



Legal Problems With Co-Writers

LEGAL PROBLEMS WITH CO-WRITERS

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It's critically important to understand how your rights to a song are affected when you write with other songwriters, because the majority of hit songs are written by more than one person, and it's likely that you will have to collaborate with someone at some point in your career. This is a very common area of difficulty and disagreement between songwriters, because most co-writers do not understand their rights and obligations in these situations. It doesn't matter whether you've written a song with your sister, your wife, or your best friend. A lack of knowledge of these issues can cause you a lot of pain later, and if your song becomes a major hit, it may also cost you a lot of money.

Co-Writer Situations

To realize how easy it is to misunderstand the legal rights of collaborators, let's look at some hypothetical situations. Imagine that you finally get together with a songwriter you've been wanting to work with. You bounce a few ideas back and forth. Impressed with each other, you decide to write a few songs. You record simple piano-vocal demos of the songs on a portable cassette recorder. Over the

next few months, these problems arise:

1. For the first song, you wrote all of the music and one-half of the lyrics. The two of you decide to license the song for a motion picture for a \$1,000 synchronization fee. Do you automatically get \$750?

2. For the second song, you wrote only the music, and your collaborator wrote only the lyrics. After promoting the song for a few months to music publishers, producers, and recording artists, all of the criticism is the same - your music is wonderful, but your collaborator's lyrics are terrible. You decide to find another lyricist to rewrite all of the lyrics without your original collaborator's approval. Can you create a new song with your music and another songwriter's lyrics without owing the original lyricist any of the money earned from the new song?

3. The third song you wrote together is perfect for a demo tape featuring you and your band. After promoting this tape for a few months, you get interest from two major record companies that

want to sign your group. Both labels insist that the co-written song is by far your biggest potential hit and will be the first single they will release after you're signed. Your collaborator, who is not in your group and who desperately needs money to pay the rent, finds an advertising agency willing to pay \$10,000 because they think the song is perfect for a national advertising campaign for a deodorant spray they represent. You tell the record companies about your collaborator's plans, and they insist they will not sign your group if the song is used in the commercial. Can you prevent your collaborator from giving a license to the advertising agency, or can you otherwise stop the agency from using the song?

4. Your diligent promotional efforts for the fourth song have paid off, and you finally receive the call you've been waiting for. Sally Superstar's producer loves the song and wants to put it on her next album. Your timing was perfect because every other song on the album is finished and the producer was waiting for a "killer ballad" like yours to finish the project. The record company wants to release

the album soon, so Sally and her producer, Eddie Ears, need to begin recording the song within the next five days. Eddie, like many record producers who like to own rights to songs, insists that you assign all of the music publishing rights in your song to his company as a condition of having it recorded on Sally's album. Your collaborator is camping somewhere in Montana and can't be reached. Can you assign all music publishing rights in the song to the producer?

Unfortunately for you, and surprising as it may seem, the answer to all of the questions above is "No!" Now you can understand why the legal effects of collaboration are some of the most misunderstood aspects of the business of songwriting. Hopefully, this chapter will clear up some of the confusion.

How Is A Joint Work Created?

A *joint work* under the Copyright Law, is a "work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." As I discussed in chapter one, a song is subject to copyright protection when "fixed in any tangible medium of expression. . .from which [it] can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device."

That formal legal definition means that when you create lyrics or music, intending that someday they will be part of a song, your creation becomes part of a joint work when it is recorded on tape or written on a lead sheet along with someone else's lyrics or music. Even though your individual contribution might have been separately protected under the copyright law and suitable for copyright registration by itself, the song that results from the *merging* of the individual contributions of the songwriters is then covered by the copyright laws in its joint

form, regardless of whether the complete song has been registered in Washington, D.C. (As I mentioned in chapter one, remember that registration is still advisable to provide evidence of your claim to authorship of the song, as well as to give you certain legal advantages if you sue someone for infringement.)

You don't have to be physically present when the merging of creations occurs, as long as you have approved the merging of creative contributions. In fact, it's not even necessary that you knew who your eventual collaborator would be when you composed your music or wrote your lyrics!

Your "approval" of creative contributions does *not* have to be in writing and can be implied from the circumstances of the collaboration. For example, if you submit your lyrics to composers and ask them to create music for the song, and if you allow them to record a demo tape of their version and promote it to publishers for a few weeks, that would likely be considered a sufficient merging of your lyrics and the composer's music to create a joint work.

Great. You now have an intentional or unintentional business partner for your song!

What Rights Does Each Songwriter Have To The Song?

1. *Collaborators each own undivided, equal interests in the whole song.* Unless they agree to some other division of ownership and income participation, two co-writers each own one-half of the song, three co-writers each own one-third, etc. These fractional interests apply to the *entire* song, and separate lyrical and musical ownership rights to jointly created songs do not exist without a written agreement among the songwriters.

What about songwriters who only make a minimal creative contribution? There are legal cases that appear to protect the primary writers of a song from the ownership claims of those who make only minor contributions to its overall creation. The writing of a few words or composing of a few notes will not normally entitle that songwriter to an equal share, even without an agreement. The same rule applies to any other contribution that would not be suitable for separate copyright protection (such as some chord

changes or vocal harmonies). The most common example is the title. Many songwriters ask if they need to share their copyright with a friend who suggested the title. In all fairness, perhaps you should pay the person who thought up the title, but there is no legal requirement that they own any portion of the copyright.

Collaboration ownership problems can arise frequently in studio sessions, where a producer, musician, or singer makes a suggestion for a small change in the melody line or lyrics or revises the chord structure, the harmonies, or the overall arrangement for the song. Often that person will think they now own a share of the song, but you cannot be forced to accept new co-owners of your song this way.

If you've already completed a song before you start recording in the studio, and if the song has been previously fixed in a tangible medium of expression (whether or not it has been registered for copyright), and if you control the copyright to the song, any changes to that song can only be made with your permission. This is because technically the changes are creating a song derived from your original song, and the right to create derivative works, as I mentioned in chapter one, belongs to the copyright owners. You can therefore reject any changes you don't want. If you keep any significant creative contributions that have been made to your song by other people, however, and if you promote or exploit your song in that form, you have likely *consented* to the creation of a new joint work. You have therefore also consented to new joint owners of your copyright. If changes made to your song in the studio by other people are insignificant, you can either reject or use the changes as you wish, without giving anyone else extra compensation or ownership rights (although you risk losing valuable friends, producers, singers, or musicians by taking *any* creative contribution without their agreement).

If your song is being fixed in a tangible medium of expression for the first time in a studio session, that's a much more risky situation. Participants who add

minimal contributions will still not be entitled to ownership rights, but the line between sufficient and insufficient contributions is not always clear. If you have the slightest doubt as to what is being created and who will claim an ownership share, it's better to be cautious. You are now creating the "work" that will be protected by copyright, so make it clear to any potential creative contributor exactly what his or her financial and ownership interest in the song will be (if any at all).

2. Contributions to a joint work cannot be separated.

This is often a source of conflict. Without the consent of the other songwriter involved, one writer can't simply remove that writer's contribution and get a new collaborator to replace it, because the original writer will still own one-half of the new version (where there were only two writers of the original version). The ownership share of the original collaborator may not be reduced by the addition of new writers without consent. (It is important to note here that this legal prohibition is removed in almost all music publishing agreements unless you specifically require contrary language. See the discussion about single song agreements in chapter six).

Again, the concept is of derivative works. For example, suppose a popular hit song is used for a beer commercial, but the lyrics have been totally rewritten to suit the product. The original lyricist is still entitled to a fifty percent share of the money received for the use of that song.

The theme from the television show *M*A*S*H* was originally written for a scene in the theatrical motion picture of the same name. Even though the song is commonly known as the "Theme From *M*A*S*H*," the original title was "Suicide is Painless," and there are lyrics originally written for the song that are sung in the motion picture version. Naturally, lyrics about suicide were not thought to be appropriate for the opening title theme of a prime-time television program, so the lyrics have never been used in connection with the TV show. Nonetheless, the lyricist has made a small fortune from small performing rights payments for the song's performance on prime-time

network television and in the national syndication of the show to local television stations.

3. *Each co-writer can grant nonexclusive licenses without the consent of the other writers. Nonexclusive licenses* are permissions for use of a song that are not exclusively transferred to the person being given the license. For example, most synchronization licenses for the use of a song in a motion picture or television program are nonexclusive, because the owner of the copyright usually reserves the right to license the use of the song to some other television or motion picture producer. This is not always the case, however, as a television producer may be paying for the right to use the song as a theme song of a continuing series. In that situation, the license may indeed be an exclusive assignment of synchronization rights to the song.

The type of nonexclusive license described above should not be confused with a situation where a television or motion picture producer has required a complete assignment of music publishing ownership and control as a condition of using a song in the motion picture or television program. That type of agreement is an *exclusive* assignment of *all* rights to the song (which I'll discuss soon) and must be signed by all of the collaborators. After that type of agreement has been signed, the motion picture or television producer has total, exclusive control over the song. That's one of the reasons many such producers insist on owning music publishing rights.

Other than synchronization licenses, the most typical nonexclusive license is a *mechanical license* (for the mechanical reproduction of a song on recorded products like tapes and compact discs). Any disagreement between collaborators regarding a mechanical license can only arise for the *first* mechanical license for a song, because later mechanical licenses are *compulsory*, and even if all of the joint copyright owners of a song agree, they cannot refuse a request for that type of license (this was discussed in chapter one).

Problems between collaborators concerning

nonexclusive licenses usually occur when the co-writers have different motivations for writing a song or when they simply disagree as to the best use of a song at a particular time. The third hypothetical situation at the beginning of this chapter is a good example of a writer who has co-written a song for a specific purpose without making sure the co-writer agreed with that purpose. Other disagreements may arise when multiple offers are received for the same song at the same time. Is it best for a song to be first used in a key scene of a major motion picture with major stars, even if there is no guarantee of a soundtrack album? Is it better for the song to be the first single on an album by a new act signed to a major label? Each writer may feel differently about the prospects for success of various projects.

For most recordings of songs by artists signed to major labels (except in a compulsory licensing situation, where other versions of the song have previously been recorded), the label, the artist, or the producer may want a guarantee that no other use of the song will be permitted until after the record has been released. Occasionally a song may be "hot" enough that an artist will want to record it despite that fact that some other artist will be recording and releasing it at the same time. Usually, however, the prospect of a competing recording will "kill" the deal, so a disagreement between collaborators as to competing recordings can be critical.

Now that I've given you some possible situations to worry about, I'll tell you that the majority of synchronization and mechanical licenses cause no dispute between collaborators at all. This is because very few songs initially attract multiple offers from different motion picture, television, and records producers at the same time. Usually, all of the songwriters are so pleased to have anyone interested in paying to use their song, they can hardly wait to sign the necessary paperwork!

Also, as a practical matter, one songwriter may not find it easy to grant a license against the wishes of the other co-writers. As to both synchronization and mechanical licenses, many users of music want the

signatures of all of the songwriters. This is because they don't want any later dispute by the other copyright owners regarding the license, and because the laws of many foreign countries require that any license to exploit a copyrighted work in their territory must be by permission of all copyright owners of the work. Don't rely on this for protection of your interests, though, because there are companies that *will* accept a license signed by one collaborator.

4. *No writer may assign an exclusive right to a song without the consent of the other writers.* Most importantly, this means that none of the co-writers can deal with the *publishing rights* (that is, the ownership and administration rights) of the other songwriters.

Other exclusive transfers of rights to the entire song are also forbidden. For example, no single collaborator can grant to one print music company the exclusive right to print sheet music of the song or grant to a subpublisher in France the exclusive administration rights to the song throughout Europe.

It is quite common, of course, for one songwriter to assign only his or her share of general music publishing rights, giving a particular publisher the same fractional interest in the entire song that the songwriter possessed before transferring the music publishing rights. So one of two equal co-writers could assign a 50% interest in the music publishing rights to one publisher. That publisher would then be a *co-publisher* or *co-administrator* with the remaining co-writer (or any music publishing company to which that co-writer may have given the remaining 50% share).

The rule forbidding exclusive assignments by less than all of the songwriters can become a special problem in two common circumstances: (a) where a collaborating songwriter, either through frequent travel, lack of interest, or numerous changes of address is generally unavailable to sign any paperwork concerning a proposed agreement that will include an exclusive assignment; and (b) where a

collaborator, whether living far from the mainstream of music industry activity or not, has no understanding of the types of agreements that are necessary to promote and exploit songs and is generally unreceptive to any proposal from the "active" songwriters who are in the industry every day trying to generate interest in the song.

This is all complicated further by another important rule applying to exclusive transfers of rights in a copyright: No assignment of exclusive rights is valid unless made in writing. Oral agreements among the songwriting collaborators or between co-writers and an outside party are therefore unenforceable. So if you're the one seeking the right to make deals freely for a song, don't merely accept your collaborator's verbal assurance that it's all right. Most publishers, record producers, and others who may want certain exclusive rights will still insist upon the signature of all of the songwriters involved. Otherwise, your collaborator can have a change of heart and invalidate the transfer of rights as to that person's share of the song.

5. All writers of a particular song have a legal duty to account to each other for any monies earned from any use or exploitation of the song. In its most basic sense, this just means each writer has to pay the others their equal share of monies received, but the "receiving" writer should also provide information about the source of the monies and a copy of any accounting statement received by that writer along with the payment.

6. Each collaborating songwriter also has a legal duty to give credit to the other writers wherever a printed or visual credit appears for any of the writers. This requirement is not contained in the copyright law but was imposed by one court in 1988 through an interpretation of the federal Lanham Act prohibition against *false designations* and representations of the *source* or *origin* of goods or services sold in interstate commerce. (Most states have similar laws that apply to goods or services sold within state boundaries.)

It had previously been clear only that songwriters have a legal right of action under the Lanham Act if authorship of their song were falsely attributed to someone who did not write the song and if *all* of their names were omitted from credit for that song. A 1988 Federal Circuit Court of Appeals case in California, however, held that a printed songwriting credit is also a false designation of origin when it attributes authorship to only one of several co-authors.

How Can Collaborators Protect Their Rights?

From the previous discussion, you can see that there are many different legal issues that may become important in the collaboration for a particular song, so each situation requires a different approach. The first thing to avoid is unnecessary paranoia at the beginning of a songwriting collaboration. You will probably never collaborate with anyone again if you make each writer sign a lengthy agreement before you even begin to write. So (getting away from the legal aspects of songwriting for, unfortunately, only a brief moment), make sure the collaboration is comfortable, and that you are likely to be completing a song together before you worry about any form of collaboration agreement.

As to those people with whom you don't want to collaborate, however, there may indeed be cause for concern and a preliminary, brief agreement. For example, prior to the start of a recording session where a song is being put in tangible form for the first time, it would be a good idea to have any producers, singers or musicians sign a short release form. The form would basically contain information about the names of the songs for which they will be rendering their services, the money they will be paid, and a paragraph stating that any creative contributions or other results or proceeds of their services will belong solely to you with no further obligation for payment. With that kind of written provision, the nature and extent of their contribution to your session will not matter. You and your original co-writers will own and control the final song and master recording.

Be careful if you and your co-writers are members of a band that will be the primary performers (both for recording purposes and live performances) of songs you've co-written specifically for the band. For the non-songwriting members of the band, a release agreement such as the one I've just described may be considered insulting and may create conflict that will destroy the group.

Some bands have agreements under which all of the band members equally own

and control the songs along with the songwriter members of the group. This is especially true in groups where the musicianship is a major factor in the marketability and success of the group's songs. In other bands, the songwriter members split equally the *songwriter's share* of income from the songs they write, while the entire band splits the income from the *publisher's share* and jointly controls the songs. Other groups leave song ownership, income, and control solely to the songwriter members. Regardless of the songwriter/non-songwriter makeup of your group, there is no single way in which this matter is always handled, and this is a sensitive issue to be resolved on a personal basis with your group.

Whether or not you're in a band, if you want to avoid any unfair application of the rule that all collaborators own equal shares of a song, the simplest solution would be a short written statement that "all right, title and interest, including copyright, in and to the musical composition "I Love You" will be owned as follows: John Jones - 75%; Susan Smith - 25%." It's important to understand that the percentages agreed upon between collaborators *do not affect control of the song*. For example, just because John Jones has 75% of the song doesn't mean that he has "majority rule" over decisions concerning nonexclusive licensing and exclusive assignments of rights. Susan Smith can still give a motion picture producer a nonexclusive license without John's approval, and John can assign only 75% of his administration rights of the song to a music publisher of his choice (he still needs Susan's written approval for assignment of her 25% share).

To protest yourself against being "stuck" with the creative contribution of a collaborator and continuing to owe your co-writer income even if you change the song and remove their contribution, a few tactics can be used. The easiest would be to orally agree that there will be no complete, merged song until you both consent.

Another general strategy might be suitable if you are the type of writer who writes lyrics alone and then looks for appropriate music, or if you generally write music alone and then look for appropriate lyrics. In either of these cases you might consider copyright registration of the lyrics alone or the music alone. The idea is to claim you have created a separately copyrightable work, with no intention that it will ever be merged with anyone else's work. You will then have a good argument that any song created after the date of that registration using your creation will be a derivative work. As I've already explained, a derivative work cannot be created at all without the consent of the copyright owner of the original song. This will prevent the possibility of any unintentional joint works that might be created when someone else's creative contribution merges with yours when the completed song is first put in tangible form.

The best way to employ the above technique for lyrics would be to use copyright registration Form TX, registering the work as poetry (if you register the words as song lyrics on a PA form, you will have obviously revealed your intention that

someday your lyrics will be merged with someone else's music). For the separate registration of music, Form PA will still be appropriate. Regarding both strategies, however, be aware that if you *never* exploit lyrics or instrumental music alone, always eventually merging your music or lyrics with the lyrics or music of other songwriters, it might be difficult to prove that your original work was intended to stand on its own without further creative contributions.

A second strategy to avoid the problem of "inseparability" would be to agree in writing to a *reversion* of all rights to your contribution if the song is not used or exploited in a specific way within a certain period of time. (I will discuss this again later when I talk about music publishing agreements for a single song). For instance, you might agree that after one year, if no music publishing agreement acceptable to all of the writers is offered for the song, and if no other approved use of the song has occurred by that time, the writers may take back their individual creative contributions to the song. This method should usually be used only where the contributions of different songwriters are very distinct (for example, where one has written only the lyrics and the other two have composed only the music). Otherwise, you'll get into a ridiculous argument over which musical measures or lyrical sentences belong to which writers.

What about collaborators' separate rights to grant nonexclusive licenses for use of a song without approval of other writers? Some writers simply agree that *no* license or agreement of any kind can be issued regarding a song without the approval of *all* of them. A common approach between songwriters of equal status is to recognize in an agreement that each of them can grant nonexclusive licenses without consulting the others, subject to certain protective requirements. Some of these might include the following:

1. a prohibition on issuing any mechanical license at a rate lower than 75% of the compulsory mechanical licensing rate in the Copyright Law (the statutory rate);

2. a general requirement that no license may be issued on terms less favorable than those reflecting *standard* or *common practice* in the music industry (as a practical matter, it would be difficult to really ascertain what is

standard or common, but this type of provision would at least discourage "free" licenses);

3. a requirement that all payments under the license be made *from the source* of the payment to each writer individually (for example, if one writer issues a mechanical license to CBS Records, the license would have to specify that CBS pay each writer's individual share of mechanical royalties directly to that writer);

4. a requirement that, if any payments are inadvertently received by one writer, the individual shares must be paid to each of the other writers within ten days after receipt;

5. a requirement that a copy of any license or other agreement be sent to each songwriter within ten days after being signed; and

6. a requirement that printed or visual credit for each songwriter be given wherever credit for any of the songwriters appears.

The above situation could be expressed in a collaboration agreement, but often a *co-administration agreement* is used. This simply means that more than one songwriter or company has the *administration rights* (the rights to issue licenses and collect income) to some share of the song. A co-administration agreement specifies percentages and limitations such as those described above, sometimes

prohibiting either company from exercising rights to anything other than its own share of the musical composition. I'll be discussing these agreements again later.

If you're a songwriter with a much stronger interest in a jointly created song than the other writers, either because the song has been written solely for your musical group or because you are the only writer actively involved in the promotion and "deal-making" for the song, *none* of the alternatives above will probably be appropriate. In your situation, you may wish to have your co-writers enter into an administration or *co-publishing agreement*, giving you the *only* right to issue license and collect money concerning the song. You would still be required to pay your co-writers their stated income participation shares at certain specific times (for example, at the end of every six months or every calendar quarter), but you would not need approval for your decisions concerning the song.

A *co-publishing agreement* refers to a split of music publishing ownership and music publishing income between two songwriters or companies. As I've discussed in this chapter, the "natural" legal state of collaboration is a co-publishing situation, because even without an agreement, two or more songwriters jointly own the song they've written and have equal co-administration rights. A formal co-publishing agreement or administration agreement, however, can specify that a copyright is technically owned by two or more writers or companies, but that only *one* writer or company has the right to issue licenses and collect money for the song.

If your situation is the one described earlier in this section, where your collaborator is either generally not interested in the business and legal aspects of songwriting, or is usually not physically available for approval over any kind of agreement, or lacks any real understanding of the business, you should have an additional written document attached to any administration or co-publishing agreement. It should be a specific *power of attorney* (in most states, this must be notarized) permitting you to act for that songwriter with respect to any matter concerning their share of the copyright. You should probably even have the right to assign their entire ownership share of the song to a music publisher, producer, or artist if you decide it's necessary (to be fair, you should guarantee to your co-writer in writing that any assignment of music publishing shares to other people or companies will be taken equally from your ownership share and theirs).

Collaboration is often a friendly, casual process. That doesn't mean it has to be an ignorant process as well. Protect yourself by understanding your rights as a co-writer and requiring appropriate agreements when necessary.



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