

What to know before starting a record company

- 1) The Artists (the ones who play the instruments and sing the songs) do NOT get a copyright protection. However, they must get paid/compensated for their work-for-hire <one shot>.
- 2) The same is true for other employees/contractors for the record creation (the sound man, lawyers, accountants, etcetera), they must get paid/compensated for their work-for-hire <one shot>.
- 3) The person who wrote the song lyrics (or the PUBLISHER who hired a lyricist to invent them) is protected by copyright (C in a circle), and gets paid ROYALTIES <ongoing>.
- 4) The person who wrote the music score (or the PUBLISHER who hired an arranger to invent them) is protected by copyright (C in a circle), and gets paid ROYALTIES <ongoing>.
- 5) The finished recording (the one made by paid artists/employees/contractors) is protected by phonorecording copyright (P in a circle), and the owner of this master work gets paid ROYALTIES <ongoing>.
- 6) Any person using a recording must pay royalties to at least the music/lyric creator AND the phonorecording creator.
- 7) The master tape is NOT covered by phonorecording copyright. While a person taking a segment from a released record/CD is infringing on phonorecording copyright, taking that same segment from a multi track master tape is NOT (because the master tape is not considered the final copyrightable mix). It MAY not even be considered a lyric/arrangement copyright violation if the segment is not clearly recognizable as the copyrighted song/music (a drum beat for example).
- 8) An AUTOMATED mix made from the multi track master recorded material, even if not released as a final phonorecording, could have the automated moves copyrighted as a compilation/software creation using copyright Form TX (U.S. Copyright manual page 234,167 paragraph 1624.1.4b "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way the resulting work as a whole constitutes an original work of authorship.", "A 'computer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result. Copyright protection extends to all the copyrightable expression embodied in the computer program.").
- 9) The entity owning the song/music composition copyright who has never allowed a recording of the work to yet be made does NOT have to allow a record company to make a recording using the copyrighted material, even if the record company wants to pay the owner royalties. The record company therefore has to get a "mechanical license" (permission slip) from the owner first. The mechanical license does NOT give the record company permission to put the lyrics or score on printed materials released with a record (this must be covered in separate agreement between you and the owner directly). The mechanical license also does NOT give the record company permission to use the song/music in a live DRAMATIC performance (a Grand License would be used in the case of music involved in a musical stage play) or as part of a video soundtrack (a Synchronization License would be used in the case of music involved in a motion picture).

10) For legal reasons, the Publisher (C-copyright owner) should be a separate entity from the phonorecording maker (P-copyright owner). The Publisher (c) should release the right to make a phonorecording to the record company (p) via a Mechanical License, even if the Publishing company is wholly controlled by the record company.

11) Once a Publisher has granted a mechanical license TO ANYONE for the first time ("first use" rule), a record company no longer needs to seek a mechanical license, and may make a phonorecording of the work WITHOUT the permission of the publisher ("demo" tapes do not constitute a "first use"). However, the record company must then comply with a very burdensome law known as a "compulsory license" (lots of mandatory publisher payments).

12) The mechanical license includes such terms as the royalty payment schedule (usually not more than quarterly, and sometimes semiannually), and the amount of royalty paid (possibly a reduced percentage rate for each record sold, or even a flat fee plan).

13) DEFINITIONS (Title 17, United States Code, Section 101):

Copyright owner, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

Work means a work of authorship that is capable of copyright protection, including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, motion picture, audiovisual, and **sound** recording works.

Literary works are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, **phonorecords**, film, tapes, discs, or cards, in which they are embodied.

Phonorecords are material objects in which **sounds**, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

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. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

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

14) Under federal law (17 U.S.C. Section 106), the owner of copyright has the exclusive rights to do the following:

- a) To reproduce the copyrighted work in copies or phonorecords.
- b) To prepare derivative works based upon the copyrighted work.
- c) To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.

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- d) To perform the copyrighted work publicly (a radio broadcast of a phonorecord is a "public performance")
- e) To perform the copyrighted [sound recording] publicly by means of digital audio transmission
- f) To display the copyrighted work publicly

15) Congress adopted a copyright statute in 1790; revised or rewrote four times (a history of decreasing formalities and increased terms—1790 (14 years and renew for 14 years); 1831 (28 years and renew for 14 years); 1909 (28 years with renewal for 28); 1976 (life of author plus 50 years); 1998 (life of author plus 70 years)).

16) Peculiar features of copyrights for music

A) Section 114: "The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), (3) and (6) of section 106, and do not include any right of performance under section 106(4). ..." In other words, the **owner of the copyright in the sound recording itself** (as opposed to the musical work) **has no exclusive right in the public performance of the musical work or the sound recording**. So, radio stations neither have to have permission nor pay a royalty to the owner of the sound recording copyright to broadcast the sound recording. But the owner of the musical work has an exclusive copyright in the public performance, which the radio station must respect. Nearly all owners of musical works have granted licensing agencies--e.g., ASCAP and BMI--the right to give consent to public performances and to collect the license fees for the same.

B) Section 115: "In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to **compulsory licensing** under the conditions specified by this section." This means that the actual permission of the owner of the musical work is not necessary if one wants to make a phonorecording (but not a public performance, for which actual permission is required) of the musical work **if** one pays the statutory license fee **and only if** the musical work has already been recorded by someone else. Note too that "a compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work."

Ownership

- a) initially vests in the author or authors
- b) works made for hire vest in the employer
- c) collective works: separate copyrights for each contribution are distinct from that in whole
- d) transfer of ownership in whole or part
- e) ownership of copyright versus ownership of material object (sec. 202)

Terms of Copyrights

Generally, there is a term of 70 years after the death of the author.

If the work is a **work made for hire** (See Section 201) and the employer is a corporation the term is 95 years after publication.

17) Copyright does **not** protect names and titles. Some brand names, trade names, slogans, and phrases may be entitled to protection under the general rules of law relating to unfair competition. They may also be entitled to registration under the provisions of the trademark laws. Questions about the trademark laws should be addressed to the Commissioner of Patents and Trademarks, Washington, D.C. 20231. Possible protection of names and titles under common law principles of unfair competition is a question of state law.

18) A copyright can be assigned to another person by selling, lending (for a fee or not), or giving away. Group compositions are initially owned by all members of the group. A "government work", an "idea" or work that is already in the "public domain" cannot be copyrighted. To prevent legal wrangling, the date of the copyright should be documented.

19) Copyrights may be granted, sold, or relinquished. Very often, a copyright holder will, by contract, transfer his copyrights to a corporation. A copyright holder does not have to transfer all rights completely. Some of the rights may be transferred, or else the copyright holder may grant another party a non-exclusive license to copy and/or distribute the work in a particular region. The original owner of the copyright may be the employer of the actual author rather than the author himself if the work is a "work for hire".

20) There is question in the US as to the legality of "moral rites" for a works creator (including the rite of attribution and the rite of a works integrity from distortion or mutualization). Moral rites are separate from copyright, and even if copyright is assigned to another, the original author still retains moral rights (unless the rite is waived, which is another unresolved legal question).

21) There are in place royalty collection agencies/lobbyists for registered Music Copyright Owners (song writers, composers, and publishers) so people interested in using the music can go through one clearinghouse rather than to each individual owner. A copyright owner would join these organizations because, although they will probably get slightly less of a royalty than they would have if they negotiated their permissions by themselves, the persons wanting to use the copyrighted material would be more likely to go through the clearinghouse than the hassle of finding you and cutting a special contract.

If you want to PUBLICLY PERFORM copyrighted compositions (this is an exclusive rite granted the owner of the copyright, and it refers to things like nite clubs, radio stations and such, but NOT stage plays), you can get permission from ASCAP, BMI, or SESAC.

If you want to PRODUCE & DISTRIBUTE copyrighted compositions (in other words, get issued a Mechanical License), you can get permission from the Harry Fox Agency.

The Owner of a phonorecording copyright also can be represented by a royalty collection agency/lobbyist group known as the RIAA.

22) This is an *example* of a Terms and Agreements contract from HFA:

Terms and Agreements

You have advised us, in our capacity as Agent for the Publisher(s), that you wish to obtain a compulsory license to make and to distribute not more than the requested number of phonorecords embodying the copyrighted work, under the compulsory license provisions of Section 115 of the Copyright Act.

On behalf of said Publisher(s), the following constitutes your authority to make and distribute the limited quantity listed above of such phonorecords, for and in consideration of the aggregate sum (payable in advance) at the Statutory royalty rate. This authority will be automatically effective, and the terms hereof shall be and be deemed accepted by you, upon your non-refundable payment by credit card of the license fee set forth herein.

The authority hereunder is limited to the manufacture and distribution of the above-stated quantity of phonorecords to the public for private use only, solely in the United States and its territories and possessions, and not elsewhere.

This license covers and is limited to one particular recording of said copyrighted work as performed by the artist and on the phonorecord number identified, and this license does not supersede nor in any way affect any prior agreements now in effect respecting phonorecords of that work.

Please Note : An HFA mechanical license does not include the right to display or reprint lyrics or the right to print sheet music. Nor does it cover any use of the song or lyrics in karaoke or "CD+G" product. For these rights, you must contact the publisher(s) directly. If you are duplicating from pre-recorded material or "**sampling**" *, you must also obtain a **MASTER RECORDING LICENSE **** directly from the record company that owns the master to the recording.

* The use of pre-recorded material (sound clips) within another recording.

** If you are using previously recorded material not owned or controlled by you, you must first obtain the rights to do so from owner of those sound recordings, i.e. the original record company.

For the period January 1, 2004 to December 31, 2005 the statutory mechanical royalty rate is as follows:

8.50 Cents for songs 5 minutes or less

or

1.65 Cents per minute or fraction thereof over 5 minutes. *

* For example: 5:01 to 6:00 = \$.099 (6 x \$.0165 = \$.099) 6:01 to 7:00 = \$.1155 (7 x \$.0165 = \$.1155) 7:01 to 8:00 = \$.132 (8 x \$.0165 = \$.132)

On January 1, 2006, the rate will be raised to 9.1 cents for songs 5 minutes or less and 1.75 cents per minute or fraction thereof over 5 minutes.

Example Recording Agreement for **COMPANY**

Unless otherwise stipulated in a this or a separate Agreement, or the invoice/order, once acknowledged compensation and payment in full for the recording session has been received by **COMPANY**, the ownership rights to the master sound recording of this recording session shall belong to the Client. **COMPANY** shall have the right to enter into an Agreement with the Client to acquire all rights to the master sound recording of this recording session. **COMPANY** shall have the timeless right of a first refusal in obtaining initial offered ownership transfer of the master sound recording of this recording session. **COMPANY** shall have the irrevocable right to enter into an Agreement with the Client and future owners of the master sound recording or their designated agents, to obtain a mechanical license and/or create a phonorecording from the master sound recording of this recording session.

Unless otherwise waived in a separate Agreement or the invoice/order, or through early affirmation of work completion by signature upon this Agreement, within thirty (30) days after the completion of the recording session, as indicated in this Agreement, **COMPANY** will issue the Client a copy of the master sound recording of this recording session in a format and upon media of its choice or otherwise stipulated in the invoice/order, unless acknowledged compensation and payment in full as indicated in this or a separate Agreement, and the invoice/order, has not been received. If after the ending of the recording session, sound information from the master recording of the recording session becomes unusable or erased prior to issuance of a Client copy, **COMPANY** shall be responsible for no more than refunding the entire base payment in full, as indicated on their invoice/order, to the Client.

COMPANY makes no claim to the lifespan or compatibility of this media once delivered to the Client, nor does it promise to make use, or create duplicates, of the media delivered to the Client. **COMPANY** is under no obligation to keep original or backup master sound recordings once the Client takes delivery of the media, nor shall **COMPANY** be in any way responsible for the media once the Client takes delivery. Receipt of this media from **COMPANY** to the Client is an acknowledgement between both parties that all services from **COMPANY** stipulated in this Agreement have been rendered, and that the quality of all services rendered by **COMPANY** are satisfactory to the Client, and the Client shall release **COMPANY** from any and all liability regarding said recording media and services rendered.

Upon day thirty-one (31) after the completion of the recording session, if acknowledged compensation and payment in full as indicated in this or a separate Agreement, and the invoice/order, has not been received, then **COMPANY** shall keep all payments and compensations made by the Client for the recording session, and all rights to the content of the original and any copies, and to the physical ownership, of the master sound recording of this recording session will irrevocably revert to **COMPANY**, regardless of any copies issued to the Client. Ownership of the master sound recording of this recording session by **COMPANY**, including, but not limited to, the exclusive right to in whole or in part keep, destroy, erase, edit, enhance, degrade, mix, modify, convert or transfer to other media, sell, license, rent, prevent from accessing, duplicate, derive, distribute, market, give away, or otherwise manipulate, distribute, and withhold the physical master and the recorded material on the master, will be irrevocable, unless nullified by order of a court of law, regardless of payments, compensations, or amends later offered by, or obtained from, the Client. **COMPANY** shall maintain the same exclusive rights over all recordings that can trace their heritage to this master. The obtainment of ownership of the master sound recording by **COMPANY** shall in no way alleviate the responsibilities and obligations of the Client as stipulated in this or a separate Agreement, and the invoice/order.

By countersigning this Agreement, the Client has secured the right to solicit and enter into Agreement with **COMPANY**, its heirs, executors, administrators, and assigns or successors in business, to reproduce in a new recording session a derivative of the material recorded onto the master tape made at this recording session. This right may not be superseded, abridged, revoked, or otherwise nullified by any future Agreements or Contracts entered into by the Client, except by order of a court of law.

As a condition of this Agreement, the Client, through stipulation in a supplemental contemporaneous Agreement and/or the invoice/order, may acquire from **COMPANY** the ownership to any master recording made at/of the recording session after the recording session end time indicated in this Agreement, and furthermore the supplemental contemporaneous Agreement and/or the invoice/order may be written in such a way so as to include any such master recording ownership transfer as an implied condition for entering into this Recording Session Agreement, details of which shall be stipulated therein. As a condition of this Agreement, the Client, through stipulation in a supplemental contemporaneous Agreement and/or the invoice/order, may have **COMPANY** create for the Client, but only with permission from the master recording owner or their designated agent, a Demo from any master recording made at/of the recording session after the recording session end time indicated in this Agreement, and furthermore the supplemental contemporaneous Agreement and/or the invoice/order may be written in such a way so as to include any such Demo creation as an implied condition for entering into this Recording Session Agreement, details of which shall be stipulated therein. Under no circumstance shall **COMPANY** be liable for circumstances beyond **COMPANY**'s control that would lead to the inability to comply with these conditions.