



Music: bands

April 2006

This information sheet is for people playing in bands, particularly if they are writing and recording their own material.

For detailed information, see our practical guide *Music & Copyright*.

For information about our other information sheets, other publications and training program, see our website <http://www.copyright.org.au>.

The purpose of this information sheet is to give general introductory information about copyright. If you need to know how the law applies in a particular situation, please get advice from a lawyer.

A Copyright Council lawyer may be able to give you free preliminary legal advice about an issue not addressed in an information sheet. This service is primarily for professional creators and arts organisations but is also available to staff of educational institutions, libraries and governments. For further information about the service, see <http://www.copyright.org.au/advice> or our information sheet *Australian Copyright Council: who we are, what we do*.

We update our information sheets from time to time. Check our website to make sure this is the most recent version.

Key points

- There are usually at least three different copyrights in a recorded song: the lyrics, the music and the recording of that particular performance of the song.
- Working out who owns copyright in songs or recordings can be difficult especially if someone leaves the band. It's a good idea to have agreements making it clear.
- In some cases, all the performers (as well as the person who made the recording) own copyright in a recording.
- If there are several copyright owners, you may need permission from all of them to use the material (even if you are one of them).

How does copyright protect songs and recordings?

If you write a song, in copyright terms you have two copyright works: a literary work (the lyrics) and a musical work (the music). Usually, anyone who wants to use the song in ways reserved to the copyright owner needs permission. Someone wanting to use the lyrics without the music (for example, by printing them in a magazine) would generally need permission. Someone wanting to use the music without the lyrics (for example, for an instrumental performance, or with different words to the music), would also generally need permission. For more information, see our information sheet *An introduction to copyright in Australia*.

Ownership of copyright in music and lyrics

Music and lyrics written by one person

Generally, the person who writes the music and/or lyrics, will be the first owner of copyright.

Collaboration

Generally, if more than one person creates music or lyrics, each of them will own a share of the copyright. For example, if members of a band work on the music for a song together, it is likely they will share copyright. However, someone who just makes suggestions about how the music should go or what words should be in the lyrics won't generally own a part of the copyright: they would generally need to have a deeper involvement in creating the music or lyrics.

If your band is writing material together, it's a good idea to have a written agreement about who will own copyright, and in what proportions. This can avoid misunderstandings and disputes down the track. Generally, it is presumed that people who create copyright material together share the copyright in equal parts, so if this isn't going to be the case in your band, you should make sure you agree how the copyright is being shared. You should then write this down as part of an agreement.

Note that problems may arise if a band member who contributes to writing the band's songs leaves the band and is not willing to give permission for the band to keep using songs which he or she co-wrote. Generally, the band will still be able to record songs that have already been commercially released by getting the necessary licence from AMCOS. (See below in the section entitled "Licences from APRA or AMCOS", for information about what a "commercial release" might be in this context.)

If the songs the ex-band member co-wrote haven't been commercially released yet, the band would generally need to get legal advice to work out whether there might be any scope for relying on an implied licence to make or release a recording. However, the ex-band member may be able to revoke any such licence. It would usually not be a good idea to proceed with the recording sessions until you know where you stand. Generally, band agreements should deal specifically with issues such as what band members can do with material created for the band when a writer member leaves.

Who is entitled to APRA monies?

Note that owning copyright is not the same as being a recipient of money collected by a collecting society such as the Australasian Performing Right Association (APRA). For example, while two people in the band collaborate to write the songs, making them the copyright owners, they may agree to split all monies received from APRA with the other band members.

Commissioned music and lyrics

If someone pays you or your band to create music or lyrics, he or she will **not** own copyright in either the music or the lyrics, unless you have reached an agreement that they will. However, he or she will usually be entitled to use the work for the purpose for which it was commissioned. You should, however, note that governments generally own copyright in works made for them, or first published by them. This can be changed by agreement, so if you are writing something for a government agency or department, and want to own the copyright, you will have to get the agency or department to agree to this in writing.

Ownership of copyright in sound recordings

The copyright in a recording is separate from the copyright in whatever is on the recording.

Generally, the owner of copyright in a sound recording is the person who owns the relevant recording medium (such as the mini-disc, CDR or cassette, DAT or analog tape, or iPod on which the recording is made). In some cases, from 1 January 2005, the performers being recorded will share in the copyright (see below for more information on this).

A different rule applies, however, if someone is paid to make a recording. In these cases, the person or people who commission the recording will own copyright.

As with music and lyrics, it's best to have a written agreement about who will own copyright in a recording if more than one person will be involved. If you don't, the operation of the rules about ownership can create difficulties and tensions.

For example, for recordings made before 1 January 2005:

- if a friend, relative or an acquaintance voluntarily worked as an audio engineer, and supplied the tape or other recording media, he or she may own copyright in the recording;
- if one member of the band brought along a tape or CDR they owned to use for the recording, or a session was recorded on a band member's iPod, then the copyright in the sound recording will belong to that person;
- if everyone in your band chipped in to have your band recorded professionally, it is likely that all the band members will jointly own copyright in the recording, but if just one or more people (such as a member of the band or a rich relative) paid someone to record a song or a session, he or she will own copyright.

A studio, producer or audio engineer you pay to make a recording will not own copyright unless you reach some agreement that they will. However, if a record company arranges to have your band or material recorded, it will own copyright in the recording.

Ownership of copyright in recordings made on or after 1 January 2005

From 1 January 2005, some very complex provisions relating to ownership of copyright in sound recordings came into operation. In some cases these provisions mean that the performers who are being recorded share copyright in the sound recording with the person who owns the item on which the recording is being made (for example, the tape or CD).

In practice, however, these new provisions won't operate where you (or your record company) pay someone, such as a producer or audio engineer, to record you. In these cases, the situation will remain as outlined above.

On the other hand, where a recording is made on a voluntary basis (for example, a friend or a band member brings along a tape or CD for the band to record onto) the person supplying the recording medium will share copyright in the recording with the performers being recorded.

For more information on these provisions, see our information sheet *Free Trade Agreement amendments*.

In any situation where more than one person is involved in making a recording, it is best to have a written agreement in place which deals with issues, including who will own copyright and what each party can do with the recording.

For more information, see our information sheet *Ownership of copyright*.

How do you get copyright?

Copyright protection is free and happens automatically. There is no registration system in Australia and no procedures that you have to follow before your material is protected.

Registering a song with APRA is **not** necessary for copyright protection; it just means that you've told APRA whom it should pay for particular songs when monies are collected (for example, for live performance or radio air-play).

For things like music and lyrics (including raps) your work must be in "material form" before it is protected. This means, for example, that you need to write out or type up your material, or record it in some way (for example, onto tape, film or CDR, or into a device like an iPod), if you want it to be protected by copyright. This also means that what you create during a jam session, or as a freestyle rap, won't be protected by copyright until you put it into some sort of "material form". For recordings, copyright is created at the time you make the recording.

If you're worried about other people claiming that they have created something which you created, record your material as you work on it and keep any written drafts.

Some countries, including the United States, have government registration systems. While it is not necessary to register in order to get copyright protection, registration in foreign countries can provide some procedural benefit if you need to take action for infringement in that country.

It may also be a good idea to include a copyright notice on the material you create. The notice consists of the symbol ©, followed by the name of the copyright owner and the year of first publication: for example, "© Roland Stone 2006". The "copyright notice" does not need to be on something before it is protected by copyright in Australia or in most other countries, but it does remind people that the work may be protected and identifies the

person claiming the rights. In some cases, in Australia and some other countries, the notice can be used to provide evidence of ownership of copyright (although this is not conclusive). Copyright owners can put the notice on their work themselves; there is no formal procedure.

How can I protect my songs?

Copyright protection

Copyright gives you legal protection against other people using your material in particular ways. Copyright doesn't prevent people from using your music in the relevant ways (any more than the legal prohibition on stealing stops people stealing CDs). However, if someone does infringe your copyright, you have a right to take legal action against them. Usually court action is not necessary. For more information, see our information sheet *Infringement: actions, remedies, offences and penalties*.

As a copyright owner, you have a number of rights. For music and lyrics, these rights are to:

- **reproduce** (for example, by making a recording, burning a CD, downloading or burning an MP3 file, or by filming or videotaping);
- **perform in public** (playing the song, sound recording or a film or video which includes it, outside a private or domestic setting);
- **communicate to the public** (for example, by emailing digital files or posting them on the internet, or by broadcasting the recording);
- **make public** for the first time; and
- **adapt** (for example, by translating the words or by making an arrangement of the music).

Owners of copyright in sound recordings have rights similar to the first three of these.

In practice, this means that people generally need permission to use all or a "substantial part" of somebody else's copyright material. In this context, a "substantial part" doesn't have to be a large part: courts have said that any part that is important, distinctive or essential may be a "substantial part", even if it is a small part. Depending on all the circumstances, a few notes may be "substantial" in a copyright sense.

In practice, most musicians assign some of their rights in relation to music and lyrics to APRA so that it can license the public performance and communication of their songs.

If you believe your rights have been infringed, there are a number of options available to you. For more information, see our information sheet *Infringement: what can I do?*

Other forms of protection

There are certain practical measures you can take to protect your songs. For example, if you make your music available on the internet you may wish to restrict access so that only people with a password can listen to it or you may wish to restrict the amount of music that people can listen to online.

Dealing with copyright rights in practice

APRA and AMCOS

APRA is a non-profit organisation; its members include songwriters, composers, lyricists and music publishers.

What APRA can do for you if you create your own material

If you write music or lyrics and have begun to perform in public or have your recordings broadcast or played in public, you should join APRA.

When you join, you transfer your public performance and communication rights to APRA. In return, it passes on to you your share of licence fees from, for example, live performances and radio play of your material.

For more information on membership (which is free), see <http://www.apra.com.au>.

If you are an unsigned composer or songwriter (that is, you have not signed a publishing agreement with a music publisher), and you have already released a recording, you can appoint APRA to act on your behalf in the event that someone wants to record a cover version of your material under the AMCOS licence we discuss below.

Licences from APRA or AMCOS

APRA licenses music venues such as pubs, clubs and theatres, but also commercial premises, offices and other organisations that play music and lyrics in public – whether the music is live or recorded, or played over the radio or on TV. APRA also licenses various online uses of music and offers licences for music on hold.

If your band is playing music in “public”, you (or the venue) will need to be covered by an APRA licence. Even if you play your own songs, if you are an APRA member you need the licence, as APRA is now the owner of the performance rights.

(In this context, “public” would cover any function or event apart from private and domestic functions such as birthday parties, weddings, 21sts and so on. Corporate or club functions and events, however, are “public” in this context, even though members of the public might not be welcome to turn up.)

APRA also manages the affairs of AMCOS (the Australasian Mechanical Copyright Owners Society), whose members are music publishers. If a recording of a song has been commercially released, anyone – including former band members – can record a cover version.

(In this context, “commercially released” means that copies of the recording have been made available for purchase. Music on CDs sold through shops or at gigs, or music made available on the internet for download would have been commercially released. However, music included only on demo tapes to send to record companies or publishers would not be in this category.)

Generally, you can record a cover version if you get an “Audio Manufacture Licence” from AMCOS. For more information, see <http://www.apra.com.au> under “Licences AU”; you can download a licence application form from the site. Generally, the “Audio Manufacture Licence” allows you to record covers for commercial release and as demos.

Whose names should we put on the APRA registration?

It is generally the writer or co-writers who will get money flowing from the commercial use of the copyright in material they have written. In other words, the names of the writers or co-writers should be registered with APRA for any particular song. (As a guide, it is common to allocate 50% to the lyrics and 50% to the music, but co-writers may reach some other agreement.)

However, people in a band can decide among themselves that non-writer members should share in monies generated by the band’s songs, including payments from APRA.

It is best to discuss these types of issues when a band is starting up, and to write down the band agreement. Of course, as a band evolves, a band agreement can be revised, but only with the agreement of everyone who was part of the original agreement.

Using other people’s material

Playing songs written by other bands

Generally, provided the venue is covered by an APRA licence, bands can play covers of music by other people. This is usually the case even where a band has split and former band members are playing music they used to play in their old band. (Note, however, that in some cases band members may be bound by contractual limitations imposed by their band agreement.)

If the people who wrote a song are **not** members of APRA or an affiliated overseas “collecting society”, the band will need permission from the writer or co-writers of the other band before they can perform it in public.

Recording cover versions

If a piece of music has been commercially released, you can record a cover version.

Generally, this is done by getting an “Audio Manufacture Licence” from AMCOS. For more information, see <http://www.apra.com.au> under “Licences AU”; you can also download an application form from the site. Strictly

speaking, you would need to contact the individual copyright owner (usually the publisher) if you wanted to change any lyrics or change the structure of a piece of music.

If a piece of music has **not** been commercially released, you will need to get permission to make the recording from the owner(s) of copyright in the music and lyrics. For an unsigned band, this may be the band members, but for a signed band, it will generally be the publisher.

Performing and recording parodies

If you want to perform or record important or distinctive parts of someone else's music or lyrics (such as the chorus), you may need permission. Permission to perform music in public is generally obtained from APRA. Note that APRA cannot license you to change the lyrics, or perform the work in a dramatic context. In these situations, you would generally need to get permission directly from the music publisher. Permission to record music is generally obtained from AMCOS. Note that AMCOS licences do not allow you to alter the lyrics or to make a recording which "debases" the original musical work. Again, you would generally need to get permission directly from the music publisher.

Using samples

Generally, even if a sample from another piece of music is very short, is likely to be a "substantial part" of that piece, and therefore permission will be needed. Depending on all the circumstances, a sample could also contain a "substantial part" of any lyrics and of the sound recording.

It is less clear whether a sample of dialogue or speech from sources such as a TV program or a film will be a "substantial part" of the original work in the relevant sense.

In every case, the legal question is whether or not the part which is used is an important, distinctive or essential part of the material from which it is taken.

However, because this can be such a grey area, industry practice appears to be that you clear all samples (for example, with both the relevant music publisher and record company). This avoids any arguments down the track as to whether or not you have infringed copyright.

Of course, if you have written and recorded your own samples, or are using a licensed library of samples or loops, you do not need permission. (We discuss this in a bit more detail in our information sheet *Music: DJs.*)

Moral rights

Creators of copyright works have "moral rights" in their works, whether or not they own copyright in them. These are separate from copyright. A creator has the right to:

- be attributed as creator of his or her work (such as in the song writing credits);
- take action if his or her work is falsely attributed (for example, if someone else is credited as the songwriter or if a song is altered and credited without acknowledging the alterations); and
- take action if his or her work is treated in a way that is potentially damaging to their honour or reputation (the "integrity" right).

If you are using someone else's material, you must ensure that you do not infringe their moral rights.

If a song writer has not stated the way in which he or she wishes to be identified, any "clear and reasonably prominent" form of identification can be used.

For more information, see our information sheet *Moral rights*.

As a result of the Australia-US Free Trade Agreement (AUSFTA), performers now have similar moral rights. See discussion under the heading "Moral rights for performers" below.

Publishers and record companies

Not every band, composer or songwriter needs a publisher or a record company, but being signed to a publisher or record company can give you access to funding, administrative expertise and contacts, allowing you to spend more time on your music.

Usually, songwriters and other people who sign with a publisher transfer their rights (other than the public performance and communication rights, which are transferred to APRA) to the publisher or record company.

You should always get legal advice about any publishing or record deal you are offered.

The Copyright Council's lawyers can generally review a **music publishing** contract for you; the Arts Law Centre of Australia may be able to give you advice if you are offered a recording deal.

For information on our advice service, see our website at <http://www.copyright.org.au>; for information on the services provided by the Arts Law Centre, see its website at <http://www.artslaw.com.au>.

Performers' rights

In addition to sometimes sharing copyright in recordings (discussed above), performers generally have the right either to consent or refuse consent to being:

- audio recorded;
- filmed or video recorded; or
- broadcast.

Also, where an audio recording is made, performers have the right to consent to their recorded performance being used with, for example, film or documentary footage.

The right to consent to these things is entirely separate from any copyright or moral rights permissions which might be needed by the person wanting to make the recording or broadcast.

Consent to these things doesn't legally have to be in writing but, as a matter of practice, it is always best for performers to give consent in writing and to list what the person making the recording or broadcast is allowed to do. Generally, if someone asks to film or record you while you are playing or performing, you are entitled to say either "yes" or "no". However, if you say "yes", you should generally limit your consent to uses which you specifically agree to at the time, and make further use conditional on your written approval.

Moral rights for performers

"Moral rights" for performers have been legislated in relation to both live and recorded performances. However, those rights had not come into effect at the time of writing. Performers will have a right to:

- be attributed as the performer; and
- take legal action if a performance is treated in a derogatory manner.

Essentially, these rights are useful for people in bands wanting to take action against people who have, for example, made bootleg recordings of a rehearsal or gig, or who have secretly filmed a performance. For more information, see our information sheet *Performers' rights*.

Common questions

Whose responsibility is it to get an APRA licence – the venue or the band?

Your band will generally need permission to play music in public. An APRA licence will cover you for almost all music and lyrics.

Many venues will already have a licence with APRA. If you think the venue your band is playing at may not be covered, you can arrange for appropriate licences with APRA just to cover your event.

(Many venues will also have a licence with PPCA (the Phonographic Performance Company of Australia) which covers the public playing of sound recordings: even live-band venues will usually play recorded music at various times, such as between sets or on jukeboxes.)

The ex-singer in my band contributed five words to a song. Can she claim to be a co-writer of the lyrics?

The answer to this type of question will depend on all the facts.

If the writers or co-writers of a song come into rehearsals with a song already completely written, and the additional words are added at that stage, the ex-singer may have a claim to be a co-writer of the lyrics containing those additional words. However, the band could decide to drop the ex-singer's contribution, and therefore not use the version over which the singer might have a co-writer claim.

However, if a band creates material co-operatively, or if a number of suggestions are incorporated into a song (for example, during rehearsal), it may be that all the contributing band members have a claim to be writers or co-writers of the entire song. In such a case, it may not be possible merely to remove words or change the song a little so as to deny someone a co-writer credit.

In practice, it will often be really hard to work out whether or not a band member who has contributed to a song is a co-writer. This is why it is best for a band to have a clear written agreement which deals with issues such as how copyright will be dealt with and who is entitled to copyright monies generated from material played by the band.

Will material I have created be protected by copyright if I post it to myself?

Copyright protection is free and happens automatically. There is no registration system in Australia and no procedures that you have to follow before your material is protected.

Therefore there is no need to post material you have created to yourself, as this does not establish or protect your copyright.

If I pay someone to write out my music who owns the copyright?

Copyright in a piece of music is usually first owned by its "author". The "author" is usually the person who first records the music in some way – for example, writes it down or records it (for example, on tape or CD).

However, a person who merely writes out music that you play to them, or who writes out music from a recording, is unlikely to be an "author" in this sense. Similarly, a person such as an audio engineer who merely records a song will not be the owner of copyright in the words or music (although, depending on all the circumstances, they may own copyright in that particular recording).

If I get someone to arrange my music, who will own copyright in the arrangement?

The first owner of copyright in a musical arrangement is usually the arranger. However, the arranger will generally need permission from the copyright owner to use the arrangement, since he or she will also be using the underlying work.

If you paid for the arrangement, you would usually be able to use it for the purposes for which it was commissioned (for example, to perform it or to make a recording), but you would need the arranger's consent to use it for any other purpose which was not discussed (for example, to use it in a film).

With arrangers, as with any other situation where more than one person is involved in creating new material, it is a good idea to have a written agreement about who will own copyright, what each person can do with the arrangement, and who is entitled to downstream income from the use of the arrangement.

What rights do session musicians have?

It is a good idea to have a written agreement with session musicians that covers issues such as copyright in the music and recording, moral rights, performers' rights, and whether or not they are entitled to any additional payment for their contribution (either as an additional up-front payment or as a downstream royalty).

Note that, as a result of the AUSFTA, for recordings made after 1 January 2005, unless the recording is commissioned or the session musicians otherwise agree, they will also have a claim to a share in the copyright of the sound recording.

Performers also have some very limited rights in relation to recordings made before 1 January 2005. Even for future recordings, performers' rights are likely to be very limited in practice as a result of a number of the

provisions. In particular, if a recording of a performance is made for a fee (for example, a record company contracts with a production studio to produce a master recording), the performer will have no rights.

If a session musician is improvising for a recording, or their improvisation is recorded at a live gig, they could be a co-writer of that particular version of the material. In a case in the UK, a session violinist was able to establish he owned copyright in a riff he had created in a recording session and on that basis was able to claim a proportion of the royalties in that piece.

I was photographed during one of my gigs and the picture appeared in promotional material for the venue. Can I stop this?

A person's image is not protected by copyright. However, in some cases, using a person's image without permission may be prevented under other laws, such as the law of passing off, the Trade Practices Act 1974 and State and Territory fair trading laws. These areas of law concern conduct which may mislead or deceive the public and may particularly come into play if the photograph is of a well-known person, and is used, for example, as a poster or as a postcard or in advertising. In this situation, you should get advice from a lawyer with relevant experience.

(Note that performers' rights only apply to sound and film recordings of performances: therefore your performance cannot be "recorded" by the taking of a photograph.)

Further information

For further information about copyright, see our website – <http://www.copyright.org.au> or contact us.

APRA's website is <http://www.apra.com.au>.

AMCOS's website is <http://www.amcos.com.au> (part of the APRA site.)

PPCA's website is <http://www.pcca.com.au>.

Entertainment lawyer Shane Simpson has written a useful book called *Music Business* which provides a detailed analysis of the legal and practical issues facing bands and musicians. It was published by Omnibus Press in 2002.

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You may download and print one copy of this information sheet from our website for your reference, or you may purchase a printed copy from our online shop – <http://shop.copyright.org.au> – or direct from us.

Australian Copyright Council

The Australian Copyright Council is a non-profit organisation whose objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.



Australian Government



The Australian Copyright Council has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body, through its Policy, Communication and Planning Division.

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