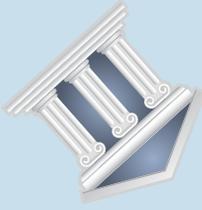
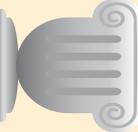


<p>VISITING</p> <p>JUST</p> 	<p>SOUND RECORDINGS</p>	<p>MUSIC, LYRICS, AND COPYRIGHT</p> 	<p>MUSICAL COMPOSITION</p>	<p>BRAND PROTECTION</p>  <p>IN THE APPS ERA</p>	<p>APP DEVELOPERS</p>	<p>APP MARKETPLACE OPERATORS</p>
<p>LANGBORD 10</p>	<p>GOLD RESERVE ACT OF 1934</p>	<p>RARE COINS</p> 	<p>1933 DOUBLE EAGLE</p>	<p>CULTURAL PROPERTY</p> 	<p>ANTIQUITIES</p>	<p>ARTWORK</p>
 <p>Property in the 21st Century</p>						

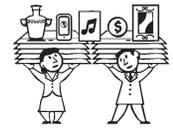


Music, Lyrics, and Copyright *Intellectual Property Rights in Music*

BY DAVID SHOWALTER

Intellectual property rights in music, as well as the tangible expression of other types of ideas, are actually a complex bundle of rights. This bundle of rights is somewhat analogous to certain aspects of real estate and mineral production. This article will focus on rights in music and recordings.

As is the case with other specialties, this area of the law has its own words of art or vocabulary. Many songs, at least some of the best ones, are simply an engaging short story told through lyrics coupled with musical notes. A song is referred to as a musical composition, and is comprised of words (lyrics) and music. The words and music are performed and recorded, either in a studio or as a live performance. A performance of the musical composition is fixed in tangible form in a sound recording, typically referred to as a master. A performer's name, image, and likeness is a valuable right that is an ancillary right also present in the context of exploiting sound recordings. Exploitation of musical compositions and sound recordings takes a variety of forms — copying, distributing, downloading, performing in a live venue, and synchronizing the sound recording with a commercial or movie. Each of these rights and attributes has independent value and generates distinct revenue streams. Consequently, each right must be understood and protected if the songwriter, publisher, record label, and performing artist are to realize the full value and compensation that is derived from exploitation of the musical composition or sound recording.



The ownership of these rights is governed by state property, marital, and contract law, while the protection of the rights is mostly preempted and controlled by federal law, specifically the Copyright Act, 17 USC §101, et seq. The line between the two can become blurred and it is not uncommon for a defendant to remove what starts as a breach of contract suit to federal court claiming the matter involves a copyright. If the Copyright Act governs the right involved, the Act preempts any other claims and causes of action that are covered. 17 USC §301 preempts all state law legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright. Section (b) of the statute, however, creates caveats to the preemption, including activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as outlined in 17 USC §106. To determine if the statute preempts a cause of action, one has to analyze the state law claims that are being asserted. The analysis involves determining whether a state law claim contains an element not shared with the federal law. If such an element exists, it changes the nature of the action so that it is qualitatively different from a copyright infringement claim. Each theory must be examined in such a manner to determine if that theory contains an extra element that will distinguish it from copyright protection. While claims sounding in copyright are preempted, there are still claims that can be asserted in conjunction with copyright claims as a result of the context of the infringement. One example is where a recording company uses a musical composition without permission and also uses the picture of the artist on bootleg or unauthorized recordings. In this instance, musicians can assert claims for misappropriation of name and likeness under common law, when no permission has been granted to the offending party. Texas has recognized a cause of action for misappropriation of name and likeness as a subspecies of invasion of privacy tort. *Kimbrough v. Coca Cola/USA*, 521 S.W.2d 719, 722 (Tex. Civ. App. — Eastland 1975, writ ref'd n.r.e.) In *Brown v. Ames*, 201 F.3d 654 (5th Cir. 2000), the court affirmed the right of musicians to seek a recovery for damages caused by this tortious conduct in addition to the copyright infringement claims that were asserted. Also, there may be instances where a license was granted, but the offending party continued to use the copyrighted material after the license terminated. Thus, a claim for royalties based on the contract would be added to the copyright claim. In these cases, the state law claims are related to, but not preempted by, the copyright claims.

Most lawsuits present a combination of Copyright Act claims and state law claims. The federal courts have exclusive jurisdiction over copyright claims, so these cases will be litigated in federal court. 28 USC §1338. Venue in copyright cases is governed by 28 USC §1400, which provides that a civil action may be brought in the judicial district where the defendant resides or where the defendant has committed acts of infringement and has a regular and established place of business. Under 28 USC §1367, the court can exercise supplemental jurisdic-

tion over all other claims that are so related to claims in the action that they form part of the same case or controversy.

Ownership and Protection of Rights

Songwriters and performers are usually focused on the creative process and fail to document their rights or get legal help with contracts until it is too late. Who owns the rights and what rights are involved? Absent written agreement transferring all or part of the rights to a third party, the copyright stays with the creator, i.e., the writer, musician, and artist whose performances are recorded.

Musical Composition

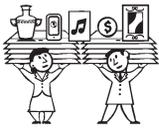
A musical composition is owned by those who wrote it at the time it is created. Often there are multiple writers. In that instance, each writer owns an equal share of the composition unless there is a collaboration agreement providing for some other split. Writers typically sign their rights to a publisher for a share of revenue, but are not required to do so to receive royalties. The writer or publisher should then register the musical composition with the Library of Congress. (See www.copyright.gov for instructions, forms, and help.) Registration can be done electronically. Registration is necessary to pursue rights in court. Registration before infringement provides enhanced

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damage remedies under the Copyright Act. A songwriting contract between a writer and the publisher is usually either for a term of time and/or covering certain specified compositions. The industry views a musical composition as generally comprised of the writers' and publishers' share. Publishers provide services for the writer that include negotiating and issuing licenses, collecting royalties derived from licenses of the composition for use on recordings, movies and commercials, disbursing royalties — usually half of the total — to the writers along with accounting records. An exception is the writer's share of performance royalties — such as those paid by BMI, which pays the writer's half directly to the writer. Publishers have the right and obligation to audit record labels for accurate accounting and payment of exploitation and otherwise policing uses, authorized or not, of the musical composition. The writer has the right of first publication, meaning the right to dictate whom records or publishes the composition. Once a song is published, anyone can use the composition for another recording as long as a license, either voluntary or compulsory, is obtained. For more information on compulsory licenses, see www.copyright.gov/circs/circ73.pdf. The writer or his or her assignee also controls the right to exploit the composition in commercials or movies by issuing synchronization licenses. The writer and his or her publisher should also register the composition with one of the performing rights societies (ASCAP, BMI, SESAC) or a revenue stream will be lost. Many publishers use an agent, such as the Harry Fox Agency, to handle mechanical licensing and royalty collection.

Sound Recordings

A sound recording is owned by the persons whose performances are embodied on the recording. The right to exploit a sound recording stays with the recording artist and musician unless there is a written agreement transferring those rights to a third party, such as a record label. Typical contracts include artist recording contracts with a record label; session musician agreements where these performers relinquish and assign their rights to the label or band owner for a flat fee and/or royalty; and producer and/or arranger's agreements reflecting the rights and compensation of these contributors to the recording. Signed agreements should be in hand before any project starts. The sound recording constitutes a property right in addition to the musical composition and should be registered with the Library of Congress. Merely paying for a recording session does not give that person any right to exploit the sound recording. Payments to artists under recording agreements is a highly negotiated process with rates that vary and that are further subject to arcane accounting conventions and deductions, which serve to reduce the stated rates. The Copyright Act provides that a sound recording is owned by the persons performing on the recording and creating same unless there is a written contract conveying those rights.

Recording contracts define the relationship between the artist and his or her record label. These agreements specify that

the recording company is the owner of the recording, usually with an obligation to pay royalties. Many recording contracts specify that the recording is a work for hire. These contracts have evolved into complex personal services agreements. They are generally incomprehensible to persons unfamiliar with the music industry and the rights and revenue streams that are at issue. The owner of the recording usually has the right to and is responsible for:

- Manufacturing, distributing, and selling finished goods (CDs, DVDs) and digital downloads embodying the recordings;
- Negotiating and issuing licenses for others to use the recording in commercials and movies;
- Collecting revenue derived from exploitation by the record company and others for use of the master recording included on products such as recordings and synchronized for use in movies and commercials; and
- Disbursing revenue to the persons entitled to royalties or payments per contract. These would include persons such as performers, musicians, and producers. There is no standard royalty or amount. All amounts are negotiated and often nothing is paid to the performer until the costs associated with the recording are recouped by the record label out of the artist's royalty.

Performing rights societies such as BMI do not pay any amounts to record labels or performers on recordings, no matter how much airplay is received.

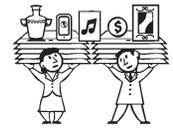
Name, Image, and Likeness

This right arises from the common law right of privacy and the concomitant right to control the use and publicity of one's name, image, and likeness. Ownership of a recording doesn't necessarily include the right to use the artist's name and image. *Brown v. Ames*, 201 F.3d 654 (5th Cir. 2000). Further, the heirs of deceased celebrities can register their rights with the Secretary of State pursuant to Chapter 26 of the Texas Property Code and secure, for 50 years, the right to control and license the deceased person's image and life story. The owner of the image, name, and likeness has the right to exploit that image and related uses in photographs, books and stories, movies, T-shirts, hats, and other merchandise and the life story of the person.

Revenue Sources

Musical Compositions

Songwriters and publishers are compensated when their musical composition is included on a recording, in a commercial, television show, movie, or live performance. Airplay or public performance royalties are derived from money collected by BMI and ASCAP from restaurants, bars, television stations, and performance venues and are allocated among musical compositions based on frequency and nature of use. Payments from BMI and ASCAP are divided into two portions and those portions are paid directly to the writer and publisher. If the com-



position is included on a recording or downloaded, royalties are paid to the writer or publisher under a license. The mechanical royalties are paid on a negotiated rate, usually a reduced percentage of the rate established by the Copyright Royalty Board. The current rate for recordings and permanent downloads exceeds \$0.09 per song per unit. Revenue from use of a musical composition in movies and television shows is negotiated on a case-by-case basis. A recording artist currently does not receive any revenue for the use of his or her hit song on the radio unless he or she was also the songwriter. Artists receive revenue from the sale of their recordings and from their concert appearances.

Sound Recordings

Record labels and recording artists profit from sales and downloads of their recordings. The music industry is in a state of flux due to the changing distribution and music acquisition habits of consumers. Further, recording artists have more options available to them for less expensive digital recording and direct Internet sales to consumers rather than the distribution arms of the major labels or distributors — although this still serves as an important source of sales and revenue. Another source of revenue are the synchronization fees for use of a recording. Some of these “synch fees” can be quite large. For example, Microsoft may have paid as much as \$14 million for use of the Rolling Stones hit “Start Me Up” to launch Windows 95. Making a record is often the easy part. Getting noticed, getting publicity, getting the product distributed and carried in stores, getting airplay, and, ultimately, selling the product is the real challenge.

Practical Considerations

Artists, songwriters, record labels, and producers should get their deals documented in writing. The contracts that are utilized in the music industry are quite complex and highly negotiated. These agreements include songwriting or publishing agreements; co-publishing or administration agreements, where one company administers the copyrights for another publisher; collaboration agreements among multiple writers of the same composition; exclusive artist recording agreements; session musician agreements; distribution agreements; assignments of copyrights; producer’s agreements; mechanical license agreements; management agreements; and agreements with performing rights societies, such as BMI and ASCAP.

Wills, probate, and estate practitioners should consider whether clients have rights in music properties that should be included in the estate plan as specific bequests or with otherwise special treatment. In too many instances, these rights get overlooked during the will-drafting stage or during probate. Because of the complexity of these rights and their general intangible nature, the failure to clarify the passage of these rights serves only to create a complicated situation to unravel at a later date. The same considerations apply in the divorce or bankruptcy context. These rights can be very valuable and should be specifically identified, valued, and divided. Heirs of a deceased celebrity, of any stature, should register their rights as

provided by Chapter 26, Tex. Prop. Code.

Litigation on behalf of songwriters, publishers, and artists can be quite rewarding, but often presents difficult issues of proving damages. See, e.g., *Daily v. Gusto Records, Inc.*, 14 F. App’x 579 (6th Cir. 2001); *Ramirez, et al. v. Freddie Records*, Civil Action No. 4:08-cv-00801 (Southern District of Texas — Houston Division 2010). Information about the quantities manufactured and sold, downloads, and other exploitation is usually solely in the control of the entities that are obligated to pay the artists and songwriters. Information gets omitted, deleted, or modified or is not kept. There are often gaps in objective sources of data to develop damages. Record companies may have in-house manufacturing capacity and may not document the quantities manufactured or distributed. While there are services — such as Nielsen’s SoundScan system — that track retail sales, some record labels don’t sell through channels that report to SoundScan. Industry accountants are essential in assisting the attorney in forensically investigating and quantifying claims of this nature.

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