television network. Mr. Jesse has been licensed as an attorney for 25 years and has been a full-time music law presenter since 2013. He is also a singer/songwriter who has released two albums: "Down on the South Side" and "Better Late Than Never." Mr. Jesse has been writing songs for over 30 years and has more than 200 songs that he has never released. He is a member of Broadcast Music, Inc. and has managed his own record label for distributing his music. Mr. Jesse is the author of *The Music Copyright Law Manual* and *The Musician's Guide to Music Copyright Law*. He consults and practices in areas regarding intellectual property, licensing, and music law. For additional information, please visit <http://rocknrolllaw.com>.

The Essentials of Music Copyright Law with Ethics

Jim Jesse, Esq.
Rock N' Roll Law
Lawrence, Kansas

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ROCK ‘N’ ROLL LAW PRESENTS



The Essentials of Music Copyright Law with Ethics



I. Introduction to Copyright Concepts

A. A Band or Artist is a Business and should be treated as such.

- Set up corporate and tax structure such as an LLC and deduct business expenses.
- Have an operating agreement, preferably in writing.
- Decisions you make early can be hard to reverse, particularly if you sign a long-term contract.

Band Operating Agreement Checklist (Important Items)

- How is revenue to be split?
- Who owns/authored the composition and sound recordings?
- Who owns the band name? Probably should TM name or make sure no one else is using
- Who is/are the leader(s); one member-one vote?
- How are members added or removed?

Other tinges to think about:

- who owns the instruments and other band property?
- how are costs split?
- do you have a manager? who books shows?
- who is your publisher?

B. Record Labels

A record label is a company that markets music recordings and videos. Often, a record label owns its own publishing company and the sound recording of its artists, coordinates the production, manufacture, distribution, marketing, promotion, and enforcement of copyright for sound recordings and music videos, conducts talent scouting and development of new artists (“artists and repertoire” or “A&R”), and maintains contracts with recording artists and their managers.

The two “Worlds” of music are Major and DIY, though there is a wide spectrum.

IF YOU REOCRD YOUR OWN MUSIC, YOU ARE YOUR OWN RECORD LABEL.

Record labels are no longer the gate-keepers; now, everyone can make and distribute their own music.

C. Origins of Copyright Law

“Congress has the power to promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”

Art. 1, Section 8, Clause 8, U.S. Constitution

Key points:

- “Useful Arts” is where Fair Use Defense emanates from (codified in 17 U.S.C. 107)
- Copyrights last for limited times and cannot last forever (see below)
- Copyrights initially vest with the author(s) of a creative work; now, keep in mind there’s a difference between AUTHOR and OWNER. Most indie artists are both.
- you get exclusive rights with your Copyright (see below)
- this area has been strictly Federal since Jan. 1, 1978 (17 U.S.C. 301(a))

D. What is a Copyright?

(a) Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) Literary works;
- (2) Musical works, including any accompanying words;
- (3) Dramatic works, including any accompanying music;
- (4) Pantomimes and choreographic works;
- (5) Pictorial, graphic, and sculptural works;
- (6) Motion pictures and other audiovisual works;
- (7) Sound recordings; and
- (8) Architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

17 U.S.C. 102 (a) and (b). Above list is illustrative and not exhaustive

In this multi-media, digital age, most creative works have multiple copyrights in them; multiple copyrights in now work, the more authors, owners, and, thus, potential problems, if multiple entities are involved

Other IP owned by a band or artist:

- trademarks such as band name, logos, slogans
- lyrics and sheet music
- photos, album covers
- music and other videos
- plays and documentaries
- books

E. The Two Copyrights in Every Song

There are two copyrights to every recorded song, and you do not have a copyright until your composition is put in a “tangible medium of expression”

- 1) the “musical work” = melody + lyrics (or composition)
- 2) the “sound recording” aka “Master Recording” or “Master”. How the composition sounds.

See 17 U.S.C. 102(a)(2) and (a)(7).

“Sound recordings” are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied. (17 U.S.C. 101). This copyright was created for sound recordings fixed as of February 15, 1972. This lasts for a flat 70 years

“Phonorecords” are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “phonorecords” includes the material object in which the sounds are first fixed. A sound recording, however, is not the same as a phonorecord. (Section 101). Simply put, a sound recording is how a song sounds.

Thus, a phonorecord is the physical object in which works of authorship are embodied. The word “phonorecord” includes cassette tapes, CDs, and vinyl disks as well as other formats such as music downloads and streams. A sound recording is how the music composition sounds fixed on a phonorecord.

One song can, and often does, have multiple sound recordings.

MUSIC + LYRICS = MUSIC COMPOSITIN

MUSIC COMPOSITION + MASTER = SONG

All of music copyright law flows from the two copyrights in each song. Most artists (absent covers) should own both; and if you want to license a song, you usually have to clear both

F. How to Establish a Copyright: Copyright Registration

Put the intangible music composition into a “tangible medium of expression” (CD, tape, hard drive) per Section 102(a) and BETTER YET . . .

Register your music composition and/or sound recordings with the copyright office

- Create an account at copyright.gov (user name/password)
- Fill out the form depending on what you copyright.
 - Form SR if you own both copyrights or just want to register the master
 - Form PA for just the composition
 - Form TX for just the lyrics or sheet music (sheet music is a physical or digital manifestation of the musical composition)
- Electronic application is cheaper and faster
- You can copyright a whole album at one time as a collective work if it meets one of two conditions below
- There is a difference between an author and an owner/claimant

A collection of works may be registered with a single application if either of the following requirements is met:

1. The collection is made up of unpublished works by the same author and owned by the same claimant; or
2. The collection is made up of multiple published works contained in the same unit of publication and owned by the same claimant.

Publication is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication. Section 101

If you have written compositions over the years and never published them, you could copyright all of them as a collective work; however, in 2019, this was limited to 20 works (songs)

Why should you register your songs/sound recordings? You can only sue for copyright infringement if you have registered your work with the Copyright office. If registration is made within three months after publication of the work or prior to an infringement of the work, statutory damages and attorney's fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner Section 412.

Good Reasons to Register:

- Cannot sue until you RECEIVE a certificate of registration—not just applying for it; *Fourth Estate v. Wall-Street.com*, 586 U.S. ____ , 139 S. Ct. 881; 203 L. Ed. 2d 147; 129 U.S.P.Q.2d 1453 (2019)
- potential access to statutory damages and attorney fees—more leverage for Plaintiff
- To tell the world you own it
- Gets the correct owner on file

Deposit Copies:

Deposit to Accompany Application: An application for copyright registration must be accompanied by a deposit consisting of phonorecords representing the entire work for which registration is to be made.

Unpublished Work: Deposit one complete phonorecord. Limited to 20 musical compositions

Published Work: Deposit two complete phonorecords of the best edition, together with “any printed or other visually perceptible material” published with the phonorecords.

G. Copyright Duration

Copyrights on both the master and composition last for the author's life plus 70 years after their death. When there is more than one author, the 70-year period begins to run upon death of the last author (Section 302). You can transfer copyrights (it is personal property), but such transfer must be in writing (except for non-exclusive transfers) (Section 204).

A work-made-for-hire copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever.

Public Domain

There are songs whose copyrights have expired or they were written prior to modern copyright law. These are in the “public domain.” This means that anyone can use or cover those songs without getting permission or paying a royalty.

H. Music Publishers and Transfers of Copyright

Only deals with the music composition, not the master.

A songwriter or composer is the creator of a work, which is a song, score or other musical composition. A publisher, on the other hand, is an individual or company that can own (in part or whole) or administers the copyright of a work. A publisher handles the business side, such as finding users, issuing licenses, collecting money, and paying the writer, among other things. In other words, they administer the composition, so these are often call “administrative rights.”

Most indie Third-Party publishers DO NOT own the copyright, but rather are admin publishers where the composer owns the composition and the publisher retains around 10 percent of the composition’s royalties.

Types of publishing deals: Exclusive/Sub-Publishing/Administrative

Transfers of Copyright

Any or all the copyright owner’s exclusive rights listed below, or any subdivision of those rights, may be transferred in whole or part, but the transfer of exclusive rights is not valid unless that transfer is in writing and signed by the owner of the rights conveyed or such owner’s duly authorized agent. Transfer of a right on a non-exclusive basis does not require a written agreement. 17 U.S.C. 204(a).

A copyright may also be bequeathed by will or be passed as personal property by the applicable laws of intestate succession.

I. Music Producers

A producer is to a song or album what a director is to a movie. He/she helps with arrangement, instrumentation, capturing sound, and all aspects of recording.

There are two elements to a “musical work”= music + lyrics

There are three elements to a “sound recording” = sound recording (how it sounds) + performances (everyone who plays on the song) + production

If you record by yourself your own written compositions, then it’s clear who owns everything; but, if you bring in other musicians and/or a producer, then you should make clear who owns what (see Works-Made-For-Hire) below.

In every song, ask who is the author and other of:

- Music
- Lyrics
- Sound recording
- Performance
- Production



II. Six Exclusive Legal Rights You Get with Your Copyright

A Copyright Owner receives six exclusive legal rights, 17 U.S.C.106, regardless if it has been formally registered. These rights help protect your work, so if you want to use another's work, you generally need permission to do so—a license—unless it falls under exceptions as listed in Section 107-122.

17 U.S.C. 106 Exclusive Rights in Copyrighted Works

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

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

1) Right of Reproduction 17 U.S.C. 106(1) APPLIES TO BOTH COPYRIGHTS

Copyright owner (usually the songwriter) gets right “to reproduce the copyrighted work in copies or phonorecords.” No one else can FIRST record or copy your song without songwriter’s or owner’s permission. Songwriter gets right of first use.

A. Mechanical Royalty

Each time Record Label physically reproduces a song, writer earns a Mechanical Royalty. If you put out your own music, you generally will not earn this on physical sales because you would just be paying yourself.

Rate is set by Copyright Rate Board (CRB). It is currently \$.091 per reproduction or \$.0175/min whichever is greater; includes cassettes, vinyl, CD, and downloads). Streaming rates are overseen by the CRB, but there is not set rate (see below).

Songwriter can waive the mechanical, and this does not apply if conditions of Section 115 (below) are not met. ONLY THE PUBLISHER/SONGWRITER GET(S) THE MECHANICAL ROYALTY, even though the right applies to both copyrights in a song.

B. Compulsory License (Cover Songs)

Under Section 115 of the Copyright Act, once a song has been recorded and released to the public, the copyright holder must license it, so it’s a “Compulsory” License:

§115 SCOPE OF EXCLUSIVE RIGHTS IN NONDRAMATIC MUSICAL WORKS: COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS

“In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) Availability and Scope of Compulsory License.

(1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery. A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February

15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.

(2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.”

TV shows, commercials, and movies are not subject to compulsory license, so publishers may charge what they want for the song. See Licensing section after Distribution.

Covering a Song—Re-recording another’s song

If you are a band, you must comply with section 115. You must get the compulsory license and pay the mechanical royalty. You can do so via Harry Fox Agency, or a like entity.

- You must serve “notice of intention” within 30 days after recording a song, and prior to its public release.
- You must attempt to find the publisher/songwriter to get mechanical license, and, if you cannot, file notice you’re covering the song. Find the publisher via Harry Fox, BMI/ASCAP, copyright.gov, or even Google. This is assuming the song is not in the public domain.
- You must file a statement and pay mechanical per the statute.
- Any failure to do the above can lead to damages authorized under the Copyright Act. There are third party companies who can handle this.

For a songwriter or publisher to get paid, their information must be in public records, such as the copyright office or a performing rights organization such as BMI or ASCAP. The law states:

To be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords made and distributed after being so identified, but is not entitled to recover for any phonorecords previously made and distributed. 17 U.S.C. 115(c)(1).

Under the Music Modernization Act, Congress created the Mechanical Licensing Collective (MLC see themlc.com). The MLC is the organization setup to collect mechanical royalties from Digital Service Providers (DSP’s—streaming services) and distributes them to songwriters (and publishers).

So, if you are songwriter, and DO NOT have a publisher collecting your royalties (hint, you should!), then you need to register your music compositions with the MLC to collect mechanical royalties from streaming.

2) Right of Distribution 17 U.S.C. 106(3) APPLIES TO BOTH COPYRIGHTS

Copyright owner gets the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”

No one can distribute or publish your music without your permission (note definition of publication under Section 101 is analogous to distribution).

There are two types of music distribution forms to think about: physical and digital (both d/l's and streaming). Do you even make physical music?

So, if you are an artist who releases your own music, and you want someone to distribute copies (either physical or digital), you must enter into an agreement with the distributor to do so on an exclusive or non-exclusive basis.

If you're on a label, you will transfer the first two rights to your label. That is why you have a label. If you record your own music, then you are your own record label and need to perform the first two rights on your own or get a third party to do it, getting back to the definition of a record label.

A. First Sale Doctrine

One exception to the right to distribute is that once someone buys a copy of copyrighted work (like a CD), they are able to resell, rent, or lend those works (e.g. give it to a friend or sell it on eBay). This is known as the “First Sale Doctrine”. This is how used CD stores and libraries, for example, are not infringing on the exclusive right of distribution held by the owner of the work. See also 17 U.S.C. 109, and *Capitol Records, LLC v. ReDig, Inc.*, 934 F.Supp.2d 640, (S.D.N.Y., April 19, 2013) (dealing with the First Sale Doctrine and digital music files).

First Sale Doctrine Summary:

What you can do:

- sell/give away your physical music
- make a copy of physical music for your personal use
- download album/song and burn it for personal use
- give away your computer/phone on which your music is created

What you cannot do:

- make copies of physical music to sell/give away
- resell a burned CD or song
- sell individual MP3 files

3) Right to Prepare Derivative Works 17 U.S.C. 106(2) APPLIES TO BOTH COPYRIGHTS

Copyright owner has the right “to prepare derivative works based upon the copyrighted work.” This is also known as the right of adaptation, or, as I put it, “the right to rip yourself off.”

A “derivative work” is a work based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”. See 17 U.S.C. 101.

The easiest way to remember this is that the owner/author has the right to rip themselves off. You write lyrics and turn it into a composition; you write a composition and can turn it into a sound recording.

As it relates to music, there are generally two types of derivatives:

- Sampling
- Replay

A. Sampling: Actual use of one (or more) master sound recordings in another song

"Sampling" in this context means the actual physical copying of sounds from an existing recording for use in a new recording, even if accomplished with slight modifications such as changes to pitch or tempo. See *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004).

The Law: Clear all samples and get permission from copyright holders of BOTH composition and sound recording if using exact sample and did not re-record. There are no set rates, just negotiate. SAME PERMISSIONS AS LICENSING A SONG USING THE EXACT MASTER.

Majority view: A little sampling can be legal

We hold that the "de minimis" exception applies to infringement actions concerning copyrighted sound recordings, just as it applies to all other copyright infringement actions. After listening to the audio recordings submitted by the parties, we

After listening to the audio recordings submitted by the parties, we conclude that a reasonable juror could not conclude that an average audience would recognize the appropriation of the horn hit. That common-sense conclusion is borne out by dry analysis.

VMG Salsoul, LLC v. Ciccone, 824 F.3d 871 (9th Cir., 2016)

Minority View: Strict liability—Use of any sound recording sampled is copyright infringement

Grand Upright Music Ltd. V. Warner Bros. Records, Inc., 780 F.Supp. 182 (S.D.N.Y. 1991) ("Thou shall not steal."); Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390 (6th Cir. 2004) (any sampling of a master, even if unrecognizable, is a copyright violation). Now, it should be noted that in this case the defendant would likely have lost under majority view.

B. Replay: Re-recording riff or hook

If you re-record riff and do not use master, you need permission only from songwriter/publisher, not owner of sound recording. Same is true for sync licensing.

Exception to getting permission for a sample

- Parody—see Campbell v. Acuff-Rose Music, Inc, 510 U.S. 569 (1994) (the 2 Live Crew case)—making some social commentary.

Because a sample is a derivative work, and not a cover, you cannot sample someone else's copyrighted work without permission. There is no such thing as a "small enough" sample, and the courts do not view ignorance as a defense. Now, if it's a small sample, you could fall under the de minimus exception. See 17 U.S.C. 107.

NO SET RATE-NEGOTIATE

Synchronization Licensing

In music industry terms, "synchronization" (sync for short) is the process of playing a song in conjunction (syncing it) with a moving or still picture of any kind: TV show, commercial, film, video game, corporate presentation, YouTube clip or live performance, or radio commercial with voice-over.

In order to use a song, you need permission from both copyright holders. You must obtain what is called a "Synchronization License" from the copyright holder of the song,

and a “Master Usage” license from the label or sound recording holder. No set rate—negotiate.

KEY TERMS OF A SYNC LICENSE

1. Money
2. Duration
3. Territory
4. Exclusivity
5. Platforms

Licensing Wrap-up

You need permission from both copyright holders for:

- use in commercials, TV shows, movies, or dramatic works like plays
- use in samples
- if you re-record song and/or own master, then you only need publisher approval

4) Public Performance of the Musical Composition 17 U.S.C. 106(4) APPLIES TO ONLY MUSICAL COMPOSITION COPYRIGHT

Copyright owner has the exclusive right “in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly”

Two types of public performance (generally):

- Playing live in a venue (focused on in this section)
- Pre-recorded music (and there are many facets to this)

Songwriter/publisher can collect royalties when their song is played in clubs, on TV, and in public by self or others. This right applies to live public performances and terrestrial radio.

This money is collected via Performing Rights Organizations (PROs), the two main ones, BMI (Broadcast Music Inc.) and ASCAP (American Society of Composers, Authors, and Publishers), collect royalties from TV, venues, and radio and pass them on to publishers after deducting their costs. A Performing Rights Organization (or Society) is defined in Section 101 as an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

PRO's act as agents on behalf of songwriters/publishers to collect public performance of the musical composition

BMI/ASCAP still divide the royalties they collect into "shares"—publisher/composer

Every songwriter, composer, or publisher should join either BMI or ASCAP, or better yet, have a 3rd party publisher do it.

PRO'S summary:

1. PRO's are for composers only
2. Can only belong to one at a time
3. No real difference between the big two
4. They still divide money into two "shares"

5) Public Performance of the Master 17 U.S.C. 106(6) APPLIES ONLY TO SOUND RECORDING COPYRIGHT

Copyright owner has the right "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."

Two forms of radio:

- 1) Terrestrial or over-the-air: FM stations pay only the copyright holder of the composition, usually the publisher.
- 2) Digital radio (satellite, internet, cable TV) pays both copyright holders. Digital Transmissions happen via the Internet (like Pandora or another Internet radio station); a satellite (Sirius); or Cable TV (like Music Choice).

In general, there are two types of digital radio:

- Interactive (like Spotify); more of a mechanical (user engages with platform)
- Non-interactive (like Pandora); strictly a public performance (programmed for you)

In order to collect the public performance of sound/master recordings, the copyright owner must register your sound recordings/master with SoundExchange (soundexchange.com). Your 3rd party publisher WILL NOT collect all of this. SoundExchange is to the sound recording what the PRO's are to the composition.

Soundexchange acts as a agent on behalf of copyright owners to collect the public performance of the sound recording/master

Public Performance Exceptions

LIVE

not in “public”

a public performance is “to perform at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered”

invite only

church service

not affiliated with any PRO/sing originals

PRE-RECORDED

not in “public”

to transmit or otherwise communicate a performance to the public, by means of any device or process, whether the members of the public capable of receiving the performance receive it in the same place or in separate places and at the same time or at different times.

“homestyle” exemption

Congress did amend the law (17 U.S.C. 110(5)), in 1999, to exempt some eating and drinking establishments from paying PROs if they are just broadcasting music over speakers or TVs and meet certain size requirements.

6) Public Display 17 U.S.C. 106(5) APPLIES ONLY TO MUSIC COMPOSITION LYRIC COPYRIGHT

Copyright owner has exclusive right “in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly”

The most obvious way in which the exclusive right to display a “copyrighted audio work” (e.g. a song) is done is by displaying the lyrics; for example, a website that publishes song lyrics. This same right needs to be negotiated and granted to anyone that wants to create, distribute and/or reproduce sheet music or lyrics. There’s no set rate, just negotiate.

If you do not copyright lyrics separately as a literary work, once this are wed to music, the lyrics become part of the musical work and credited as such.



III. WRAPPING UP EXCLUSIVE RIGHTS, JOINT AUTHORSHIP AND WORKS MADE FOR HIRE

A. Wrapping Up the Exclusive Rights

Revenue Streams for Bands:

- Publishing for composers
- Sound recordings
- Touring
- Merchandise
- Licensing (samples and TV, etc)

The songwriter/publisher always gets paid, master holder gets shut out of mechanicals and terrestrial radio; DIY are usually own both

Money Streams Summary:

- PROs collect public performance royalties on the COMPOSITION only, both live and pre-recorded
- Harry Fox (and like agencies) collects mechanicals on reproduction of both physical and digital music
- SoundExchange collects sound recording royalties on the public performance of the MASTER, including non-interactive streaming like Pandora
- The MLC collects mechanical royalties from interactive streams

If you are a Songwriter, get all the money you are entitled to:

- Get digital distribution and publishing via a third party
- Join a PRO to collect public performance revenue (publisher will do this but NOT collect live public performances)
- Register your sound recordings via SoundExchange (pub will NOT do this)
- Register your songs with the MLC

Reasons for a 3rd party Publisher

- collect from thousands of potential sources worldwide
- they will register your musical comps with a PRO AND the MLC
- collect pub side of public performance
- save you time & frustration

With each copyright in a song for a band ask

Who is the author/owner

Who collects the money

How is \$ divided

10 Rules for Bands (and Artists)

1. Have an operating agreement
2. Incorporate as a business
3. Treat yourself as a tax entity
4. Know there are two copyrights in every song
5. Own your masters
6. Formally copyright your songs
7. Register as a collective work if possible
8. Never give your songs/publishing away
9. Get digital distribution and publishing via a third party
10. Register your songs at SoundExchange and MLC

Two Sides of the Revenue:

1. Songs/Publishing
 - a. Mechanicals
 - b. Public performance
 - c. Licensing
2. Sound Recordings
 - a. Public performance of sound recordings via digital audio transmission
 - b. Licensing

The Cardinal Rule: “Do everything you can to control your copyrights and manage [or assign, but own] your own publishing company.” Lee Eastman

B. Works Made For Hire

“Works Made for Hire” (WMH)—You hire someone for a creative work and you own the copyright, not the person who created it. A WMH copyright endures for a term of 95

years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.

Works made for hire are defined under Section 101 as:

A “work made for hire” is—

- 1) a work prepared by an employee within the scope of his or her employment; or
- 2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

The facets of WMH:

- Creator who wants to maintain sole ownership and authorship
- Entity wants ownership
- Creator who gives away works as WMH

To protect your music when bringing in others:

- WMH agreement
- Others’ contributions are licensed to you in perpetuity
- Others’ contributions are waived forever, etc.

C. Joint Authorship

Section 201(a) of the Act states the obvious: “The authors of a joint work are co-owners of copyright in the work.” Under Section 201(a), for works created after January 1, 1978, a copyright “vests initially in the author or authors of a work,” or someone who has succeeded or obtained those rights.

To be an author:

- “the person who translates the idea into a fixed, tangible expression is entitled to copyright protection.” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989)
- contribution must be creative or intellectual
- contribution must be more than the minor

Section 101 defines a “joint work” as “a work prepared by two or more authors with the intention that their contributions will merge into inseparable or independent parts of a unitary whole.”

Courts are split on how to define who is a joint author.

The *Childress* test requires that, for a work to qualify as a joint work, each putative author must have:

- (1) intended, at the time of [the works] creation, to be a co-author and
- (2) made independently copyrightable contributions to the work. *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991)

The Ninth Circuit has its own test:

- (1) a person claiming to be a joint author superintend[ed] the work by exercising control;
- (2) the claimed joint authors made objective manifestations of a shared intent to be joint authors; and
- (3) the work's audience appeal turns on each claimed joint author's contribution, such that the share of each in its success cannot be appraised. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000)

Absent an agreement with your joint author:

- Each owns an undivided interest in the whole work (one can license work without others)
- Tenants-in-common, not joint tenants
- Split revenue equally

Have an operating agreement with your co-author that addresses:

- How revenue is to be split
- How licensing for the song/master is approved
- How the song is credited/names listed
- What type of ownership
- who is your publisher/PRO

Regardless of the above, you can have a legal fiction where you claim certain people are “authors”



IV. Copyright Infringement and Led Zeppelin

A. Initial Matters

1. Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. 17 U.S.C. 501(a)

2. Statute of Limitations

The Copyright Act imposes a three-year statute of limitations on copyright infringement claims that begins to run from the date of the last act of infringement. 17 U.S.C. § 507(b). If infringement is ongoing, cannot use Laches as a defense.

B. What a Plaintiff Must Prove

Plaintiff has burden in federal court by a preponderance of evidence. Plaintiff must initially prove two things: They have a valid copyright in the work and have received a certificate of registration; And Defendant copied a “protected interest”

1. Work must be “original”—a low bar

Did not copy something

Minimal or modicum of creativity

Selection and arrangement of unprotectable musical elements can be protectable, but is a “thin” copyright

2. Standard in making decisions:

In establishing a claim of copyright infringement of a musical composition, the plaintiff must prove (1) ownership of the copyright in the complaining work; (2) originality of the work; (3) copying of the work by the defendant, and (4) a substantial degree of similarity between the two works. See *Selle v. Brothers Gibb*, 741 F.2d at 900 (Bee Gees case).

- a. Access Infringer had access to the song (i.e., they could likely hear it). Access does not mean a possibility they heard it through conjecture or speculation, but rather evidence. *Scott v. Paramount Pictures Corp.*, 449 F. Supp. 518, 520 (D.C.D.C.1978) aff'd, 197 U.S. App. D.C. 180, 607 F.2d 494 (D.C.Cir.1979), cert.

denied, 449 U.S. 849 (1980); see 3 Nimmer on Copyright § 13.02[A], p. 13-12 (1982).

Two distinct components: copying and unlawful appropriation

b. Copying is Access + Similarities probative of copying, and you would not expect if created independently

c. Substantial similarity has two components—extrinsic and intrinsic test

1. Extrinsic test

Expert testimony compares the objective similarities of specific expressive elements in the two works that are protectable interests

If not satisfied, do not pass go or get to intrinsic test

2. Intrinsic test

Would an ordinary, reasonable juror think there's a "substantial or striking similarity" between the songs. *Marcoux v. Van Wyk*, 572 F.2d 651, 653 (8th Cir.1978); see also *Bee Gees* at 1183.

The judicially formulated definition of "striking similarity" states that "plaintiffs must demonstrate that 'such similarities are of a kind that can only be explained by copying, rather than by coincidence, independent creation, or prior common source.'" *Testa v. Janssen*, 492 F. Supp. 198, 203 (W.D. Pa. 1980) (quoting *Stratchborneo v. Arc Music Corp.*, 357 F. Supp. 1393, 1403 (S.D.N.Y. 1973)). See also *Scott v. WKJG, Inc.*, 376 F.2d 467, 469 (7th Cir. 1967) (the similarities must be "so striking and of such nature as to preclude the possibility of coincidence, accident or independent creation.")

Reasonable access + substantial similarity = presumption of copying

C. Defenses:

1. No Access;

2. Songs are not "Substantially Similar";

3. Independent creation, prior common source

4. Parody; or, Fair Use Exception to Exclusive Rights listed above: 17 U.S.C. 107
Fair Use Exception to Exclusive Rights listed above. There are four factors. 17 U.S.C. 107:

1. Purpose of use (commercial or educational)

2. Nature of the copyrighted work

3. Amount used and substantiality of the portion used in relation to the copyrighted work as a whole

4. Effect of use on potential market of copyrighted work

Fleshed out, the four "factors" of fair use are:

The purpose and character of the use, including whether such use is of a commercial nature or for non-profit educational purposes (Why are you taking another's work, what are you doing with what you are taking and are you looking to make money from your end product that includes the taken work?)

The nature of the copyrighted work (What kind of work are you taking from? Is it comprised of facts or is it a creative work? Is it published or unpublished?)

The amount (quantity) and substantiality (quality) of the portion used in relation to the copyrighted work as a whole (How much did you take and was it a core portion of the borrowed work?)

The effect of the use upon the potential market for or value of the copyrighted work (Will your work reduce the ability of the copyright owner of the taken work to market it or to get the expected price for a license or sale of it that would have likely been obtained had your work not included the taken material?)

"The ultimate test of fair use ... is whether the copyright law's goal of 'promot[ing] the Progress of Science and useful Arts' would be better served by allowing the use than by preventing it." *Castle Rock Entm't, Inc. v. Carol Publ'g Grp., Inc.*, 150 F.3d 132, 141 (2d Cir.1998) (quoting U.S. Const., art. I, § 8, cl. 8). Accordingly, fair use permits reproduction of copyrighted work without the copyright owner's consent "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107. The list is not exhaustive but merely illustrates the types of copying typically embraced by fair use. *Castle Rock Entm't, Inc.*, 150 F.3d at 141.

Parody

The Supreme Court held in *Campbell*, that while 2 Live Crew's unauthorized use of elements of "Oh, Pretty Woman" constituted a derivative work, the infringement was defensible as fair use because 2 Live Crew's version provides new insight to listeners, and thus represents socially important commentary (this is very similar to/overlaps with the fair use defense of parody).

The Court compared the song to the original before applying the four steps. The justices decided that the 2 Live Crew version "commented on" the earlier song and seemed to criticize it. They said that part of the content, along with the original rap lyrics, parodied the Orbison song. The court reached a unanimous decision that parodies fell under the fair use defense. See more in the Fair Use section later in the Manual, particularly the "Weird Al" discussion.

D. Damages

Plaintiff has potential to choose between actual and statutory damages, 17 U.S.C. 504, along with attorney fees; damages can be reduced for an "innocent" infringer; statutory damages range from \$750 to \$30,000; willful violation can be up to \$150,000 per work.

A lot of cases have little or no actual damages, so a plaintiff will usually go after songs that are huge hits (or statutory damages).

At a minimum, claimant is entitled to actual damages. Actual damages are based on the copyright claimant's lost profits and the infringer's earned profits attributable to the infringing use. See Circ 1, page 7).

“Though it is not essential to a finding of liability under the Copyright Act, the question of whether a defendant's infringement was willful does have a significant bearing upon the potential damages to be awarded in connection with the violation.” *Castle Rock Entertainment v. Carol Publishing Group, Inc.*, 959 F.Supp. 260, 266 (S.D.N.Y. 1997). In this context, “willfulness” means that the infringer either had actual knowledge that it was infringing the owner's copyrights or acted in reckless disregard of those rights. *Brown v. McCormick*, 87 F. Supp. 2d 467, 482 (D. Md. 2000). Evidence that the infringed works bore prominent copyright notices supports, but by no means compels, a finding of willfulness. See *Castle Rock Entm't v. Carol Publ'g Group, Inc.*, 955 F. Supp. 260, 267 (S.D.N.Y. 1997).

“Innocent” Infringer

The Copyright Act permits a court to reduce statutory damages to a mere \$200 per infringed work if “the infringer sustains the burden of proving . . . that such infringer was not aware and had no reason to believe that [its] acts constituted an infringement of copyright.” 17 U.S.C. § 504(c)(2).). An infringer cannot obtain the reduction, however, if a proper notice of copyright appears on the material allegedly infringed.

The Zeppelin Case

Randy Craig Wolfe Trust v. Led Zeppelin (and a host of others), 905 F.3d 1116 (9th Cir. 2018) reversed No. 16-56057, D.C. No. 2:15-cv-03462- RGK-AGR (en banc, March 9, 2020), or “Taurus” by Spirit v. “Stairway to Heaven” by Led Zeppelin

Other notable cases:

9. *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871 (9th Cir., 2016), or “Ohh I Love It (Love Break) by the Salsoul Orchestra and Shep Pettibine v. “Vogue” by Madonna

8. *Marcus Gray v. Katy Perry*, Case No. 2-15-CV-05642-CAS(JCx) (US Dist Ct., Cen.Dist. CA, Western Division), or “Joyful Noise” by Marcus Gray v. “Dark Horse” by Katy Perry

7. *Tom Petty v. Sam Smith* or “I Won’t Back Down” by Tom Petty v. “Stay With Me” by Sam Smith; no case filed—settled out of court

6. *Three Boys Music Corp. v. Bolton*, 1996 U.S. Dist. Lexis 22960 (C.D. CA 1996) aff’d 212 F.3d 477 (9th Cir. 2000), or “Love Is A Wonderful Thing” by the Isley Brothers v. “Love Is A Wonderful Thing” by Michael Bolton

5. The Rolling Stones v. The Verve or “The Last Time” by The Stones v. “Bittersweet Symphony” by The Verve—no case filed—settled out of court.
4. Selle v. Brothers Gibb, 567 F.Supp. 1173 (N.Ill 1983) aff’d 741 F.2d 896 (7th Cir. 1984), or “Let It End” by Ronald Selle v. “How Deep Is Your Love” by the Bee Gees
3. Fantasy, Inc. v. John C. Fogerty, 1995 U.S. Dist. Lexis 6197, aff’d 984 F.2d 1524 (9th Cir. 1993), or “Run Through the Jungle” by Creedence Clearwater Revival v. “The Old Man Down the Road” by John Fogerty
2. Robin Thicke, Pharrell William Williams v. Gaye Estate, Case No. CV13-6004 (Cent. Dist. CA); affirmed 885 F.3d 1150 (9th Cir. 2018); see also 895 F.3d 1106 (9th Cir. 2018), or “Blurred Lines” by Robin Thicke v. “Got To Give It Up” by Marvin Gaye
1. Bright Tunes Music Corp. v. Harrisongs Music Ltd., 420 F.Supp. 177 (S.N.Y. 1976), or “He’s So Fine” by the Chiffons v. “My Sweet Lord” by George Harrison; See also ABKCO Music, Inc. v. Harrisongs Music Ltd., 722 F.2d 988 (2d Cir. 1983)



V. Ethical Issues in Representing a Band or Group

MRPC Rule 1.13 Organization As Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Talking points:

- The band/group is the client, not the individual members, unless there is informed consent.
- Who in the band do you go to? Is there a hierarchy of leadership? Can you go to manager or record label?
- This goes back to the importance of the operating agreement. Who are the leaders?

MRPC Rule 1.14 Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Talking points:

- It is hard to put a band/group into a conservatorship.
- Not all members of the group will have diminished capacity at all times.
- Getting back to the points above, who can you go to in the organization if there is an issue with making informed decisions?

MRPC Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Talking points:

- Is there an inherent conflict when an attorney, who is hired or referred by a record label, represents a band who is signed by said label?
- A lawyer's personal relationship with a group member may undermine their representation of the group as a whole per MRPC 1.13.

MRPC Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Talking point:

- Given the conflicts discussed above, can a lawyer exercise independent professional judgment?



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