

LCA's Video Law Library

Representing the LCA Music Client: Song Rights

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What is a Song?

- **Musical Work**: Original works of authorship consisting of **music** and **lyrics** (accompanying words)
- Music is a **succession of pitches or rhythms**, or both, usually in some definite pattern
- The main elements of copyrightable musical work authorship include: **Melody, rhythm, harmony**, and **lyrics**, if any.
- A **Sound Recording** is a separate work – one that results from **fixation**.

Copyright Compendium 802.1 – 802.3

Copyright Circular 56

Melody

- Definition: a succession of **tones** or **notes** that constitute the tune of a song.
- Examples: the tune of "*Mary Had A Little Lamb*" or "*Happy Birthday*"

Song Lyrics

- A set of words, sometimes grouped into verses or choruses, that are intended to be accompanied by music
- **Chorus:** a part of a song that recurs at regular intervals
- **Verse:** a section of song that is often followed by a chorus
- **Hook:** an entertaining musical element or clever lyrical phrase that repeats multiple times throughout a song to stick in the listener's memory. A catchy combination of melody, lyrics, and rhythm
- **Bridge:** a transitional piece of music connecting sections of a composition

Rhythm

- Definition: the **pattern of sounds** in time and beats in music
- Example: 4:4 time signature (beats or quarter notes per measure)



Harmony

- Definition: the **simultaneous notes or chords** that support a melody
- Example: singing "*Mary Had a Little Lamb*," at the same time at a higher pitch than the original melody

What Makes a Song Recognizable?

- Strong melodic **hook**
 - a catchy combination of melody, lyrics, and rhythm that gets stuck in the listener's head
- Lyrics that have a theme, repetition, or a rhyming scheme

Copyright Basics

- Copyright protections gives the song owner **exclusive rights** to:
 - Copy / Reproduce
 - Adapt / Create Derivative Works
 - Publish / Distribute
 - Perform the work publicly
 - Including by digital transmission
 - Display – the public showing of a copyrighted work

What Does Copyright Protect?

- Copyright protects the creative “**expression**” of an idea – the specific series of words or notes – not the idea itself
- Copyright Protection Requires:
 - **Original music:** lyrics and sound recordings
 - **Authorship**
 - **Fixed in a tangible medium of expression**

Originality Requirement

- Requires “**Independent Creation**,” meaning:
 - The author did not copy it from another source
 - The work is not a reproduction or derivative of an existing song
- Only a **minimal degree of creativity** needed:
 - There is no predetermined number of notes, measures, of words that automatically constitutes **de minimus authorship** or automatically qualifies a work for copyright registration
 - Short musical phrases are not copyrightable because they lack a sufficient amount of authorship

Works That Do Not Meet the *De Minimus* Requirement

- **Short phrases:**
 - Example: "I love you so much it hurts"
- **Sounds the songwriter didn't author**
 - Example: clock chimes
- **Short series of notes:**
 - Chord Progressions
 - Standard Drum Beats
 - "Scenes a Faire"; i.e. common musical patterns or progressions.
 - Example: "mi do re sol, sol, re mi do"

Fixation

- **Tangible** forms that are:
 - “perceptible by the human sense either directly or with the aid of a machine” i.e. capable of being reproduced
- Fixation in the performing arts:
 - **Copies**: “material objects ... in which a work is fixed, ... and from which a work can be perceived, reproduced”
 - **Phonorecords**: “material object ... in which sounds, other than those accompanying a motion picture or audiovisual work, are fixed, ... and from which the sounds can be perceived, reproduced ...”
 - i.e., CDs, Vinyl, MP3 Files, Sheet Music, or any other physical recording of the work

Human Authorship Required

- Music generated **entirely** by a mechanical or an automated process is not copyrightable
- Examples:
 - Automated transposition
 - Music created by a computer algorithm
 - Artificial intelligence generated music

Copyright Notices

- The proper copyright notice for a work embodied in a '**copy**' is:
 - © 2018 J. Rock
- The proper copyright notice for a work embodied in a '**phonorecord**' is:
 - ® 2018 J. Rock

Acquiring Music Copyrights

- Copyright can be transferred by:
 - **Assignment** of ALL rights
 - **License** or permission LIMITED to specific use/s
 - Bequest
 - Operation of Law (Ex. Bankruptcy debt transfer, Judgment)

Sound Recordings

- Definition: works that result from the fixation of a series of musical, spoken, or other sounds
- Requires a temporal succession of sounds rather than a single sound expressed horizontally or simultaneous sounds expressed vertically (Chord)
- Note: Pre-1972 Sound Recordings are not protected under US Federal Copyright Law

Work of Authorship v. Material Object

- Don't confuse a "**sound recording**" with a "**phonorecord**"
- **Sound Recording** is a work of authorship
- **Phonorecord** is a tangible material object which may embody a certain type of work of authorship

Copies and Phonorecords - §101

- “**Copies**” are material objects, other than “**phonorecords**”, in which a work **is fixed** by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

Copies and Phonorecords - §101

- “**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.

Songs v. Sound Recordings

- Separate and distinct Intellectual Property
- **Different Owners/Authors**
 - **Songs**: The author is the composer and lyricist
 - **Sound Recording**: The author is the performer whose performance is captured or fixed in the recording or the record producer who processes the sounds and fixes them in the final recording
- Who is the author/copyright owner of a sound recording?

Pre-1972 Song Recordings: Overview

- Sound Recordings were not covered by **federal** copyright until **February 15, 1972**.
- Prior to October 11, 2018, pre-72 sound recordings were covered only by **common law** copyright, unfair competition, or state law
- Title II of the Music Modernization Act created a new exclusive federal right for pre-72 sound recordings

Pre-1972 Song Recordings: Music Modernization Act

- The Act preempts actions for state and common law claims for pre-72 sound recordings with regard to activities taken on or after the enactment date and covered under the statutory license for digital audio transmissions of post-72 sound recordings.
 - The Act preempts state copyright claims regarding mechanical and distribution rights for pre-72 sound recordings as well.
- Under the Act, remedies for infringement of copyrighted works (as set forth in §§502-505 of the Copyright Act) are available to owners of pre-72 sound recordings

Sound Recordings and Common Law Copyright

- Flo & Eddie v. Sirius
 - Is there an exclusive right of public performance in pre-1972 sound recordings?
 - C.D. Cal. 2014
 - Yes. Court ruled in favor of Flo & Eddie
 - S.D.N.Y. 2014
 - Yes. Court ruled in favor of Flo & Eddie
 - S.D. Fla. 2015
 - No. Court ruled in favor of Sirius XM

Core Rights of Music Copyright Holders: Reproduction Rights

- **Musical Works** enjoy broad protection against any reproduction “in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation” per legislative history.
- **Sound Recordings: §114(b) – Reproduction Rights**
 - Limited to “duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording.”
 - They **do not extend** to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

Core Rights of Music Copyright Holders: Public Performance

- To perform or display a work “**publicly**” means:

(1) To perform or display it **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; or

(2) **to transmit** or otherwise communicate a performance or display of the work **to a place specified by clause (1)** or **to the public, by means of any device or process**, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Core Rights of Music Copyright Holders: Public Performance

- §106(4) does not include Sound Recordings.
- §114(a) – “The exclusive rights of the owner of copyright in a sound recording . . . **do not include any right of performance.**”

§202: Work of Authorship v. Material Object

- Ownership of a copyright is distinct from ownership of any material object in which the work is embodied.
- Transfer of ownership of any material object does not of itself convey any rights in the copyrighted work embodied in the object.
- Transfer of ownership of a copyright or of any exclusive rights does not convey property rights in any material object.

Work of Authorship v. Material Object

Forward v. Thorogood (1st Cir. 1993)

- Promoter who paid for recording session for demo tapes could not commercially release the tapes as recordings.
- He owned the tapes (phonorecords) but not the copyrights.

Exceptions – No License Needed

- Fair Use
- § 110 Exemptions to Public Performance Right
- *de minimus*

Copyright Term

- Copyright Act of 1909
 - 28 years from the date secured, subject to one renewal
- Copyright Act of 1976
 - Life of the author +50 years
 - If there are multiple songwriters, the copyright lasts the life of the last living author +70 years
- Songs created as a Work Made For Hire, Anonymous, or Pseudonymous Work:
 - Life of the author +95, or 120 years, whichever is shorter.

Copyright Term

- Copyright Term Extension Act of 1998:
 - Increased term an additional 20 years, or
 - Life of the Author +70 years
- Other amendments and treaties have extended the life of song that would have otherwise fallen into the public domain, so check:
 - Cornell Law School Copyright Chart:
 - <http://copyright.cornell.edu/resources/publicdomain.cfm>

Determining Song Ownership

- Songwriters often enter into publishing agreements and designate a music administrator for song rights.
- Search tools:
 - www.copyright.gov: to determine copyright claimants for music/lyrics and sound recording; may also include a designated “permissions” contact
 - www.bmi.com, www.sesac.com, www.ascap.com, www.harryfox.com: to determine registered music publishers and songwriters; may include administrator contact
 - Check liner notes or artist website
 - Google

Song Authorship

- Songwriters can share ownership of a song in designated percentages, often documented in:
 - **Copyright Split Sheets**
- Authorship types:
 - Music, Words, Lyrics, Arrangement, Sound Recording
- Note:
 - **Author** = Creator
 - **Copyright claimant** = Owner

Assessing Authorship/Ownership

- **Nashville Method**
 - each contributor has an equal ownership share of the song and the copyright
- Song splits focus on the melody and lyrics
- Identify the creative contributions to identify the authors/songwriters

Joint Authorship

- Works prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a whole
 - Absent an agreement to the contrary, each joint author has an undivided pro rata ownership interest in the whole work
 - Each joint author can authorize use of the joint work without the other authors' permission or consent subject to a duty to account to and pay to each author, his or her pro rata share of any compensation received for the use of the joint work
- Example: 'Bad Blood' by Taylor Swift
 - Authors on Copyright Application: Taylor Swift, Max Martin, and Shellback

Copyright Compendium 801.6, 505
17 U.S. Code § 101

Types of Joint Works

- **Song** – Musical Composition
 - A collaboration between two or more songwriters to create a song
- **Sound Recordings** – Master
 - A collaboration between artists or artists and a producer to create sound recordings

Work Made For Hire

If a song or sound recording is created as a **Work Made For Hire**:

- the author and claimant = the person or business commissioning the work - not the actual songwriter!
- What music or sound recording/s counts as a **Work Made For Hire**?
 - **prepared by an employee** within the scope of his or her employment
 - **specially ordered for a certain use with an express written agreement** signed by both parties that the work is a work made for hire.
- Work of Authorship **MUST** be one of nine categories under the Copyright Act
 - Does not include music as a single work but can include collections or compilations of music
- In the 7th Circuit, you must sign a work for hire contract “**before the work commences**” for it to be enforceable.

Derivatives

- A work based upon one or more preexisting works that may be recast, transformed, or adapted. Only copyrightable elements are the new and original elements.

Derivative Musical Works: Overview

- **Derivative Musical Work:** A work based upon one or more preexisting works. Needs sufficient new original authorship.
- When sufficient new harmonies or instrumentation are added, the musical arrangement can be registered as a derivative work:
 - **Harmonization:** addition of chords or musical lines to a melody
 - **Instrumentation:** the distribution or redistribution of harmonic elements among different instruments
 - **Adaptation:** reworking of musical elements (melody, lyrics, rhythm, harmony)
- Examples: a new arrangement of a musical work; new or revised song lyrics

Derivative Sound Recordings: Overview

- **Derivative Sound Recording:** A sound recording that is based on preexisting sounds that have been rearranged, remixed, or otherwise altered in sequence or quality
 - **Remix:** A recombination of audio tracks from a preexisting sound recording.
 - **Sampling:** The incorporation of a fragment or snippet from a preexisting track into a new track.
 - **Mashups:** A track formed by combining elements from two or more preexisting works.
 - **Mixtapes:** A compilation of preexisting tracks.

Derivative Sound Recordings: Copyrightable Authorship

- To be registrable, a derivative sound recording must contain a sufficient amount of new, creative sound recording authorship
- A **sound-alike** recording is not copyrightable unless it contains new, original and sufficiently creative authorship to support a new registration

Compilations

- Works formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

Collective Works

- A work in which a number of contributions, consisting of separate and independent works in themselves, are assembled into a collective whole

Songwriting Income

- Licensing
 - Mechanical (Compulsory) License
 - Synchronization License
 - Public Performance License
 - PROs: ASCAP, BMI, SEASAC, GMR

Beat Makers

- A **beat maker** is someone who makes beats and sells them to artists who then arrange the beat and other musical components to make a song
 - Beats are usually genre-specific: hip-hop, rap, R&B, etc.
- **Songwriter**: a person who writes popular songs or music

Producers

- Producer produces, records, and mixes the masters.
- Supervise the music project by controlling recording sessions, offer suggestions to song arrangements, and put ideas from musicians and beat makers into play.
- Producers also uses best efforts to secure a record label or distribution agreement for the artist.
- Will expect a % of any advances in income in connection with the secured contract.

Producer Agreements

- Treat the contributions of the producer in the same manner as the contributions of a recording artist
- The contributions may need to be defined as works made for hire, or assigned to the artist or record company
- Producer's role in the production of the sound recording is copyrightable
 - Without a written agreement, the Producer will be at least a co-owner of the copyright in the sound recording

Split Sheets

- A brief songwriter agreement detailing the percentages of ownership attributed to each person involved in writing a song.
 - It will also often designate credit
 - Ie. Words & Music by ...
- Absent an agreement to the contrary, each person involved in writing a song has an undivided pro rata ownership interest in the whole work.

Publishing Agreements

- **Single Song Agreement**

- Songwriter assigns copyright ownership of song to publisher in return for services such as promotion, administration, and collection and accounting of proceeds.

- **Exclusive Songwriter Agreement**

- All compositions created by the songwriter during the term of the agreement will be assigned to the publishing company.

- **Copublishing Agreement** – Two scenarios

- When two or more writers collaborate in the creation of a composition.
- When a publishing company with greater administrative resources obtains a co-ownership interest in the composition through an assignment of a partial interest from the original publisher.

- **Administration Agreement**

- Contract for administrative services such as licensing, as well as collection and accounting of proceeds.

Model Exclusive Songwriter Agreement

About LCA

Lawyers for the Creative Arts is an Illinois nonprofit organization providing pro bono legal services to individuals and organizations engaged in all areas of the arts – the visual, music, performing and literary arts, as well as arts education and nonprofit organizations in general. Services are provided by LCA staff and a roster of volunteer attorneys experienced in all areas of law which affect the arts. LCA also provides mediation and facilitation services through its Patricia Felch Arts Mediation Service and numerous educational outreach programs. To apply for legal help on your arts-related matters, complete the form at

www.law-arts.org/application.

About LCA

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Thanks for viewing

For more information on this topic, as well as model agreements, please see the Supplementary Materials included with this CLE program.

Please check out the remainder of our series on Representing the LCA Music Client and the rest of the LCA Video Law Library.