Music Copyright and Publishing for Bands and Musicians

Composers, lyricists, independent recording artists and bands that own the copyright in their music can derive income through the licensing and performance of their compositions and sound recordings. This information sheet explains music copyright and royalties, the role of collecting societies such as APRA/AMCOS and PPCA, and music publishing. Sample agreements that may be relevant include Music recording agreements guide, Music Studio Recording Agreement for Unsigned Artists and Session Musician's release.

This information sheet explains the rights in musical works and sound recordings and describes how composers, independent recording artists and bands that own the copyright in their music can derive income through the licensing and performance of their compositions and sound recordings.

Introduction

When music is created, subject to certain number of exceptions discussed below, its composer or creators are regarded as the 'author' or 'authors' and will generally own the copyright in the musical work and the lyrics of the song. As discussed later, a song is a combination of two separate copyright works – the 'musical work' and the lyrics, which are a 'literary work' as defined in the *Copyright Act 1968* **(Copyright Act).**

Song writing can be a solo activity or a collaborative effort. In some writing partnerships there is a clear distinction between the person who writes the musical work and the person who writes the lyrics. Alternatively, two or more people may have worked on the musical work or lyrics as a joint activity. In such cases, it may be that each person has made an equal contribution to the authorship of the particular musical work or lyrics or it may be that the respective contributions are quite different and the collaborators want to recognise those differences in contribution by allocating different percentages of ownership and shares of revenue.

Who is the author or composer of a song?

The Copyright Act does not define who is an 'author'; however the author will usually have put in creative skill and effort in creating the work.

Whether the level of creativity or effort is sufficient for 'authorship' can be considered by asking the question as to whether the effort has resulted in something that is sufficiently original. In considering this question, the courts have made a distinction between composition or creation of a musical work on the one hand and the performance or interpretation of it on the other. The requirement of 'composition and creation' means that a person must provide a significantly original contribution to the creation of the musical work and/or lyrics in order to be recognised as the co-author of the work. It may be clear as to who is the composer/author of a song, or it can be a very complex question.A famous legal argument over the relative contributions of different band members occurred in relation to the Procol Harum song 'A Whiter Shade of Pale' where Matthew Fisher claimed to be the composer of the 8-bar organ solo said to give the song its distinctive baroque flavour while Gary Brooker claimed the melody was written by him before Fisher joined the band. Fisher was successful in his claim to be recognised as a co-author and thus entitled to share in the royalties generated by the song's success.

The Arts Law **information sheet on copyright** provides basic information on copyright, including ownership of copyright in musical works and lyrics. Generally, the 'authors' own the copyright – whether the musical work or the lyrics.

However an employer will be the first owner of copyright where the composer or lyricist created the song as part of their employment. There may be a transfer of ownership of the copyright by the author in an agreement relating to the creation of the work. The effect of the Copyright Act is that:

· The copyright in music (musical score and/or lyrics) that is created in the course of employment is owned by the employer. This means that if in the course of your employment you are requested to make a musical or literary work then it is

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the employer who owns the copyright in the work.

· However the Copyright Act distinguishes between independent contractors and employees. An independent contractor paid to create music or lyrics is still the first owner of copyright in the works they create, unless there is a written contract that transfers ownership of the copyright – such a transfer of copyright is usually described as an assignment of copyright.

· It is possible for the author of music to enter a contract that assigns the rights in the music to another party.

The law doesn't distinguish between the relative contributions of co-authors treating them equally and for this reason contracts are often used to allocate shares of copyright between the authors based on how important each contribution is.

Arts Law publishes two sample **Band Partnership Agreements** that can be used by band members to establish how the band is to operate including clear procedures for determining the ownership of band compositions and sound recordings.

Who is the maker of the sound recording?

A separate copyright exists in the recording of a song and in the music video, which are defined in the Copyright Act as a 'sound recording' and 'cinematograph film' respectively. The owner of the copyright in a sound recording of a song is NOT the owner of the copyright in the song being performed and recorded but rather the person identified as the 'maker' of the sound recording (or music video). Arts Law's **information sheet on copyright** describes who the 'maker' is, and therefore the initial owner of copyright in a sound recording or film. The first owner is the person who made the arrangements for the recording to be created with the payment of the costs being an important signifier as to who is the maker. Band managers, sound engineers and people carrying out the functions of a record producer may all have a claim to be the 'maker' of a sound recording. For example, where a record label pays for the recording costs it will usually expect to own the copyright in the resulting sound recordings. Because of the uncertainty as to what contribution is sufficient to be recognised as a person who 'made the arrangements' for the recording to be created, it is important to have agreements with every person involved in the creation of a sound recording so that the copyright is transferred to the correct person, band members or legal entity that is intended to be the owner of the copyright.

In relation to a sound recording made of a live performance after 1 January 2005, unpaid performers are recognised as having an interest in ownership of copyright in the sound recording jointly with the maker of the sound recording. This means that all musicians and singers, including backing singers, who perform on the recording, may have a claim to be a co-owner of the copyright in the sound recording, unless the performer is employed or paid. A live performance does not require an audience, and whether a studio recording of a song constitutes a live performance is currently an uncertain area of the law.

Arts Law publishes a sample **Session Musician's Release** that can be used when a musician is being hired to perform as part of a music recording session or for live performance that is being recorded. This Release is intended to transfer any copyright from the session musician or backing singer to the person who is the 'maker'.

Ownership of Copyright in Music

There are three forms of copyright that exist in music and they are separated as follows:

1. Musical Work (melody, harmony, rhythm)
2. Lyrics
3. Sound Recording

A song is therefore a combination of two different copyright works – the Musical Work and the Lyrics. Each of these separate copyrights can be owned by either the same person, different people, or to make things even more complicated, by a number of different people within each separate copyright.

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The owner(s) of Copyright in the Musical Work or the Lyrics have the exclusive right to:

· Reproduce or copy the song (such as by making a sound recording or music video, photocopying sheet music, making CDs or electronic copies);

· Publish the song;

· Perform the song in public;

· Communicate the song to the public (such as by radio, television, or internet);

· Arrange or transcribe the musical work;

· Translate the lyrics.

In order to record a song, the copyright owners in the Musical Work and the Lyrics must reach an agreement to exercise their exclusive rights. Where several people have contributed to the Musical Work, Lyrics and making of the Sound Recording, ownership of copyright can get complicated, so it is recommended that written agreements are made which defines:

· the ownership of the copyright in the songs, which will be divided between the composer(s) of the Musical Work and the author(s) of the Lyrics; and

· the ownership of the Sound Recordings, which may be divided between all band members or some band members or shared with or owned by the people who financed the recording costs.

The owner of the copyright in the Sound Recording has the exclusive right to:

· Make a copy of the Sound Recording

· Cause the Sound Recording to be heard in public

· Communicate the Sound Recording to the Public

· Enter into commercial rental arrangements in respect of the Sound Recording

It is important to understand that copyright exists in the Sound Recording in addition to the copyrights in the Music Work and the Lyrics. See below an example of the importance in understanding the nature of the copyright in the Sound Recording.

The band recording set out in Example 1 describes how ownership of the recording would be determined where the recording was arranged and paid for by each band member in equal shares.

EXAMPLE 1

FACTS:

Jane Smith was one of four members of the band “Rockstars”. Prior to joining Rockstars, Jane had written the music and lyrics for a song called ‘Sweetheart’ entirely on her own. Rick is a friend of one of the members of the Rockstars and offered to help them make a sound recording using his computer and recording equipment. The Rockstars performed and recorded Jane’s song ‘Sweetheart’ at the house of Rick Ramrod, who was not paid to make the recording. Rick’s younger sister Sarah, who was also not a member of the band, sang harmonies for the recording of ‘Sweetheart’. Rick created copies of all the recorded songs for everyone in the band so that everyone had a copy of the sound recordings. Sadly the band dissolved a few months later and the Rockstars never released any of their music. A year later, Jane decided to upload some of the songs she had written to SoundCloud, including the song ‘Sweetheart’. Jane did not re-record Sweetheart but instead uploaded the sound recording that the Rockstars made at Rick’s house. A few weeks later, Jane received a copyright infringement take down notice from SoundCloud in respect of the song ‘Sweetheart’. Jane was confused as she wrote the

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song herself and so believed that she owned the copyright in it.

ISSUES:

Is Jane able to upload the band's recording of 'Sweetheart' to SoundCloud as she wrote the song herself?

ANSWER:

While it is likely that Jane is the sole owner of the copyright in the music as a musical work and in the lyrics as a literary work and thus has the exclusive right to reproduce, publish, communicate, perform and adapt the music and the lyrics of the song, it is unlikely that Jane is the sole owner of the copyright in the sound recording of the song.

There is a separate copyright that subsists in the particular sound recording that the Rockstars made of the song 'Sweetheart'. The Copyright Act defines the owner of the copyright in the sound recording as one who is the 'maker' of the sound recording. The 'maker' of the sound recording is generally:

a) The person or persons who made the arrangements for the recording to be created; and

b) The musicians who perform the live music on the recording

In this scenario, assuming there was no written agreement amongst the band or with Rick or Sarah in relation to the recording, each band member who performed on the recoding of the song as well as Sarah and Rick who made the recording, would be joint copyright owners of the sound recording of the song 'Sweetheart'. Therefore if Jane wants to upload this particular recording of the song 'Sweetheart' she will need to seek permission from each of the copyright owners of the sound recording of the song i.e. each band member who performed on the song including Sarah and Rick who owned the recording medium and helped make the recording.

Operating a music label and being a music publisher

The music industry has developed with specialist organisations managing the copyright in musical works (the 'music publishers') and the record labels managing the sound recordings (the major and independent 'record labels'). Independent musicians and recording artists must therefore take responsibility for the activities that are otherwise managed by music publishers and record labels.

The internet provides musicians and recording artists with a platform to distribute music to a worldwide audience. The direct distribution of music means that having a recording contract with a major or independent music label is an option rather than an essential requirement to distributing music to a worldwide audience.

Management of musical works

The composers of the musical works (the songs and other compositions) have choices as to whether to get signed by a music publisher, so that the music publisher can manage the musical works and generate income from other people licensing the compositions (for example, in soundtracks of film, television programs and advertisements). Alternatively the composers may choose to be self-published and take the responsibility themselves for generating income from their compositions, which will include registering the musical works with the music collection societies APRA & AMCOS (see below).

Management of sound recordings

Independent musicians and recording artists have choices as to whether to get signed by a record label, so that the record label will pay the recording costs, with the record label also managing the distribution of the sound recordings. Alternatively the musicians and recording artists may choose to own and control their sound recordings and operate as an independent music label to organise and manage the distribution of their sound recordings and take the responsibility for generating

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income from their sound recordings, which will include registering the recordings with the Phonographic Performance Company of Australia (PPCA)(see below).

Arts Law publishes sample agreements for use by independent musicians and recording artists including **Band Partnership agreements** that can be used when members of a band want to set out how their band will operate, including how decisions will be made as to the management of musical works and sound recordings created by band members.

As there are many pitfalls to success as an independent artist or band, it is important to develop an understanding of how the copyright in musical works and sound recordings is managed and how the music industry operate. The **Australian Copyright Council** provides free information sheets and low cost publications that describe how copyright law operates in relation to the creation and use of musical works and sound recordings.

Online Sales Service ('OSS')

An **Online Sales Service ('OSS')** may provide services related to music publishing, or a platform for consumers to access and purchase sound recordings. When reading the terms and conditions of use of the OSS it is important to have an understanding of the difference between granting permission to use a copyright work (a 'licence') as compared to transferring the right of ownership of the copyright (an 'assignment'). Licensing rather than assigning rights is the preferable option and if an assignment of your copyright is required then an explanation should be sought as to why an assignment rather than a licence is required.

Music Collecting Societies

There are collecting societies that manage some of the rights on behalf of copyright owners. The music collection societies are described in the Arts Law information sheet on **Copyright Collecting Societies**.

APRA/AMCOS collects royalties for the reproduction, performance and communication of musical works and pays them to copyright owners. Its website explains that the musical work is reproduced when a song is uploaded onto a server for the purpose of a streaming or download service. The musical work is also reproduced when the song is downloaded to the end user or communicated to the public in the operation of a streaming service.

If independent musicians and recording artists operate their own website, which includes a download service or music streaming service, then an APRA licence is needed as the operation of these services will involve:

- the reproduction of musical works; and
- the communication to the public of those musical works.

APRA/AMCOS provides information on digital music service providers and licensing of music download services. Even when band members compose the songs, an appropriate APRA downloading or streaming licence may still be required in order that APRA can pay the individual composers and music publishers (if a composer is signed to a music publisher) for the reproduction and communication of musical works.

The public performance and communication of sound recordings is managed by **Phonographic Performance Company of Australia (PPCA)**.

Independent musicians and recording artists who have not signed with a record label and own the copyright in their sound recordings, can register those recordings with PPCA so that any revenue generated by the reproduction and communication of those recordings to the public can be paid to them.Arts Law publishes an information sheet on **Direct licensing guidelines: sound recordings,** which provides information about the direct licensing guidelines/policy that all PPCA licensors must have and contains additional information about licensing of sound recordings. The PPCA has an 'input agreement', which is the agreement that the owner of the copyright in the sound recordings signs so that PPCA can licence the sound recordings and music videos and to collect royalties on behalf of the owner.

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Independent musicians and recording artists that own the copyright in their sound recordings can also provide a licence directly to an **Online Sales Service ('OSS')** to distribute their sound recordings.

The Arts Law information sheet **Direct licensing guidelines: sound recordings** explains how the PPCA's **Sample Direct Licencing Guidelines** provides independent musicians and recording artists with choices as to whether to hold back the right to grant licences to use the sound recordings or to pass to the PPCA the responsibility on managing the licencing.Independent musicians and recording artists that expect to use an OSSshould retain the ability to grant direct licencing when completing their PPCA documents. The direct licensing instructions to PPCA can also be changed from time to time, so that artists and bands can amend those instructions if necessary.

If independent musicians and recording artists are using an OSS to distribute sound recordings then it is the responsibility of the OSS to obtain the appropriate licences for the public performance and communication of musical works and sound recordings. The terms and conditions and other information provided by the OSS should be checked to confirm that the OSS has the appropriate licence to reproduce and communicate musical works and sound recordings to the public. Note that there are music collection societies in other countries that provide licences to streaming and downloading services so that APRA & PPCA are only involved with licencing an Australian based OSS.

Dealing with Copyright in a Sound Recording

Giving permission to a third party (Licensee) to use some or all of your rights of copyright is called licensing your copyright. It is possible to license one or all of your rights. You may also assign (either by selling or donating or giving away) your entire copyright, which transfers all your rights in the work to a third party. In order for an assignment to be valid, it must be in writing and signed by the person giving up the copyright.

If someone uses your copyright without your permission they are said to infringe your copyright and you may have a claim against them.

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The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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