



Lawyers for the  
Creative Arts

LCA *Law Guide*

# BAND LAW FOR BANDS

SECOND EDITION

**BARRY IRWIN**  
**ADAM REIS**



**LCA** *Law Guide*

# Band Law for Bands

Barry Irwin  
Adam Reis

Editor: Jason Koransky

**Second Edition**

LAWYERS FOR THE CREATIVE ARTS  
CHICAGO, ILLINOIS

The materials contained in this book represent the opinions and views of the authors and/or the editors, and should not be considered the opinions or views of the law firms with which the authors and/or editors are associated.

Nothing in this book should be considered as providing legal advice for a specific case, and readers of this book should obtain such legal advice from their own counsel. This book is intended for educational and informational purposes.

Book Designer: Patricia Rios  
Cover Designer: Kristen Onesti

© 2013, 2016 Lawyers for the Creative Arts. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form without the prior written permission of Lawyers for the Creative Arts. For permission, contact Lawyers for the Creative Arts, (312) 649-4111, or via fax at (312) 944-2195.

**Library of Congress Cataloging-in-Publication Data**

Irwin, Barry  
Reis, Adam  
Band Law for Bands  
Barry Irwin & Adam Reis  
Library of Congress Cataloging in-Publication Data is on File.

ISBN-13: 978-0-692-65090-5

ISBN-10: 0-692- 65090-5

To order copies of this book, please contact:

Lawyers for the Creative Arts:  
213 Institute Place, Suite 403  
Chicago, IL 60610  
(312) 649-4111  
info@law-arts.org

www.law-arts.org

## Table of Contents

Foreword.....	v
About Lawyers for the Creative Arts.....	vii
<b>Chapter</b>	
Introduction.....	1
<b>1 Do We Need a Partnership Agreement?</b> .....	3
<b>2 Should We Trademark Our Band Name?</b> .....	7
<i>Trademark Rights Arise Through Use of the Mark</i> .....	7
<i>Benefits of a Federal Trademark Registration</i> .....	8
<i>Clearing Your Trademark</i> .....	8
<i>The Interstate Use Requirement</i> .....	10
<i>The Immoral Mark Issue</i> .....	11
<i>Trademarking Last Names</i> .....	13
<i>The Process of Obtaining a Trademark</i> .....	13
<i>Protecting Your Trademark</i> .....	13
<b>3 Who Owns Our Music?</b> .....	17
<i>Ownership in Your Compositions</i> .....	18
<i>Publishing Companies</i> .....	20
<i>Ownership in Your Sound Recordings</i> .....	20
<i>Transferring Ownership</i> .....	21
<b>4 Should We Register Our Copyrights, and How?</b> .....	25
<i>Formalities of Copyright Registration</i> .....	26
<i>Single vs. Standard Application</i> .....	26
<i>Determining How Many Applications to File: The Three</i> <i>Questions to Ask Yourself Before Registering Your Works</i> .....	27
<i>Registering Your Works Online</i> .....	37
<i>Registering by Mail</i> .....	45
<b>5 How Do We Make Money With Our Music?</b> .....	47
<i>Getting Paid for Your Compositions</i> .....	48
<i>Getting Paid for Your Sound Recordings</i> .....	55
<i>Touring and Merchandise</i> .....	64

**Chapter**

- 6 Can We Use Other People’s Music  
(And When Can Other People Use Ours)? ..... 69**
  - Cover Versions ..... 69*
  - Fair Use Exception: Parodies ..... 73*
  - Sampling: Fair Use and De Minimis Exceptions ..... 75*
- 7 What Do We Look for in a Recording Contract? ..... 79**
- 8 The Helping Hands?..... 89**
  - Booking Agents..... 89*
  - Producers ..... 92*
  - Session Players and Sound Engineers ..... 94*
- 9 How Do We Get Permission to Use Artwork and Photos? ..... 95**
- 10 Partnership, Corporation, or Limited Liability Company? ..... 97**
- 11 How Do We Break Up?..... 101**
  - Website Resources..... 107*
- Appendix A: Band Agreement ..... 109**
- Appendix B: Copyright Split Agreement..... 121**
- Appendix C: Copyright Assignment ..... 123**
- Appendix D: Work-Made-For-Hire Agreement ..... 127**
- Appendix E: Cover Art Assignment ..... 131**

---

## Foreword to the Second Edition

In 2012, LCA decided to celebrate its 40th year of service to the arts by producing a series of books on arts-related legal topics. The goal was to explain basic legal principles in a way that would be accessible to practicing artists – in other words, individuals without law degrees. And so the *LCA Law Guide* series was born.

The *LCA Law Guide* is now three-volumes, with another forthcoming. The present volume is our first “second edition,” incorporating many changes, updates and expansions from the first edition. This second edition is authored by the first edition co-author, Barry Irwin, with Adam Reis. Special thanks to Jason Koransky, who co-authored the first edition of *Band Law for Bands*, and who has been the Editor of the entire *LCA Law Guide* series since its inception.

This second edition of *Band Law for Bands* will be helpful to musicians of all kinds in learning the basic legal principles that apply in this area of law. We at Lawyers for the Creative Arts welcome your feedback!

Carol Anne Been  
President, Board of Directors  
Lawyers for the Creative Arts



## About Lawyers for the Creative Arts

Since its founding in 1972, Lawyers for the Creative Arts has been the “go to” resource for legal advice crucial to the creative arts. Regardless of a client’s ability to pay legal fees, LCA provides legal advice to individuals and organizations in the arts and entertainment communities directly and through our network of volunteer attorneys.

LCA serves individuals and organizations in all areas of the arts and entertainment, including the literary, visual, and performing arts. From string quartets to rock bands; from screenwriters to documentary filmmakers; from sketch artists to photographers; from stage actors to producers; from bronze casters to painters; from literary publishers to media houses; from museums to digital archivists; LCA helps them all navigate the complex legal system.

We have helped clients start businesses, draft contracts, and protect innovative designs and creations of every nature in every conceivable discipline of the arts. We help artists in litigation matters and we are equally active in helping to resolve claims out of court. Our Patricia Felch Arts Mediation Service exists to help artists resolve disputes quickly, privately, and outside the costly realm of courtroom litigation. Our popular nonprofit workshops are directed to artists seeking to organize as tax exempt corporations under state and federal law. We have helped thousands of organizations, including many of the most prominent and successful arts institutions in the area.

LCA operates with a small full-time staff, but we are backed up by hundreds of active private attorneys from the best firms in the area. Our volunteer lawyers are the true heroes who level the playing field when clients are at a disadvantage. They are willing to step up and contribute their time and valuable expertise to our many thankful clients. They get it—that art, in all its forms, is



an important and worthwhile piece of American culture, and that art and those who create it should have legal protection.

The long list of volunteer attorneys, together with LCA's dedicated staff, Board of Directors, Honors Council, and Associate Board, are the soul of LCA. With their support, artists are free to do what it is they do—bring color, texture, and wondrous sights and sounds to all of our lives.

Education is another key element of LCA. LCA provides materials, conducts workshops, and gives seminars on not-for-profit incorporation and tax exemption, the law of music, publishing, film, copyright, and more. LCA gives presentations to dozens of schools, colleges, law groups, and arts groups each year. And, it mentors hundreds of young lawyers.

As LCA celebrates 44 years of service, we pledge to continue, with the help of the legal community and other supporters of the arts, to provide our unique, high-quality, and necessary services to the artists and arts organizations throughout Chicago and Illinois.

#### Lawyers for the Creative Arts

Jan Feldman, Executive Director  
Marci Rolnik Walker, Legal Director  
William E. Rattner, Senior Counsel  
Sarah Concannon, Administrator

## Introduction

Making music is arguably the most rewarding reason to be in a band. Performing live can also be thrilling. But, unless you take care of the business side of your musical passion, you may not be able to pay the bills. To put yourself in the best position to do so, you must take care of all of the legal issues that confront a band—from its formation through breaking up.

This book was written to help you understand and address the most common legal issues that emerge with a band. We have not written this book to be a comprehensive analysis of the legal issues. And given the rapidly shifting dynamics of the music industry, new issues emerge seemingly every day involving various digital technologies and new business models. Huge treatises and textbooks have been published that address all the details and minutiae of the music industry, and they are updated regularly. This book addresses at an introductory level the fundamental issues bands face, including entering into a partnership agreement, song ownership rights, licensing issues, registering copyrights and negotiating recording contracts.

We hope you can use this book as a first resource when wondering what the law may say about a particular issue. And as we mention throughout this book, times will emerge when you should consult with an attorney for advice or to handle a particular situation. But if you keep this book handy, you should be able at least to recognize some of the important issues your band faces, and handle them with knowledge and confidence . . . just how your band performs on stage night after night!



## Chapter I

### Do We Need a Partnership Agreement?

You and your buddies recently started a band. You all get along, trust each other, and your focus is on making great music. But, you also realize your band is a business and the legal issues are complex. The first question we usually get as lawyers for musicians who have recently formed a band is, “Do we need a partnership agreement?” The fact that you are asking this question is a good sign. Without treating your band as a business from the get-go, you could wind up in a battle with your bandmates down the road. The choice of whether to operate as a partnership or some other legal entity is a separate question that we touch on briefly below and in more detail in Chapter 10. But, no matter what legal entity your band chooses, **you should attempt to enter into an agreement, often called an “band agreement,” setting out the expectations of the group regarding how the band will operate.** Without such an agreement, bitter disputes may arise.

The time to sort out the rules is now, while everyone is getting along. Waiting for an issue to arise before doing so is a recipe for an early breakup. For example, who owns your band name that may have been suggested by the lead singer, but popularized by the group? What if your drummer skips practices and only shows up for gigs? What happens if he skips a gig? What happens when your guitarist leaves the group; can he continue using the name? Can he perform the music he was part of creating? What about the T-shirt design that the bassist came up with—who can use that design if there is a breakup?

The place to address these issues is in the band agreement. If these issues are not addressed in the band agreement, the law will answer them for you. And

the law might not provide the answer that you were expecting. For example, unless agreed otherwise, if your drummer misses a gig, he is still entitled to his share of the profits as a part owner of the business. As to the band name, the band owns that name—not any individual member.

### ***Battle of the Bands:*** **When Bandmates Clash**

The Beach Boys spent years fighting in court, until they finally settled their lawsuit over the rights of certain band members to use the band's name. The Black Crowes endured a bitter lawsuit over a former manager's claim to an equal portion of the band's profits—based on a pie chart scribbled on a piece of paper during the band's early days of existence. Chris Daughtry, made famous on the hit show *American Idol*, was sued by his former bandmates over songwriting credits. These stories—and many more like them—all occurred because the business details of the bands were not nailed down from the start.

Fundamental issues you want to address in a band agreement include:

- Band member jobs and responsibilities;
- How to split profits from gigs;
- How to split merchandise profits;
- How your band should make future decisions (majority vote or unanimous vote);
- How to determine songwriting credits;
- Who owns the band name; and
- What to do if a band member wants to quit.

An attorney can assist you in drafting a band agreement; however, there is no set way in which these issues must be drafted in an agreement, and you can generally address them how you and your band members agree. We have included a sample band agreement, similar to one which we used with one of our clients, as Appendix A in the back of this book. We do recommend,

---

however, that you consult with an attorney to draft and tailor an agreement to meet your band's specific needs.

As to the legal entity you might want for your band's business, most states provide three relevant options:

- (1) A general partnership;
- (2) A corporation; or
- (3) A limited liability company (LLC).

If your band has been paid for playing a gig, recorded a song, or sold some merchandise, you are likely already recognized as a partnership under the law. A partnership is basically the default legal enterprise that can exist without any formal filing or paperwork. Most states define a partnership as two or more people acting as co-owners of a business for profit. Generally speaking, a partnership exposes its partners to personal liability, while a corporation provides some immunity from personal liability. In Chapter 10, we discuss some of the differences in these legal entities in more detail. But, until such time as personal liability begins to become a concern, you are probably fine continuing to operate as a partnership. Whatever type of legal entity you ultimately choose, however, will require that you have a band agreement.



## Chapter 2

### Should We Trademark Our Band Name?

It probably was not long after you came together as a group of musicians to create music that the conversation turned to your band's name. You all settled on a name and were proud and excited about it. You should be, as this is your new musical identity. A question we often get from bands like yours is, "Should we trademark our band name?" Again, if your band is asking this question, that is a good sign.

The good news is that a band name can be protected as a trademark. A trademark is a word, phrase, logo, or other characteristic that indicates to consumers that your band is the source of particular goods (albums, T-shirts, posters, etc.) or services (such as live shows). In fact, a band or musician's name can be quite valuable. For example, Elvis Presley Enterprises owns numerous registrations for the "Elvis" trademark and many other trademarks which incorporate the word "Elvis." Licensing these "Elvis" trademarks appears to be big business, as the official Elvis website even features a page devoted solely to providing information about how to license the Elvis name for various goods or services.

So, given the potential monetary value in your band's name and its ability to distinguish you as the source of your music, you are smart to be concerned about protecting your name.

#### Trademark Rights Arise Through Use of the Mark

Rights in your name as a trademark (sometimes referred to as a "mark") can be created simply by being the first person or business to use it. You may not have to do anything else to obtain rights to your name in the geographic area in which you are using it—just keep on using it.



For example, say that you are the first band to use the name Kicking Picks, and you are doing gigs in Illinois. If no one else has filed for or obtained a federal trademark on the name, filed an intent-to-use federal trademark application, or has an Illinois trademark registration, you will have rights to the name Kicking Picks in Illinois. As you expand into other states, if no state or federal trademark applications have been filed for your name, your rights will grow without having to do anything else but use the name in those areas. If you do well, and use the name across the nation, you could obtain rights across the nation without doing anything but using the name. However, unless you obtain a federal trademark, if you have been using the name only in Illinois, and someone begins using the name in California, like you, they could obtain rights in California.

#### Benefits of a Federal Trademark Registration

A federal trademark, often called a federal trademark registration (which refers to the fact that the trademark is registered with the United States Patent and Trademark Office), provides the exclusive right to use that trademark throughout the country. Such use is subject only to any prior users, who would be limited to using the trademark in the area in which they had been using it. In the example above, if the band in California were to obtain a federal trademark registration to the name Kicking Picks, that registration would be subject to your right to continue using the name in Illinois. Alternatively, if you obtain a federal trademark registration after they began using the name (and they have not yet started to obtain a federal trademark registration), you would have exclusive rights everywhere in the United States except California.

#### Clearing Your Trademark

So, it may have dawned on you that the questions you should be asking are: does any band already have a federal trademark in our name, and does anyone else already have rights in the name we selected in certain areas? You

---

can conduct a search to determine if any other bands exist with the same or a similar name. A trademark search can be conducted in several ways. You could perform the search yourself, using the Internet to search the United States Patent and Trademark Office's ("USPTO") trademark database at its website ([www.uspto.gov](http://www.uspto.gov)) for possible uses of your name. You can also look for other possible uses of your name through an internet search. These are free ways to conduct a search that can often provide a solid basis to determine whether other parties are using your proposed band name.

An alternative to conducting a search on your own is to hire an attorney to conduct one for you, or to use a trademark search firm (an attorney would most likely use a service like this). A trademark search firm report will show trademark registrations that are the same or similar to your band name, as well as uses of the same or similar name on website domain names and in business listings. Such a report costs several hundred dollars, but it is thorough and can provide a solid basis to determine whether trademark registration of your band name is possible.

These searches, of course, may produce results that show other uses of the name. An issue to consider is whether the uses of the name that come up in your search are for a band, other entertainment goods or services, or goods or services that may not be related to a band or music. This is because trademark rights exist only for the types of goods and services that are specified in the trademark registration, and similar goods or services. For example, say that no other band is using the name Kicking Picks, but the name is being used by a toothpick manufacturer. Because your goods and services as a band are completely different than the goods sold by the toothpick manufacturer, the law presumes that a consumer would most likely not believe that the toothpick manufacturer is the source of your music, and vice versa. Therefore, the existence of this company should not be an impediment to your trademark registration.

As with many aspects of the law, however, an exception to this concept exists. If a mark has become “famous”—think brands such as Coca-Cola, McDonald’s, or Microsoft—the owner of this famous mark has the right to stop other uses of the mark that may dilute or tarnish the famous mark. Therefore, to avoid such conflicts, you should not adopt a name that is the same as or confusingly similar to a famous trademark.

Even if you do find another band using the same or a confusingly similar name, unless they have a federal trademark registration, this is not necessarily fatal to your use of the name, or even your obtaining a federal registration to the name. However, you may end up co-existing with a band having a similar name (albeit most likely based in another part of the country).

### The Interstate Use Requirement

As alluded to above, to obtain your federal trademark you must use the mark in interstate commerce. This means that the commercial activity associated with the mark is not limited to one state. In today’s digital world, using a band’s name in interstate commerce is common, as almost every band has a website on which it sells music, or sells its music through a third-party website. Also, any touring or merchandise or album sales in more than one state should be a use in commerce.

However, if you perform in only one state, and do not sell music or in any way use your name outside of that state, you most likely cannot receive a federal trademark for your band name. You could, however, apply for a trademark in the state in which you use the mark, which would provide you protection in that state. Similarly, you can file a federal intent-to-use application, which states that you plan to use the band name in interstate commerce. An intent-to-use application will give you exclusive rights from the date the intent-to-use application is filed provided you begin using the name in interstate commerce within six months, and convert your intent-to-use application to a use-based application

---

(one which states that you are now using the mark in interstate commerce).

### The Immoral Mark Issue

Another potential obstacle to federal trademark registration is the prohibition on marks that are “immoral, deceptive, or scandalous,” or that disparage or bring into disrepute a person or institution. No defined test exists as to what may constitute immoral, deceptive, or scandalous material. However, if your band’s name contains profanity, explicit drug references, or explicit sexual references, it is possible that you will be denied a federal trademark registration.

Whether or not you could be denied a federal trademark registration if your band name clearly insults a person or institution is the subject of debate. The Trademark Office recently cancelled the Washington Redskins' trademark registration on the basis that it contained matter that may disparage a substantial composite of Native Americans, and a federal court upheld that decision. The Redskins have appealed the federal court decision. In their appeal, the Redskins are arguing that the prohibition on disparaging trademarks violates a person's right to free speech because it allows the government to ban content based solely on the possibility that some might find the content offensive. In the meantime, another federal court has recently ruled that the prohibition on disparaging trademarks is unconstitutional for the same reasons argued by the Redskins. The court reviewing the Redskins' case is not bound by the other court's decision, but the Supreme Court recently decided to review the other court’s decision. The Supreme Court’s decision, on the other hand, will control the outcome of the Redskin’s case. For now, the prohibition on disparaging trademarks is still good law in certain parts of the country. So, for safe measure, and to avoid alienating any fans, it is probably good practice to avoid band names that insult a person or institution.

## *When Trademarks Met Hard Rock: The Tale of Ozzy Osbourne and the “Black Sabbath” Name*

Ozzy Osbourne may be best-known for his wild and outrageous rock-'n'-roll antics and lifestyle. He can also serve as an example of a musician who did not recognize until far too late the value in owning a trademark to his band name, in his case the pioneering hard rock band Black Sabbath.

Black Sabbath formed in 1969, and broke up in the 1980s. According to Black Sabbath guitarist Tony Iommi, when Ozzy left the group in 1980, he signed an agreement in which he gave up his rights to the “Black Sabbath” name. In 1999, Iommi filed an application with the USPTO to register “Black Sabbath” as a trademark. In 2000, when the USPTO approved the application for the “Black Sabbath” trademark, Iommi obtained the exclusive right to use the band name in the United States for uses such as performing concerts and selling merchandise and CDs.

In 2008 Iommi sued concert promoter Live Nation and Signature Network—the company that had licensed the “Black Sabbath” mark for merchandise—for trademark infringement related to their uses of the “Black Sabbath” mark. After Iommi had taken action in federal court, Ozzy filed his own federal lawsuit, and asked the court to rule that he was a co-owner of the “Black Sabbath” mark. After all, Ozzy was the lead singer and face of the band, and Ozzy and Iommi had been splitting royalties for merchandise sales since their 1997 reunion tour. Ozzy and his wife, Sharon Osbourne, also ran the blacksabbath.com website.

Forty years after Ozzy and Iommi had joined forces to pioneer the hard rock landscape with Black Sabbath, they were battling before a judge over who owned this valuable name. And they had plenty at stake, given that Black Sabbath had sold millions of albums and earned millions more from touring and merchandise sales. A good band agreement, as discussed in Chapter 1, may have prevented this battle.

Bad blood can sometimes sour relationships in a band. But Ozzy and Iommi worked out their differences and reached an amicable settlement. Black Sabbath returned to touring, headlining concerts such as the 2012 Lollapalooza in Chicago, and recorded a new album. Fortunately, the fight over the “Black Sabbath” name apparently did not leave lasting scars.

### Trademarking Last Names

While trademark law states that a last name usually cannot be registered as a mark, it is possible for an artist to register his or her name as a trademark if it is recognized by consumers when they see or hear it as the source of particular goods or services. For example, the band Van Halen owns several federal registrations for the “Van Halen” mark, even though this is the last name of two of the band’s original members. It obtained these registrations because its name had become well-known on account of the band’s success, and the fact that it had used its name continuously for at least five years. This is how other groups such as the Dave Matthews Band or artists such as Bob Dylan obtained trademarks for their names—their success allowed them to prove that their names had become well-known.

### The Process of Obtaining a Trademark

If you choose to pursue a federal trademark registration for your name, this can be done without an attorney, and resources exist at the USPTO’s website at [uspto.gov](http://uspto.gov) to help with the registration process. Alternatively, a trademark attorney can assist in this process and let you focus on your music. In 2016, obtaining a federal trademark, if you do it by yourself, can cost as little as \$225 (for one class of goods/services). However, you will likely want to file your registration for at least two classes: Class 41, Education and Entertainment Services, and Class 9, Scientific Apparatus (for CDs and digital downloads).

### Protecting Your Trademark

Once you have registered your mark, you must continue to use your trademark in order to maintain your rights. If you stop using the band name—say the band breaks up or changes names—your rights to the mark will expire. You must also comply with the USPTO’s renewal obligations. To do so, you must file an affidavit with the USPTO in the year before the six-year anniversary of your mark’s registration and in the year before the 10-year anniversary of your

mark's registration. In this affidavit, you must state that you are still using the mark in commerce for the goods and services that are set forth in your mark's registration, or that you have an excusable reason why you are temporarily not using the mark.

You should also use your trademark in a consistent manner. For example, if you have registered a logo as a trademark, you should use the same logo or very similar derivations of the logo. You should also use your name in the same way. You should avoid adding, deleting, or changing words in your name. Changing your name will only reduce the ability of the name to identify your band as the source of your music. However, if you do change your band's name, you can apply to register this new name as a trademark, and let the old mark expire.

Finally, you should police uses of your mark or similar versions of your mark. If you allow other bands or entertainers to use the same or confusingly similar versions of your name, you run the risk of your trademark becoming generic or weak. If you discover someone else using a name that is likely to be confused with your name, you should at least write them a letter demanding that they stop using the name. And, you should be prepared to file a lawsuit against them if they do not comply. Note that these actions would most likely require you to hire an attorney.

While obligations certainly exist if you own a trademark to your band name, the benefits you receive if you own the mark usually outweigh the obligations.

Numerous musicians and bands own trademarks for their names. Beyoncé, Madonna, Kanye West, Bon Jovi, The Rolling Stones, Radiohead, the Black Eyed Peas, and Bruce Springsteen are just a few of the artists and bands who own such marks. Bands also own trademarks to graphics or logos that have become synonymous with the group, such as the Grateful Dead's "steal your face" skull with a lightning bolt running through it. Even the name of one of

---

this country's great cities, Boston, is a registered trademark for the classic rock group (and one that has been subject to litigation, as the band's founder sued one of the group's former guitarists for continuing to use the band's name to promote his career long after he left the group).

For sure, these are examples of music superstars and legends securing trademarks. These artists understand that their names are valuable intellectual property, and that a trademark provides them the exclusive right to use their names. However, trademarks are not reserved just for stars. Millions of dollars need not be at stake for a name to receive trademark protection. **Any band can and should attempt to register its name as a trademark.** Your name can be one of your most valuable assets, the "brand" under which you create, distribute, and perform music.





---

## Chapter 3

### Who Owns Our Music?

Those long nights and weekends spent in your band’s small and loud rehearsal space have paid off. Random guitar riffs and horn lines have evolved into melodic and cohesive songs with hard-driving and danceable rhythms. Words brainstormed and jotted into a tattered notebook and typed into your iPhone now tell the stories for a new album. Your band not only has developed a personal and unique sound, but it now has its own song catalog. But who “owns” these songs?

One or two compositions may have been written almost entirely by a single band member; others may have involved substantial contributions by a couple members and minor, but important, input from one or two others; others were pure collaborative works where one person came up with the hook, and the entire band built a composition around it. Everyone performed the compositions on the band’s album.

The starting point in discussing ownership of your band’s music is a fundamental concept in copyright law that can often lead to confusion—**there are two separate and distinct copyrights in a song. First, there is a copyright for the “composition” itself. These are the musical notes, lyrics, and the arrangement. Another entirely distinct copyright exists in the “sound recording.” This is the recording of a composition** that is placed on an album, sold as an MP3, or broadcast over the radio. The sound recording is the actual recorded performance of the composition. We will address rights to each specific work in this section.

### Ownership in Your Compositions

Since compositions are usually created before sound recordings, let's begin by sorting out who owns the compositions. A band's most valuable assets can be its compositions. Think of the millions in royalties that legendary songwriters like George Gershwin and Harold Arlen earned for classics such as "Summertime" and "Over The Rainbow," respectively. Or the millions earned by songwriting teams like Lennon & McCartney, Jimmy Jam and Terry Lewis, and whoever wrote all of those pop songs for Britney Spears. Composition ownership can be a big business, and even a small ownership percentage can mean real money if the composition makes it big. Absent a band agreement that controls ownership, copyright law governs the question of who owns the compositions. But, copyright law does not always lead to a simple answer.

When two or more people create a composition with "the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole," the work is a joint work. **Under the Copyright Act, absent an agreement to the contrary, each joint author has equal ownership in the work, each has the right to individually exploit the work (such as license it), and each has a duty to account to the other owners for profits they individually obtain from exploiting the work.**

Some courts insist that even if you intend to create joint ownership of the works, each person has to contribute some copyrightable expression to the composition. But, the Supreme Court has set the bar low as to what constitutes copyrightable subject matter—it basically has to have more creativity and originality than listings in a White Pages phone book. Further, other courts find collaborators joint authors even if one of the collaborators did not create independently copyrightable expression. Sorting out who contributed what after the fact is often difficult, and **the safest course is to assume that absent an agreement to the contrary all contributors will have an equal claim**

---

**of ownership to the composition.** If a different result is desired, a written agreement is necessary.

Sometimes, bands agree that the compositions will be owned by the contributing members based upon the amount contributed to the composition. For example, perhaps the lead singer/guitarist wrote the lyrics, came up with the melodies, and crafted the song structure. Maybe the drummer and bassist simply crafted their parts around the guitarist's composition, and the rhythm guitarist just played the part that was given to him. Unless your band wants each contributing author to be considered an equal owner of the composition, you should agree that the composition will be owned based upon contribution and, for every composition, determine the percentage of the composition owned by each band member.

This agreement can be reflected in a simple letter (a sample is attached as Appendix B at the back of this book) assigning ownership for each composition in proportion to each band member's contribution. Such a letter should be done for each of your band's compositions (or one letter for several compositions). Make sure that the letter is dated, and that each member of the band signs the letter, regardless of what percentage, if any, he or she owns of the composition.

On the other hand, absent an agreement to the contrary, only the members who actually contributed to the composition own the rights to the composition. Sometimes, bands choose to require all authors to assign their compositions to the band. Then, each band member would have an ownership interest in the compositions through his or her ownership of the band, or the band could agree that (while it owns the compositions) all revenue derived from the compositions will be distributed to the co-authors. This approach may help streamline the copyright registration process discussed in Chapter 4 below. However your band decides to handle ownership of the compositions, it should be set out in the band agreement.

A word of caution to those bands that choose to give composition credit (albeit in small percentages) to certain individuals. After 35 years, any joint author could potentially terminate that agreement and recapture its full share of ownership rights. It is important to understand this aspect of copyright law before choosing to collaborate with someone on your composition.

### Publishing Companies

Musicians often license their compositions to publishing companies. Publishing companies attempt to generate revenue by licensing your compositions. Bands may own their own publishing companies and publish their compositions with this company. Or, a band may license its compositions to a larger publishing company, which can help it get royalties for compositions and get compositions placed in media such as commercials and movies. For example, major multinational publishing companies such as Sony/ATV Music Publishing and Warner/Chappell Music own and control the publishing rights to millions of musical compositions, including classic compositions from legendary songwriters as well as those from some of today's newest stars.

Smaller publishing companies have also emerged as the music industry moves away from a centralized major label model to a more egalitarian, indie-driven business. And, as discussed in Chapter 5, compositions can mean big business, as they can provide steady sources of income. For example, every time an artist records a cover version of another artist's composition, the owner of the composition collects a royalty.

### Ownership in Your Sound Recordings

Regarding your sound recordings, ownership is a little more clear-cut. Unless your band's band agreement provides otherwise, those who perform the song are joint authors of the sound recording. Additionally, absent an agreement to the contrary, producers and sound engineers may be considered co-authors of the sound recording. However, by agreement, record labels often obtain

ownership of the copyright in the sound recordings, or they may require the artists to license the sound recordings exclusively to the record label. In return, the record label should be required to market and promote these albums and pay its artists royalties for the albums that it sells.

By owning or being the exclusive licensee of the sound recordings, record labels have the financial incentive to promote their artists when they release their albums. As discussed in Chapter 5, a recording can be a valuable asset and a steady source of income from album and song sales, licenses to sample the recording, or licenses to use the recording in television shows, commercials, movies, or other media.

If your band chooses to retain ownership of its sound recordings rather than license them to a record label, you could require each author to transfer his or her rights in the sounds recordings to the band, and have the band own the copyrights to the recordings. The approach you use will impact how you complete the copyright registrations, as discussed in Chapter 4, so it is important to make this decision early.

Even though discussing who owns your band's music may not be easy, it is an important part of formalizing the working relationship between your bandmates, and those that help to capture your band's performances. It may not be as enjoyable as making music, but it is an important part of having a good working relationship and preventing future fights.

### Transferring Ownership

There are two primary ways in which a band that creates compositions or sound recordings transfers the rights to this music to another party. The manner selected may have significant consequences.

The first way to transfer ownership in a copyright would be through a copyright assignment agreement, which is a written document that, for example, transfers the rights to sound recordings to a record label. Such an agreement

could also be used for individual members of your band to transfer ownership of the compositions they write, and their interest in the sound recordings, to the band itself.

The other method occurs under the work-made-for-hire doctrine. Under the work-made-for-hire doctrine, if someone is employed to create a work, their work is owned by the employer; in essence, the work is transferred to the employer when it is created. Sometimes, bands seek to transfer compositions and sound recordings to the band by employing each of the members to create compositions and record music. Similarly, many recording companies purport in their record deals to employ the band to create sound recordings. Importantly, however, in deciding whether such work-made-for-hire agreements are enforceable, courts will evaluate whether the authors actually were employees. As such, many agreements are written as work-made-for-hire and copyright assignment agreements (in case a court determines the work was not actually created by an employee).

There are two major consequences which flow from the manner in which a company obtains ownership of a copyright. First, how these rights are transferred to a third party affects the length during which these works can be protected by copyright. Copyright protection begins at the moment a work is created and typically endures for the term of the author's life plus an additional 70 years after the author's death. ("Author" means the person who created the work.) Or, if two or more people jointly created the work, the copyright protection term lasts for 70 years after the last surviving author's death. If a band or record label obtains ownership by assignment, the copyright endures for this entire period. Consider a twenty-year-old band member that lives to be 80—the life of the copyright would be 150 years! But, if a band or record label obtains ownership by virtue of the work-made-for-hire doctrine, the term of the copyright is 95 years from the date of publication (the release of an album, for example) or 120 years from creation, whichever expires first.

---

Second, as discussed elsewhere in this book, between 35 to 40 years after the grant, copyright assignments can be terminated. If the band or record label obtains ownership under the work-made-for-hire doctrine, however, the grant of ownership cannot be terminated. Given this termination right, it is good practice to document the authors of a band's compositions and the performers of the sound recording, even if the compositions and sound recordings are assigned to the band.

In short, copyrights acquired through assignment may last substantially longer than copyrights acquired under the work-made-for-hire doctrine. But, copyrights acquired by assignment can revert back to the original authors 35 years after they are assigned. If termination is not a serious concern, assignments are the better practice.

Appendices C and D are sample agreements that have been used to transfer compositions and sound recordings from the band member's to the band. Appendix C is a copyright assignment agreement entered into between a band and its members. Appendix D is a work-made-for-hire agreement for a band and its members. Either agreement can be modified such that it only covers sound recordings, leaving ownership of the compositions to the authors as set out in the copyright split sheet.