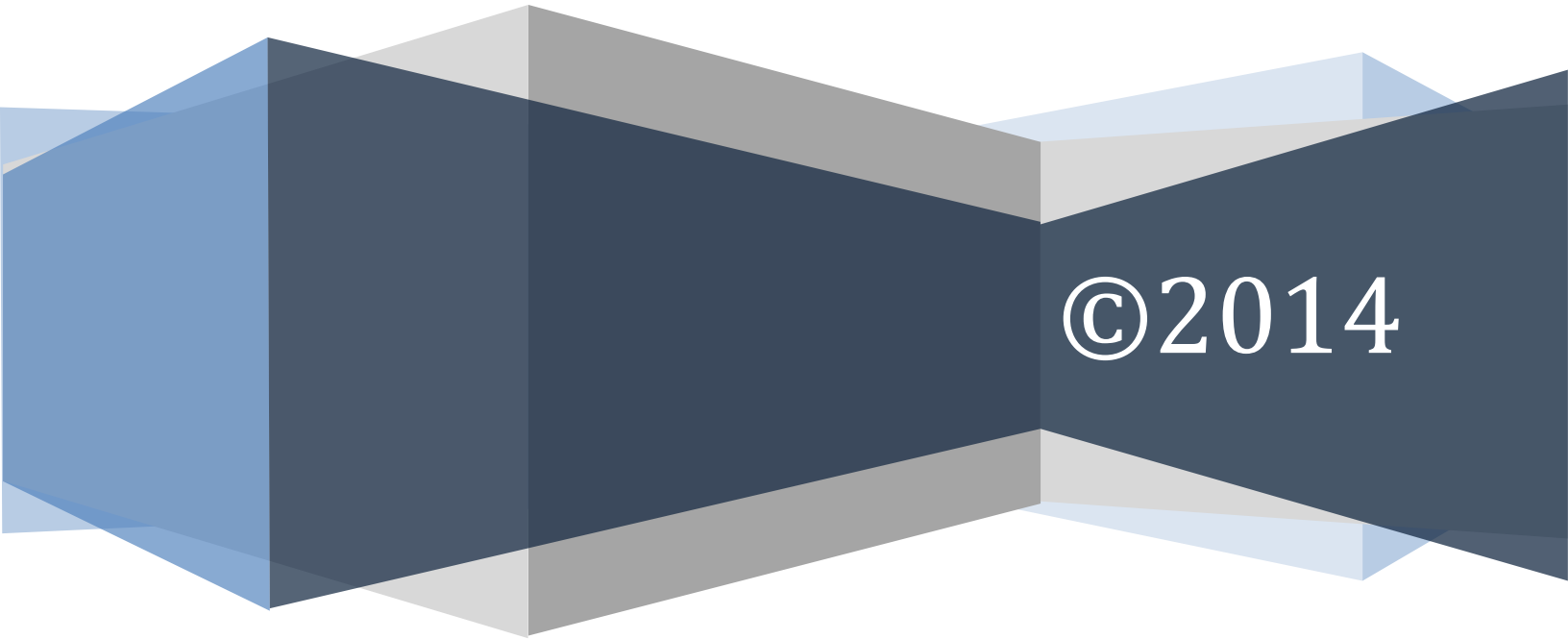
3 THINGS YOU MUST KNOW ABOUT MUSIC COPYRIGHTS

BY BARRY CHASE



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About the Author:

Barry Chase, the author of this ebook, is the Senior Partner at ChaseLawyers℠, an entertainment, sports and media law firm with offices in Miami and New York City.

Mr. Chase is an honors graduate of **Yale College** and **Harvard Law School**. While at Yale, he was elected to Phi Beta Kappa, the pre-eminent collegiate Honor Society, and was listed as a Ranking Scholar during the majority of his eight semesters before graduating magna cum laude. At Harvard, Mr. Chase graduated with honors, earning his JD degree cum laude.

Mr. Chase began his legal career with a large Washington, D.C. law firm, focusing his practice on Communications and First Amendment law. During this time, Mr. Chase represented such media giants as CBS, the Times-Mirror Company, Capital Cities Communications and Time, Inc., regarding Federal Communications Commission (FCC) matters. In connection with his First Amendment work, Mr. Chase represented journalists who came under fire during the famous Watergate litigation before Judge John Sirica. He also represented journalists in the course of the criminal proceedings leading to the historic resignation from office of Vice President Spiro Agnew.

Mr. Chase was then appointed Associate General Counsel of the Public Broadcasting Service (PBS) Television Network. In that capacity, he dealt with national and international television program and music rights, on-air legal issues relating to the Fairness Doctrine, Equal Time and defamation, and program funding. After two years in the PBS Counsel's Office, he became Director of PBS's News and Public Affairs Programming and later became the top national PBS programming executive (Vice President for Programming). During this period, he was PBS's point-man in charge of such projects as EYES ON THE PRIZE, NATIONAL GEOGRAPHIC, FRONTLINE, THE NEWSHOUR, Carl Sagan's COSMOS series, NOVA, and the CIVIL WAR series. He later re-located to South Florida, becoming the Senior Vice-President of National Production for South Florida's PBS affiliate.

After his high-level hands-on experience in the world of television and film production, Mr. Chase returned to the practice of entertainment law in Miami and New York. He represents Spanish- and English-language musical artists; television stars; composers; record companies; filmmakers; actors; models; authors; screenwriters; live performers; visual artists; and Internet and New Media entrepreneurs. He lectures regularly on the representation of media personalities and the legal "do's and don'ts" of music, television and film production.

Introduction:

Music is everywhere. For especially creative people like composers and artists, music – their own original music—is inside their heads as well as their ears. If you're one of these gifted people and you're serious about your ambitions, you'll want a career in music. And to have a career in music, it is not enough to create the music. You also need to know how to create "property" rights in it, protect your property, and make money at it. To do that, you MUST know the following three things.

1. There are Two Copyrights in Every Piece of Recorded Music

First what is a "copyright?" It is the legally protected right to own your music as "property". In the US, this right is even mentioned in the Constitution, which says that Congress has the power to "promote the Progress of… useful Arts, by securing for limited Times to Authors … the exclusive Right to their respective Writings." When the Constitution was written, the major type of copyright protection people had in mind was for authors of "Writings." But the basic principle of an "exclusive Right" now covers artworks, musical compositions, photographs, movies, TV shows, architectural drawings, and many other kinds of "works," including sound recordings.

For musicians, the most important thing about today's Copyright Act is that there are TWO copyrights in every piece of recorded music, one for the composer of the song and one for each separate sound recording of the song. For example, "White Christmas" was composed many decades ago by a man named Irving Berlin. Once Irving wrote the composition down or recorded it on a scratch track, he created "intellectual property" rights for himself. So "White Christmas" was converted from a set of thoughts in Irving's head to a piece of property which he owned. Since Irving owned "White Christmas" – just as you might own your car – it was up to him whether to let anyone else use it. Composers make a living by "licensing" their compositions to others (these others are called "licensees", with Irving as the "licensor"). Licensees of a composer's property have their own ways of making money from the songs they license, like record companies (who make and own copyrights in each separate "sound recording" of "White Christmas" they create), movie producers, advertising agencies, radio stations, etc. In return for the license to use Irving's song, of course, Irving gets paid. Sometimes he gets paid in up-front cash, sometimes in "royalties" as a percentage of the money that the licensee makes on using Irving's song on a record, in a show, in a movie, on the radio or in an ad for a product.

COMPOSER REVENUE STREAMS

There are three main ways composers make money on their songs – (1) "performance" royalties; (2) "mechanical" royalties; and (3) "synchronization"/ "transcription" royalties. Here's what each kind of royalty is about:

A. "Performance Royalties": This is actually the oldest form of royalties for composers, and it remains one of the richest. Prior to about 1900, no technology existed for recording sounds. The only way to hear what a composer created was to go to a live show, a live band concert, or use printed sheet music to play or sing the composition (movies, TV and radio did not exist yet). All of these uses of music required that the composer grant a "public performance license", for which the composer would receive money, either an up-front payment, percentage royalties or both. A "public performance license" grants the right to play the composer's work publicly. Performance royalties from live events are still a good source of revenue for composers, since they are paid whenever the composer's work is performed at concerts, in stage shows or at a piano bar. And during the 1920s, this form of royalty exploded because of radio play. Every time that a composer's work is played on the radio in the US, the composer has a right to a performance royalty. The same is true for most songs played on TV, or on the Internet. You might ask, at this point, how in God's name does anyone know how many times a song like "White Christmas" is heard on the radio? Who keeps track of these things? It is the "Performing Rights Organizations" ("PROs") that handle this. In the US these PROs include ASCAP, BMI and SESAC. (Other countries have their own PROs.) PROs in the United States originated in the early 1900s, when Broadway composers realized that clubs, restaurants and other venues were performing the songs they created without paying them. So they sued one or two venues, won, and ASCAP was formed to assure that all these venues paid composers for a public performance license. When radio became the dominant performance medium in the 1920s, the license requirement was extended to radio (and later TV and Internet) plays of their music. What the PROs do for their member-composers is actually calculate the number of times each composition is performed on the radio (or on TV or in clubs). Then – from the license fees that the PROs collect from radio stations, TV networks, clubs, etc. – the PROs make payments to composers based on this measurement. And it does not matter at all to a composer which of the sound-recording versions of her work a radio station is playing. For example, there are

hundreds of recorded versions of "White Christmas" out there, but Irving Berlin is the composer of all of them. So Irving gets paid no matter which one is being played. Wouldn't you like to own this item of intellectual property during the Holiday Season?

But note that a composer can collect his performance royalties from a PRO only if the PRO knows about the composer and his property. This happens when the composer registers his songs with a PRO. At ChaseLawyers℠, we run into too many composers who lose out on money because they have not registered with a PRO. You can only collect money on the use of your creative property if you register your original compositions with a PRO.

B. "Mechanical Royalties": Soon after the recording of sounds became possible, the "record industry" was born. Naturally, the makers of records (first "piano-rolls", later discs and now digital media) wanted to sell as many records as possible. So they went to the composers of the most popular Broadway and bandstand tunes for licenses to put those tunes on their recordings. In these early days, the process for doing this involved a machine – a "mechanical" device – to poke holes at the appropriate spots in piano rolls. When a hole rolled around to a certain point, the correct "hammer" inside a player-piano was triggered and played the right note. Because this hole-poking was a "mechanical process," the license from the composer to the record company was called a "mechanical license;" and it still is today. A mechanical license gives a record company the right to make and sell a sound recording of a composer's property. How does the composer get paid? It is based on a private deal between the composer and each record company, though there are certain "standard rates" that have evolved.

C. "Synchronization/Transcription Licenses": At about the same time as radio became the dominant communications medium, movies came into existence, and later TV and other forms of "audiovisual" entertainment. "Audiovisual" just means that audio and video exist in the same production. With audiovisual entertainment, there is an extra element – the need to "synchronize" the musical sounds with the pictures the audience sees. So the "synchronization license" was born (often called a "synch" license, pronounced like "sink"). A synch license is negotiated between the composer

and the producer of an audiovisual production (not just movies, but also TV shows, TV advertisements, music videos), who are free to agree on whatever payments and other terms they wish. As with radio play, it does not matter which version of a song is used in an audiovisual production. The owner of the composer's copyright (usually a "publishing company," which exist to make money on composer copyrights) gets paid no matter which one is played within the production. This is true even if the movie or TV producer records its own new version of the composition. It is still the composer's original creation which they are using. "Transcription licenses" operate pretty much the same way, except that they do not involve synchronization with pictures – for example, radio ads, which involve only sound.

Summing up, there are three major revenue streams available for the composer copyright – (1) performance royalties (for the right to use the composer's song on radio, in live venues, elevator music, etc.), which are paid to the composer through a PRO like ASCAP, BMI or SESAC; (2) mechanical royalties, which are paid to the composer by a record company for the right to put the composer's property on its records; and (3) synchronization/transcription royalties (for audiovisual productions and audio-only productions like radio ads), which are paid to composers by producers for the right to use the composer's "property" (the song she created) in their productions. It doesn't matter whether the composer is also the artist performing the song on a sound recording. For copyright purposes, singer/songwriters are treated as if they were two people, each with her own copyright property.

The second kind of music copyright is the property interest in a "sound recording". Because of a technical provision of the Copyright Act (called the "compulsory license"), there may be any number of sound recordings of the same composition – each licensed from the composer by a record company under a mechanical license. If you look up the number of sound recordings of "White Christmas", for example, you'll find literally hundreds. So what are the revenue streams for the owner of the copyright in any particular sound recording (usually a record company)? There are basically two.

SOUND-RECORDING REVENUE STREAMS

A. Sales of sound recordings: Everyone knows that it costs money to buy a record. Or at least it USED to cost money, before the digitization of sound recordings and the ease of copying without paying a fair price (aka "piracy"). Most artists and composers have already heard about the "decline of record sales" because of piracy, and that is a fact. But, while the big record companies complain incessantly (and with good reason) about their loss of revenue from record sales, there is much less emphasis placed on the recent and ongoing creation of non-traditional products from sound recordings, such as ringtones. For the foreseeable future, though, you can expect revenue (and artist royalties) from record sales to continue to decline.

B. Uses of the "Master": The ownership of a sound recording is often called the "master" within the music industry. So a license for, say, the use of Kelly Clarkson's 2013 version of "White Christmas" in a TV ad would require the producers of the ad to obtain a "Master Use License" from RCA Records, the owner of Clarkson's sound recording (as well as a performance/synch license from the owner of the composer copyright, the Irving Berlin Music Company). For example, let's say that Nike, the shoe company, plans to launch a new collection of white-only athletic shoes for next Christmas, with the only color element being the Nike "swoosh." What better song to use than "White Christmas"? No matter which of the hundreds of sound recordings of that song Nike chooses for its TV ad, it will need to negotiate and obtain a synchronization license from the Irving Berlin Company, which controls the composer copyright. If it wants to use the version of "White Christmas" recorded by Kelly Clarkson, Nike will also need a Master Use License from RCA Records. Nike could also choose, of course, to produce its own new sound recording of the song, in which case it needs only the Irving Berlin license.

So there are two main revenue streams for owners of sound recording copyrights – (1) sales of records; and (2) licenses of the master.

But wait a minute. What's missing here? Weren't there THREE major revenue streams for the composer copyright? Why are there only TWO for the sound recording copyright?

The answer to this one gets us into business and political judgments. When radio first started playing musical recordings, ASCAP already existed. Remember that ASCAP (and now BMI and SESAC) represents the **composer copyright.** So ASCAP and major radio-station owners made a deal for the payment of license fees to ASCAP whenever a station played ("publicly performed") an ASCAP member's composition. But the record companies did not have an organization like ASCAP. Since they were not unified, each company had to decide whether to (1) insist on a license fee when its sound recordings were played on the radio; or (2) encourage this powerful new medium to promote and play its records by NOT charging a license fee, in hopes that people would run out and purchase a disk. And, because there was no umbrella-type organization like ASCAP to provide a unified bargaining position, EVERY record company would need to choose option 1 above, or radio stations would play the records of only those companies which provided them for free. The result was that ALL the record companies chose option 2; and so there were no payments for radio's right to play sound recordings. In the nearly 100 years since, this situation has never changed for "traditional" radio (since 1995, it **has** been different for satellite radio and Internet plays).

So now you know about the two copyrights and how each of them makes money. What else do you need to know if you want to have a career in music?

2. A Song Becomes "Property" as Soon as You Write It Down or Record It

What do you need to do to create a "property right" in your music? The answer to this question is pretty simple once you get by the legal mumbo-jumbo. The Copyright Act says that the copyright is magically created as soon as your song is "fixed in any tangible medium of expression." This word "fixed" is confusing, because it doesn't have anything to do with something that is broken. It just means that the composition (or the sound recording, artwork, words in a book, painting, architectural plans, etc.) has to stay in one form long enough to be established as "permanent" or "stable" so that someone else can appreciate it. So the musical notes in your head are not "fixed," but the same notes on a piece of paper or recorded on tape are "fixed." In the old days, a composer might write down her new song in musical-note style, the way it shows up on sheet music. Once it was written down, it was "fixed" in the paper on which it was written, and – presto! – the composer created a new piece of property ("intellectual property") and a legally enforceable copyright in that property. These days, the first time a new composition is "fixed" in a "tangible medium" may be when it is first recorded. But, for purposes of copyright ownership, it doesn't matter what the method of "fixation" is. The song you have just created is property as soon as it is "fixed," and, if you are the person who created it, you own it. You should record your copyright in the Library of Congress (it costs only $35 at copyright.gov) to gain greater legal protection, but it is now your property.

3. You Should Do Everything You Do With a Copyrighted Song in Writing

I know, I know – lawyers are always nagging everyone to "get it in writing." It's a pain because you're trying to create a fast-moving career for yourself based on "trusting relationships" with other creative people; and you're trying to do it without spending a whole lot of dollars on non-creative, non-productive "business" stuff like written contracts. Besides, when you tell your co-composer or producer that you want a written agreement before you work together, he might run the other way and never see you again.

But there are two problems with this unwritten approach – one is practical and one is legal. The practical one arises if the song you're co-writing, or the track that you and the producer are collaborating on, is a runaway hit and sells ten million copies. You might say that this is a good problem to have, and it would be. But the bad part is that, when there's big money at stake, memories of who did what, and who is supposed to receive how much revenue, become cloudy. Even among (former) friends. So if you want to KEEP the warm creative relationships that you develop as your career takes off, you're better off if everything you do with anybody else is put in writing from the beginning. That way, everything is clearly spelled out (if a good lawyer prepares the agreement); and there are no later "business" disputes to get in the way of your important creative relationships down the road.

And, where copyright ownership (and the revenue from it) is concerned, there is an even more important legal reason for "getting it in writing." THE COPYRIGHT ACT SAYS SO. Under our copyright law, you cannot transfer or grant an exclusive license in anything you create unless it is in an "instrument of conveyance", which is legal talk for a written document. And the document MUST be signed by the person transferring the rights. Since emails now qualify as such an "instrument of conveyance," there is no excuse for not doing this. You need to be clear about the significance of this requirement: It is not just that you will have a difficult time PROVING that a transfer of ownership happened. If there is no such written document, IT NEVER HAPPENED AT ALL, no matter how many "witnesses" you have. For example, let's say that that you are preparing a track on which you write the

rap – the "lyrics." Your producer is creating the beat. If you want to own the copyright in the entire composition, you MUST have in writing that the producer has transferred his composer copyright in the beat to you, and your producer must sign it. If you don't have the document, you don't own the beat, no matter how much you paid for it or how many times the producer assured you that it is "all yours." It won't even help you to file a copyright registration for the entire composition, because those registrations can be defeated later in court. Most new artists can't imagine that it would ever come to that; but let me assure you that, if the composition becomes a large moneymaker, your (former) friend the producer won't recall all those assurances. So you'll be left having (1) paid him for what you didn't receive (ownership of the beat); (2) owning only a share of the entire composition; and (3) one less friend. So get it in writing where copyrights are concerned.

That's it. Good luck, and be sure that while you're making beautiful music, you set yourself up to make beautiful money as well.

If you need help on your music project, please feel free to contact me for a consultation.

Barry Chase, ESQ.