CHAPTER 4

Ownership of Copyright

"The songs I create mean many things to me. Foremost among them is my goal, and I think the goal of every artist, to connect with and communicate my thoughts, emotions and beliefs to my audience ... But, my songs also are my livelihood. If I can't earn a living from them, I'll have to do something else ... I love what I do. But this is a tough business. And to illustrate that, I would ask each of you on this distinguished committee to think about this question: Have you ever seen in the classified section of any newspaper an ad which reads: 'Songwriter wanted. Good salary. Paid vacation. Health benefits and many other perks.' I'm sure you haven't. Most songwriters are lonely entrepreneurs trying again and again for that hit which will help them take care of their families and keep them writing in the hopes of another hit down the road, so that songwriting can be a career, not a part-time unpaid struggle. However, success would be meaningless without strong copyright laws ... For it is only through the protection of the copyright law ... that our right to earn a living from our creative work is assured."[1]
—Lyle Lovett, testifying before the House Subcommittee on Courts, the Internet and Intellectual Property, May 17, 2001

Like any other type of property, a copyright can be owned by one or more people and can be transferred from the owner to another party. Just as a car owner can sell her car, a copyright owner can sell its copyright. A major difference is that when an author sells a copyrighted work (commonly known as a transfer or assignment of copyright), the author usually retains a right to receive income from uses of the work. In many situations, in order to earn income from their copyrighted works, authors must transfer their copyrights to publishers so that the publisher can exploit the work. Primarily due to the fact that copyright is intangible property, there are some strict rules for the transfer of copyright that must be followed.

It is crucial to understand the difference between ownership of copyright as opposed to ownership of physical objects that copyrighted works may be embodied in. Section 202 of the Copyright Act provides that:

> **Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object.**

For example, the transfer of ownership of a compact disc would not constitute a transfer of copyright ownership. The purchaser of the compact disc owns the physical object embodying the copyrighted works contained on the compact disc, but does not acquire any ownership rights in the copyrighted works contained on the disc.

I. Initial Ownership

Copyright ownership arises from and begins upon creation of a work. Many people confuse copyright ownership with copyright registration and assume that you have to register a work in order for it to be copyrighted. In fact, a work is automatically protected by copyright from the moment it is created, as long as it satisfies the requirements for copyrightable subject matter discussed in the previous chapter. Although registration of a work does provide certain benefits to the copyright owner, copyright ownership is not conditioned upon registration.

Section 201(a) of the Copyright Act provides that the author of a work is the initial owner of the copyright. Although in most situations it is obvious who the author of a work is, there are some situations where this is not clear, such as when there is more than one author and when one person creates a work on behalf of another. In general, the author of a work is the person who creates the work or translates an idea into fixed, tangible expression. The Supreme Court has stated that the term "author" should be interpreted in a broad sense and defined an author as "he to whom anything owes its origin."[2]

Example 4.1: If I wrote a song, I would be the author and the copyright owner of that song (assuming that the song is original and fixed in tangible form).

The owner of a copyrighted work may exercise any of the rights provided by copyright law or may authorize others to exercise any of those rights. The owner may also transfer copyright ownership to others.

Example 4.2: As the copyright owner of the song from the previous example, I could reproduce, adapt, distribute, and publicly perform my song, or I could allow others to do any of these things. If I wanted to, I could sell my song to a publisher, who would then become the owner of the song.

Obviously, knowing the identity of the author of a work is extremely important because all rights initially belong to the author. An author, however, does not necessarily have to perform all of the tasks involved in the creation of a work. For instance, copyright ownership in a sound recording may belong to the producer who directs and supervises the recording process, as well as to the performers themselves.

II. Joint Ownership

It is not uncommon for more than one person to contribute to the creation of a work. In fact, as far as songs are concerned, it is rare for a single individual or entity to own the whole copyright to a song. One reason for this split ownership is that songwriters often collaborate in the creation of songs.

Example 4.3: If a song is written by a band consisting of five individuals with all five members contributing to its authorship, the copyright will be split among five co-authors. Ownership may be further divided due to transfers of ownership by the authors. If three of the band members have publishing contracts with three different music publishers, there would be eight co-owners (i.e., the five band members and three additional publishing companies).

Even if a song is written by one author, copyright ownership may still be split among several parties. For instance, if a songwriter writes a song and pitches it to a record producer, the producer might insist on partial ownership in return for getting an artist to record it. Sometimes artists as well as record companies will similarly insist on partial ownership of a song in return for recording it. The result is that a song written by one person may end up being owned by several different publishing companies.

Section 101 of the Copyright Act defines a joint work as 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.[3] Under § 201(a), the authors of a joint work are considered co-owners of the copyright in the work.

A. REQUIREMENTS FOR JOINT OWNERSHIP

There are two requirements necessary for the creation of a joint work. First, two or more authors must contribute to the creation of the work. Second, each of the co-authors must make his contribution with the intention that the contributions be combined to form a single work.

(1) Intent Requirement

In order for a work to qualify as a joint work, its authors must intend to combine their contributions into a unitary whole. The authors' intent to combine their contributions must exist at the time their contributions are created. When two or more co-authors work together at the same time and in the same place to create a work, it will be fairly obvious that they intend their contributions to be combined.

Example 4.4: Many publishers in Nashville have "writer's rooms" where songwriters get together to collaborate on new songs. Songs created in this manner will clearly be joint works as long as each collaborator has made an independently copyrightable contribution. Similarly, when members of a band write songs together, the songs will be joint works.

It is not necessary, however, that authors work together at the same time and place or that they even know each other as long as each intends that his contribution will be combined with someone else's contribution to form a single work.

Example 4.5: In one case, a songwriter sold lyrics he had written to a music publisher, who then had another writer compose music for the lyrics. The court held that the resulting song was a joint work, stating that "It makes no difference whether the authors

work in concert, or even whether they know each other; it is enough that they mean their contributions to be complementary in the sense that they are to be embodied in a single work to be performed as such."[4]

There are, however, situations in which separate works may be combined to form a single work and the resulting combination is not a joint work. For example, if one person writes a poem that she intends to be complete as is, and later, another person writes music to accompany the poem, the resulting song would not be a joint work because the intent to combine the poem with the music did not exist at the time the poem was composed. Instead, the song would be a derivative work based on the poem.

In order to determine whether authors possessed the intent to create a joint work, courts will generally look at several different factors. First, a court will examine the conduct of the contributors and any statements they may have made indicating their intent. Additionally, courts may consider the quality and quantity of the contribution. If the quality and quantity of a contribution are great, it is likely that a joint work was intended. Conversely, the fact that someone contributed a relatively small amount to a work indicates that joint authorship was probably not intended. Finally, if the copyright to a work has been registered, courts will presume that the information identifying the authors in the registration application is accurate, and someone claiming to be an author who is not identified as such in the registration application will have the burden of proving that he is in fact a co-author.

(2) Copyrightability of Individual Contributions

In addition to having the intent to create a joint work, each of the contributors must contribute some original expression that would be copyrightable on its own. This requirement results from section 101's definition of a joint work, which specifies that the work must be prepared by two or more "authors." In other words, each contributor must contribute copyrightable authorship in order to have a joint work.

Example 4.6: If I added a few words to a song's lyrics, I would not be a joint author because my contribution would not be copyrightable on its own. Similarly, if I have an idea for a song but, because I have no talent as a songwriter, I tell someone else my idea and they write the song, I would not be a joint author. My idea, no matter how important it is to the song, is not a copyrightable contribution.

Although uncopyrightable contributions will not qualify a contributor as an author, a contributor could still be a co-owner of the resulting work's copyright. For instance, if I have an idea for a song and want someone else to write a song based on my idea, I could require the songwriter to sign a contract giving me partial copyright ownership in the song in return for the idea. In this situation, I would have acquired my ownership from a transfer of ownership rather than from being an author. Sometimes, individuals who have not contributed authorship to a song will still be credited as authors. In some situations this results merely because the parties involved are not aware of the legal requirements for joint authorship. In other situations, the parties may agree to treat someone as a co-author even though they know that the person is not really an author, such as when a recording artist is credited as a co-author of a song when the artist merely makes some minor, uncopyrightable lyric changes.

Although each co-author's contribution must be independently copyrightable, it is not necessary that each contribution be equal. In other words, it is

possible for one author to contribute much less to the creation of a work than another but still be a co-author.

B. RIGHTS AND DUTIES OF JOINT OWNERS

The Copyright Act provides some rules governing joint ownership of copyright. These rules can be thought of as default rules that apply unless the co-owners make up their own rules. Co-owners are free to agree to any other ownership rules as long as they put their agreement in writing. However, if they do not agree otherwise in writing, the Copyright Act's rules apply.

(1) Equal, Undivided Ownership Interests

Section 201(a) provides that joint authors of a copyrighted work are co-owners of the copyright in equal, undivided interests. This means that each co-author owns an equal share of the entire work. For instance, if two songwriters collaborate in the creation of a song, each will own a 50 percent interest in the entire song. This is true regardless of the contributions made by the individual authors. Even if one author composes the music while the other writes the lyrics, both authors will own a 50 percent interest in the entire song rather than one owning the music and the other owning the lyrics. The same rule holds true even if one songwriter contributes 90 percent of the song and the other contributes only 10 percent.

The joint work provisions operate under the assumption that co-authors contribute relatively equal portions and deserve an equal share of any profits derived from the work. There are two main reasons for this assumption. First, courts should not be put in the position of having to make subjective judgments about the relative value of co-authors' contributions. Second, in reality, co-authors rarely discuss how ownership should be shared prior to collaborating in the creation of a work. In many co-writing relationships between songwriters, it is assumed that each co-writer will own an equal share in the song. However, co-authors are perfectly free to alter this assumption of equality and agree upon any ownership split they choose as long as they put their agreement in writing.

Example 4.7: *Papa-June Music v. McLean*[5] involved an ownership dispute between co-authors of songs. In 1989, Ramsey McLean sent some poems he had written to Harry Connick, Jr., who added music to them and recorded the resulting songs on an album. Connick and McLean entered into a co-publishing contract that provided that copyright ownership of the songs would be split 70 percent to Connick and 30 percent to McLean. Several years later, McLean sent Connick some new poems, which Connick added music to and recorded on another album. McLean then notified Connick that he wanted a 50/50 ownership split. Connick however thought the 70/30 split previously agreed to should apply. The court held that McLean was a joint owner of the copyrights for the songs, and because the parties did not have a written agreement specifying a different arrangement for these songs, McLean and Connick each owned 50 percent under § 201(a) of the Copyright Act. This result illustrates the importance of having a written agreement if co-owners intend to share ownership in anything other than equal shares.

Tips for Songwriters: Many disputes arise over ownership of songs. In fact, this is one of the most common reasons for disputes between band members. The following are a few tips that can help avoid some of the more common disputes:

- Although rarely done, written collaboration agreements with co-writers can clarify how ownership and income will be shared and reduce the chance of misunderstandings. A collaboration agreement form can be downloaded from the author's website.

- Do what the big record labels, recording artists, and movie studios do: Do not accept or listen to any unsolicited material. By doing so, you make it easier for someone to prove access if they sue you for copyright infringement.

- Keep notes and/or recordings of writing sessions, especially with co-writers. Many professional writers keep journals where they write down song ideas, lyrics, etc., and some use notebook computers or PDAs for the same purpose. Make sure you date your notes or recordings. If you are ever sued or have to sue someone else for infringement, these types of records can be important evidence.

(2) Right to License

Because each joint owner of a copyrighted work owns an equal, undivided interest in the work, each joint owner has the right to use the work or to authorize others to use the work. This rule applies regardless of whether the author authorizing the use has the consent of the other authors. For instance, if three songwriters collaborate in the creation of a song, each would be free to record the song himself. Further, each of the songwriters would be free to issue mechanical licenses authorizing someone else to record the song. The only exception is that a joint owner cannot grant an exclusive license because that would prevent its co-owners from granting licenses. Practically, this rule can present licensing problems, but as with all of the joint ownership rules, co-owners are free to agree otherwise in writing. Even though one joint owner can grant non-exclusive licenses, many licensees will want to obtain a license from all joint owners. Contrary to American copyright law, many foreign countries require all joint owners to consent to the issuance of a license.

(3) Duty to Account to Co-Owners

Although joint owners have the right to use and to authorize others to use the copyrighted work, they are required to account to their co-owners for their share of any profits derived from the use. Unless the co-owners have agreed otherwise in writing, each co-owner is entitled to an equal share of any income generated by a jointly owned work.

Example 4.8: *Jerry Vogel Music Co. v. Miller Music, Inc.*[6] involved the song "I Love You California," which was composed by two authors, each of whom assigned his ownership interest to a different publisher. Universal Pictures asked Jerry Vogel Music Co. for a license quote for the use of the song in a movie, and Vogel quoted a fee of $1,000. Universal then obtained a license from Miller Music for $200. Vogel demanded half of the license fee, and after Miller refused, sued for an accounting. The court held that co-owners have a duty to account for profits from licensing to third parties. The court recognized that not having a duty to account to co-owners would lead to competition among co-owners for a low bid and encourage waste of copyrighted works. In other words, one co-owner cannot underbid another co-owner and keep the entire amount of income generated from the low bid.

(4) Joint Authorship Problems

Problems frequently arise with respect to joint authorship of copyrighted works. Usually these problems are the result of authors who collaborate in the creation of a work but fail to discuss what their ownership interests will be. Disputes also tend to arise when songs are composed or worked on during recording sessions.

Example 4.9: In 1999, Sarah McLachlan was sued in a Canadian court by Daryl Neudorf, who was hired by McLachlan's record company to work on the preproduction of her first album. Neudorf claimed that, during this working relationship, he co-wrote four songs with McLachlan that were included on her album. McLachlan contended that

Neudorf only provided services as a musician and producer and that his contributions to the songs did not constitute authorship. The court found that although Neudorf did make contributions to the songs, his contributions to three of the songs were not sufficient to constitute original expression. However, even though the court believed that Neudorf had contributed original expression to the fourth song, it held the song was not a joint work because Neudorf failed to prove a mutual intent to co-author the song with McLachlan. The problem that arises from this decision is that, regardless of the extent of a musician or producer's songwriting contributions, a recording artist could always defeat the musician or producer's joint authorship claim by simply intending not to treat that person as a co-author. Instead, the artist could claim that any contributions the musician or producer may have made to songs were merely part of the services they were hired to perform.

The only practical solution is for the co-authors to have a written collaboration agreement for any co-written songs.

In recent years, the distinction between songwriters, musicians, and producers has become blurred. This is especially true in musical styles such as hip-hop, rap, and electronica that are largely dependent on beats and samples as opposed to more traditional melody- and lyric-based songs. In these types of music, the distinction between the creation of a song and a recording is often also blurred because songs often result as part of the recording process.

Example 4.10: In 1998, four individuals who worked on Lauryn Hill's album ***The MisEducation of Lauryn Hill*** sued Hill claiming that they were co-authors of several songs on the album. Hill contends that she was the sole writer of the songs. Interestingly, the album's liner notes credit the individuals as performers, producers, or contributors of "additional music or lyrics," arguably indicating that they are co-authors. This lawsuit has reportedly been settled, with the terms of the settlement confidential.

C. COMMUNITY PROPERTY

Nine states, including California, have community property laws specifying that property acquired while people are married belongs to both spouses equally.[7] In such states, if a wife were to compose a musical composition, the copyright ownership in that composition would belong jointly to the husband and wife unless they agree otherwise. A California court has held that a copyright acquired by one spouse during marriage is community property. Property acquired before of after marriage is not considered community property.[8]

Under community property laws, either spouse would be entitled to sell a jointly owned copyright without the other's consent. Any income from such a sale would have to be shared jointly. However, a spouse cannot give away community property without the other spouse's consent. When one spouse dies, the other spouse would not necessarily inherit a copyright owned as community property because the deceased spouse may convey his or her share of the copyright by will to anyone. Upon divorce, the spouses are free to divide their jointly owned property in any way they choose. However, if they cannot agree, a court may end up splitting up the property. In such a situation, the judge could award a copyright entirely to one party and award the other cash or other property of equal value or could award each spouse half of the copyright.