



# Publishing Primer

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## **Music Copyrights and Publishing**

### **I. Creation of Copyright**

By law, a copyright is created the instant a songwriter "[fixes](#)" a work in a tangible medium from which it may be reproduced. This tangible medium might be in the form of sheet music, cassette tapes, or any other media from which one can reproduce the song.

The copyright owner of a song is usually called "the publisher". As evidence of his claim to the existing copyright, the publisher may register the work with the Copyright Office in Washington, D.C., by submitting a "PA" copyright form. "PA" stands for performing arts, and the copyright designation is shown as a circled "c", followed by the year of copyright and name of the publisher. The term of copyright now extends 75 years beyond the date of the author's death.

If an author fails to register his work with the copyright office, he still owns the copyright. The copyright certificate is merely recorded evidence of the claim. However, in a legal dispute over copyright, the evidentiary weight which is accorded the copyright registration certificate is at the discretion of the court. Therefore, should an author be able to prove that the holder of the first registered certificate does not have a valid claim, a court may decide in the author's favor in spite of the registered certificate.

Except in the case of a work made for hire, where a song is written by an employee within the scope of his employment, an author of a song is the initial owner of a copyright. Should an individual or firm other than the author wish to make a claim to the copyright, based on contractual agreement or otherwise with the consent of the author, then the claimant must register the copyright transfer with the Copyright Office. The Copyright Office at the Library of Congress maintains a Transfer Register for the purpose of giving "[constructive notice](#)". An infringement suit may not be brought by a non-author claimant until a transfer document has been recorded.

Although the copyright owner is often called the publisher, the word is somewhat of a misnomer, since the publisher rarely actually prints copies of sheet music for retail sale. In fact, less than five percent of a publisher's income may actually derive from the sale of printed sheet music or song folios (a collection of songs).

## **II. Mechanical Income**

The greatest source of income for a publisher is almost always from what is called "mechanical royalties". This is income deriving from the production of electro-magnetic (and other) transcriptions which make use of a PA copyright. Examples are phono-records, compact discs, and cassette tapes.

The royalty rate for mechanical income is set by the successor to the Copyright Royalty Tribunal in Washington, D.C., under authority granted it by Congress in the Copyright Act of 1976. The "statutory rate", that is, the amount determined by statute (written law), is given elsewhere on our website, and is based on a per song, per reproduction concept. An additional per minute rate or fraction thereof is granted to recorded works in excess of 5 minutes in length (the "long song" formula). A song which times out to 6:12 will (under the 2002 rate) be entitled to mechanical royalties 10.85¢, representing 6 full minutes plus part of a 7th minute at 1.55¢ per minute each.

The mechanical royalty rate is adjusted every two years by the Copyright Royalty Tribunal. Future adjustments are given elsewhere on our website.

Therefore, if a publisher owns the copyrights for 10 songs appearing on a record album and the mechanical rate is 8¢ per song, the record company must pay him 10 x 8¢ per album, or 80¢ for mechanical royalties. If 100,000 records are sold, the publisher will receive \$80,000.

### Sound Recording Copyright

It is very important to differentiate the mechanical royalty (PA Copyright) from the royalty which a record company must pay to the recording artist. As an example, let's look at Linda Rondstadt's recording of the song "It's So Easy (To Fall In Love)".

Rondstadt's record company, Elektra/Asylum, is obligated to make two separate royalty payments. The first payment, to Linda Rondstadt, is as a royalty for the beneficial use of her recorded performance (her singing) deriving from an "SR" (sound recording) copyright owned by Elektra/Asylum Records. (A sound recording copyright is designated as a circled "p".) This is the Artist Royalty and is entirely unrelated to publishing royalties. Unlike mechanical royalties, the Artist Royalty is not determined by copyright law. It is based on the negotiated rate in the artist's recording contract.

The second payment which Elektra/Asylum must make is the mechanical royalty payment to MPL Communications, the firm which owns the PA copyright to the

song "It's So Easy (To Fall In Love)". The mechanical royalty is paid based on the PA copyright utilized in Rondstadt's recorded performance.

Now if Boy George should record the same song, his label, Virgin Records, would claim an SR copyright in and to their master tape of the Boy George rendition. Nonetheless, Virgin would again be obligated to make mechanical payments to MPL Communications for use of the underlying work.

In general, therefore, there is only one PA copyright (exceptions are from new arrangements, new lyrics, new melodies, etc.) However, there may be many SR copyrights which make use of a single PA copyright. This is the case for the song "Yesterday", by John Lennon and Paul McCartney, which has been recorded by over 1,000 artists.

Now let us look at the case of a recording artist who is also a songwriter. In the case of Bruce Springsteen, he is the writer of the song "Born In The U.S.A.", which is published by his own company, Bruce Springsteen Music. Columbia Records must still pay the mechanical royalty, even though Springsteen is also being compensated as the recording artist. He makes more money as artist and publisher of the songs than he would if he were merely the artist, typically 50% more.

It is easy to see why so many recording artists record songs which they have written and have published. It is also easy to see why record companies have developed the "controlled composition clause."

### Controlled Composition Clause

A controlled composition clause is a clause which is found in an artist's recording contract, which specifies that the artist will grant a reduced mechanical royalty for any song which is written or controlled by the artist. The record company wants to minimize its total royalty costs (recording artist plus mechanical royalties plus producer royalties, etc.). Typically, a controlled composition clause will specify a 75% statutory rate and a maximum number of songs payable per album. This means that the record company will pay only 75% of the statutory rate per song. On a single record album containing 12 songs, this may reduce the record company's mechanical royalty costs by more than 24¢ per album.

The present status quo is that new, emerging, or marginally profitably acts that write their own material must accept a reduced mechanical royalty. However, in circumstances where an artist is a superstar such as Michael Jackson, he can demand and receive the full statutory rate. In fact, certain superstar artists may have recording contracts which specify a guaranteed or minimum aggregate mechanical rate of perhaps 14 x the statutory rate per album. If the artist delivers

an album which is comprised of only 10 songs, this results in an actual per song mechanical rate which exceeds the statutory rate by 40%.

In the absence of a controlled composition clause specifying a discounted mechanical rate, there are certain factors which will induce a publisher to grant a reduced rate. An example might be when a record company states that they will include a publisher's song on a Greatest Hits package only if they get a discounted rate. The publisher must weigh the benefits of not having the song included versus accepting a discounted mechanical rate. Another example would be if a record company promises to release a single of the song if the publisher grants a discounted rate or gives an advance.

### Compulsory License

A brief discussion should be made of "compulsory" license. Compulsory license derives from Copyright Law. An artist may record and a record company may release a version of any song which has voluntarily been released or publicly performed, WITHOUT the publisher's permission, AS LONG AS STATUTORY MECHANICAL FEES ARE PAID IN ACCORDANCE WITH THE COPYRIGHT LAW.

The artist or publisher retains the right to determine who will initially record, perform or otherwise release a song. Thereafter, anyone who complies with the copyright law and pays statutory mechanical royalties may use the song, in any particular style (calypso, punk rock, elevator, doo-wop, etc.) they wish. The only restrictions are that significant changes in lyrics (other than gender, for example) or melody are forbidden.

In a potentially "hostile" compulsory license situation, the publisher will not grant a discounted mechanical rate.

### Collection of Mechanical Fees

In the United States, mechanical royalties are collected by the publisher, either directly from the user (record company), or (at the publisher's option) via a mechanical licensing organization, the best known of which is the Harry Fox Agency in New York.

By issuing and negotiating a "direct" license with a record company (such as Columbia Records), the publisher gets quick, direct payment of his mechanical royalties. However, for mechanical licenses which are issued by the Harry Fox Agency on behalf of a publisher, royalties will be sent by the record company to

the Harry Fox Agency, which will, after a short delay, then account to the publisher. The Harry Fox Agency also audits record companies. For its administration and audit costs, the Harry Fox Agency will retain 4.5% of the amount collected. Wixen-Polin Company does not use the Harry Fox Agency.

For the publisher who does not collect mechanical income through the Harry Fox Agency, (and also for those who do) there are also independent accounting firms which specialize in record company audits. Royalty accounting is a very complex matter, and there are many areas open to interpretation and error. In most instances, a record company audit will uncover unpaid or underpaid royalties in excess of its cost. Typically, a recording artist contract will specify the terms of frequency of an artist's right to audit company records.

### Foreign Mechanical Payments

The process for collecting mechanical royalties from record companies outside of the United States is different. Although it varies by country, the general procedure is illustrated in the case of France as follows:

When a record company decides to release a record, they must go to the mechanical right society for France, SDRM and obtain an authorization to use the SDRM seal by paying the appropriate mechanical fees due under French law. The use of this seal is analogous to the package stamps which are required for liquor or cigarettes in the United States. Without the SDRM seal, records may not be sold in France. One can think of these mechanical royalty fees as a mechanical royalty tax levied against the record company at the time of manufacture.

The money which is collected by SDRM is eventually redistributed to the U.S. publisher's French collection agent (otherwise known as a "subpublisher". More about foreign collection and subpublishers later).

Each foreign country determines the mechanical rates payable within its jurisdiction, although these rates are now in the process of being standardized in Europe within the European Economic Community. Most foreign mechanical rates are not paid on a per song basis (i.e. 8¢), but rather as a percentage of the record's [retail selling price](#).

For example, the Japanese mechanical rights society, JASRAC collects a percentage of a record's retail price (less sales tax) as a mechanical fee. If the company wishes to reduce mechanical costs, it must lower the price it charges for its records.

Some other important foreign mechanical right societies are GEMA (Germany) and MCPS (England).

### **III. Performance Royalties**

The next most important source of publishing income is from performance royalties. Performance royalties derive from public performance of a song, most commonly on radio or television. Broadcasters sell advertising and generate revenue by playing records of copyrighted songs, and thus, they must pay the copyright owner for this privilege.

A publisher collects performance royalties for his songs by using the services of a performing rights society (although in extremely rare cases, an individual or firm which wishes to publicly perform copyrighted music may negotiate performance royalties directly with the publisher). There are three performing rights societies in the United States: BMI (Broadcast Music, Inc.), ASCAP (American Society of Composers, Authors and Publishers), and SESAC. BMI and ASCAP are the two major performing rights organizations in the United States, and both are non-profit.

While both BMI and ASCAP operate competitively, they nonetheless operate in a similar manner. Let's look at how the process works when a typical publisher decides to affiliate with BMI for the collection of performing rights.

After joining (at a one-time cost of \$150), the publisher will submit "clearance forms" to BMI, which lists for each song controlled by the publisher, the title, the author's(s') name, the publisher's(s') name and other relevant information. Upon receipt of a clearance form, BMI will add the song to its [master repertoire list](#).

### Blanket Licenses

Radio and television stations which wish to play songs within the BMI repertoire must obtain a license from BMI. BMI does not generally issue licenses for individual titles, but rather "blanket licenses", which cover each and every work contained in the BMI repertoire. A station typically pays a percentage of its revenue to BMI for a BMI blanket license. This license allows them to play as much or as little BMI music as they want.

The blanket license has been challenged many times by disgruntled broadcasters who hope to obtain cheaper performance rights directly from publishers. Arguments have been made that the blanket license is not collective bargaining, but rather restriction of free trade and therefore unconstitutional. The case of

Buffalo Broadcasting vs. ASCAP went all the way to the United States Supreme Court, which in refusing to hear the case, reaffirmed the constitutionality of the blanket license.

### Sampling and Distribution

Through random scientific sampling techniques, BMI determines which of its repertoire songs are being performed, and how frequently. Based on this sampling, BMI makes monetary distributions from the blanket license fees it has collected. These distributions of royalties are based on the number and type (size of station, etc.) of sampled performances.

Both ASCAP and BMI collect hundreds of millions of dollars for performance licenses each year. BMI is generally thought to have collected less performance income than ASCAP, but they do not make their figure public. All money, less actual operating costs, is distributed by each to their affiliates.

It should also be noted that both BMI and ASCAP collect for other types of performances, including nightclubs, arenas, circuses, cable TV and others.

### Foreign Performances

There are foreign performing rights societies which are analogous to BMI and ASCAP. In many cases, these performing rights societies are allied with or part of the local mechanical rights society. Such is the case with SACEM-SDRM in France, JASRAC in Japan, and GEMA in Germany.

While foreign performing rights societies are operated similarly to their U.S. counterparts, there are some individual differences. For example, in Germany GEMA collects performance income on a per-patron royalty basis in movie theaters for the music contained in a motion picture soundtrack.

In Japan, due to the tremendously high cost of an album (well over \$20), there is a huge industry devoted to renting records so that they may be taped by a customer in his home (or frequently in the store). JASRAC collects a portion of the rental fee which it distributes to publishers as a rental copyright royalty (which is really a mechanical royalty, however the "reproducer" is a private party and not a record company).

All of the foreign performing rights societies have mutual collection agreements with one another. Thus, PRS (UK), SACEM (France), GEMA (Germany),

JASRAC (Japan), etc. all account to ASCAP and BMI, which in turn account to their members.

#### **IV. Other Sources of Publishing Income**

Although mechanical and performance income are the primary sources of publishing income, there are many other sources of royalty income. Usually these royalties are small and insignificant. Some examples:

When an airline records music to play on in-flight audio programs, they must make arrangements with copyright holders. When a greeting card company prints the lyrics to "Happy Birthday To You" (yes, it is still under copyright), they must compensate the publisher. When the MUZAK company records a song for a closed-circuit broadcast system as a supplier of "muzak" to department stores and elevators, they must have performance and re-recording rights from the publisher.

However, there are other more significant sources of publishing revenue. [Examples include print \(sheet music and folios\), advertising, inclusion in a stage play, and synchronization uses \(motion picture, television and videocassette uses\).](#)

##### Advertising

Substantial payments are made by advertisers to publishers for permission to use popular songs in television and radio commercials.

In some cases a publisher may not be interested in exploiting or associating a song with a commercial product.

##### Synchronization

A very important source of other publishing income is from synchronization licenses. When a movie company wishes to record a composition in timed relationship with a film, they must obtain a license from the publisher. Except for public broadcast stations, synchronization fees are determined by mutual negotiation between the film producer and the publisher. The synchronization fee may vary from \$200 or less to \$50,000 or more. Some factors which determine the fees are:



1. The nature of the film, its budget, its director, its stars.
2. The type of use (recurring theme, instrumental, visual performance or background usage.)
3. The length of use (10 seconds or 10 minutes, etc.)
4. The scope of the synchronization license (are video cassette rights included, is Pay-Television broadcast permission granted, etc.)
5. Will the song be included on a soundtrack album?

It is worth noting that video-cassettes are more variable in the payment method for music usage. In some cases the video-cassette company (or film producer) negotiates and pays for a "video buy-out", which means that they may manufacture and sell as many videocassettes of the movie embodying a song with no further payment. Other times, the "sync" license may specify a per tape royalty (typically 12¢ to 14¢ per tape.) A third possibility is a "limited video buy-out", which allows the video-cassette company to manufacture and sell up to a fixed number of videocassettes (say 50,000) without an additional royalty payment to the publisher.

### Print Rights

A publisher may enter into a license agreement to sell sheet music, song folios, or lyric folios with a firm engaged in the practice of selling written music. In the United States, there are only a few major companies which sell sheet music, among them Warner Brothers Music (Print Division) and Hal Leonard. If a publisher does not license his copyrights to one of these firms, he may of course sell copies by himself, at whatever price the market will bear. In general though, a song is only commercially viable in written form if it has been a major hit record, is a standard, or a song from a Broadway show.

## **V. Foreign Income**

All the publishing rights and usages of copyrighted songs have their foreign counterparts. British record companies must pay mechanical royalties for the use of compositions published by an overseas company, and the BBC and other commercial British stations must pay performing rights. The same holds true for every territory throughout the world.

In foreign countries, the local mechanical rights society is usually forbidden by the local government from paying the mechanical royalties it collects directly to the original foreign publisher. For example, when a record which embodies a copyright owned by a U.S. publisher is released in France by a French record company, the local mechanical rights society will only pay the royalties to a French publishing firm which is a member of SDRM.

This situation necessitates that the original American publisher enter into an agreement with a French publisher to collect French mechanical royalties on his behalf. The foreign publisher who collects on behalf of the U.S. firm is known as a subpublisher. In general, the U.S. publisher will employ a world-wide network of subpublishers, who will be contractually empowered with the right to collect all types of publishing royalties on behalf of the original U.S. publisher within his territory. This includes performance, mechanical and print rights.

For the collection services it renders, the subpublisher will deduct a portion of what it collects when making payment to the U.S. publisher. Typically, a subpublisher will charge anywhere from 10% of receipts to 30% of receipts for his services. A major publisher or artist will likely be able to negotiate a subpublishing fee of 10% or 15%. However, an artist who negotiates a deal with a foreign subpublisher which includes an advance from the foreign publisher against his publishing earnings within the territory, will pay a higher collection rate, typically 20-30% of revenue from within the territory.

All publishing deals should be compared on an "at-source" basis. This compares "apples to apples". Specifically, it measures how much of the earnings from the source reach the publisher. For example, if the foreign subpublisher takes 10% of the earnings in his territory, and the administrator takes 10% of the receipts received from the subpublisher, then it is an 81/19 "at-source" deal (i.e. 90% of 90%, or 81% reaches the publisher; 10% is retained by the subpublisher; and 10% of 90%, or 9%, is retained by the administrator.)

There are also other variables which determine the rate charged by the subpublisher, which include the level of promotional activity the subpublisher will provide for the artist or publisher and the assistance he may provide in convincing a local record company or artist to release records embodying the song which he is subpublishing.

Certain countries, with which the United States enjoys particularly good relations with, such as England, will allow an American company to directly affiliate with the local mechanical rights society. An American firm which joins the British society MCPS (Mechanical Copyright Protection Society) will be able to directly collect mechanical royalties paid in Britain, without the cost of employing a British subpublisher. However, the distance and cultural barriers may make this ill-advised.

Current practice among almost all U.S. publishers is to employ subpublishers for the services they provide above and beyond straight collection of income. With a financial interest, the subpublisher can closely monitor the local record company, make sure that the local performing and mechanical rights societies have the titles, authors, and publishers registered properly, and provide every nature of assistance to the original U.S. publisher with respect to the protection and beneficial exploitation of the copyrights within the territory. The subpublisher's fee is not a big price to pay for these services.

### Territorial Groupings

In general, 12 to 17 subpublishing deals will allow a publisher to cover all the major territories of the world where there is substantial mechanical or performance income. This is because there are certain territories which are traditionally grouped together by publishers and subpublishers.

Some traditional subpublishing groupings of territories are: UK (includes Great Britain, Ireland, and British territories such as Jamaica, North African countries, etc., excluding New Zealand, Australia, and Canada); France (SACEM territories include at least 30 countries including Guiana, Polynesia, Saint Pierre, Niger, Upper Volta, Central Africa, Lebanon, Egypt, Monaco, Turkey, Syria); GAS Territories (Germany, Austria and Switzerland and often Eastern European countries including the former parts of the Soviet Union); NORDIC Territories (Scandinavia, Finland, Norway, Sweden, Iceland); Italy; Portugal and Spain (sometimes grouped with Italy); Australia and New Zealand; Japan and Mandate Islands; BENELUX Territories (Belgium, Netherlands, Luxembourg); South Africa; South America and Mexico; and Greece.

## **VI. The Songwriter**

Up until now, our discussion has omitted the crucial component of music copyrights: The Songwriter. A songwriter usually writes music in an effort to make a living for himself. Prior to (about) 1960, most recording artists did not write their own material. In order for a songwriter to make a living, it was necessary for the writer to get a recording or performing artist to record or perform his song.

In order to do this, the songwriter would take his song to a Publisher. It was the publisher's job to act as the song's agent, and get the song recorded by a major artist or performed by an important band or orchestra. The publisher and songwriter would make an agreement to split all income earned by the song. The traditional split was 50-50. Thus, the songwriter would get half the money for

writing the song, and the publisher would get the other half for establishing sources of income (a monetary value) for the unexploited (valueless, except in aesthetic terms) song by getting it recorded or performed.

Eventually, however, major songwriters such as Irving Berlin, whose name on a song was enough to get the song recorded or popularized, realized that they no longer required the services of a publisher to "plug" songs. Why give up 50% of the money if the publisher doesn't really have to do anything other than collect the money? So Irving Berlin, and others, formed their own publishing companies, so that they could retain both halves: publishing and songwriting. (Incidentally, Irving Berlin was also one of the founding members of ASCAP.)

With the beginning of the rock era, most artists began writing their own material. In fact, very few of today's artists record songs which they themselves have not written. Most of today's recording artists are also the publishers of their own works.

Nonetheless, there still are some "traditional" publisher and songwriter relationships. "Staff Writers" for "traditional" publishers still rely on their publishers for "song-plugging" services. Enjoying a 50-50 split, the publisher typically works on behalf of songwriters who have songwriting talent but lack performing talent or inclination, or who do not have record deals. For many years, before becoming a successful recording artist, Carole King was a successful staff writer who wrote songs such as "The Locomotion" for Little Eva.

Traditional terminology and practice has nonetheless been maintained: An artist who self-publishes a recorded song will receive an aggregate payment for mechanical royalties. This aggregate payment represents both the writer's half and the publisher's half. Thus, \$10,000 in mechanical income for a song owned by an artist owned company will result in \$5,000 income to the artist as publisher, and \$5,000 income to the artist as songwriter.

The performing rights societies divide income for a song up in the same manner. For example, Prince receives half of the performance royalties earned from the song "Manic Monday" on his ASCAP songwriter statement, and the remaining half through the ASCAP publishing company statement for his company, Controversy Music.

BMI accomplishes the same thing by figuring net income on a 200% basis, with half representing 100% publisher share, and half [representing 100% writer share](#).

### Writer Splits

When a songwriter collaborates with another writer, they must decide how they wish to split the income. (See also: Legal Problems with Co-Writers elsewhere on this site.) Typically a writer of lyrics and a writer of music will split songwriter (and if applicable, publishing) income equally. Sometimes, writers will agree on a 50-50 split even if their contributions were not equal. Such is the case of Paul McCartney and John Lennon. Lennon's contribution to the song "We Can Work It Out" was the one line "Life is very short and there's no time for fussing and fighting my friend", yet he is listed as a 50% writer. Although the split among writers may be anything which is mutually agreed from 99-1 to 50-50 (in the case of two writers), in the absence of an agreement between songwriters, copyright law gives each (of 2) writers 50% of the work, no matter how insignificant one writer's contribution may be. The same logic extends to three or more songwriters. Therefore, writer split agreements are advisable.

### Publisher Splits

Often there is cause to split the publisher's half of the income. If, as in the above case, both of two 50-50 writers are also owners of their own publishing companies, they will agree to "co-publish" the work created. If each 50% writer is also a 50% publisher, then each will receive 25% of the aggregate income as writer income (representing half of the writer half), and 25% of the aggregate income as publisher income (representing half of the publisher half.)

Many people get confused about publishing and writer splits. While basically straightforward, there are some quirks in the way performance income is split by BMI or ASCAP. The first quirk is that when a BMI writer co-writes a song with an ASCAP writer, the song must be published in the same percentages as written by a publishing company of the appropriate affiliation. Thus, if a song is written 70% by an ASCAP writer, and 25% and 5% respectively by two BMI writers, the clearance forms for the song must specify publishing ownership in the same proportions by affiliation: 70% publishing interest held by one or more ASCAP companies, and [30% publishing interest held by one or more BMI publishing companies](#).

The other quirk about performance income splits concerns foreign collection. In the absence of a subpublishing agreement, ASCAP or BMI will collect both the publisher and writer halves of performance income from overseas. If a publisher enters into a subpublishing agreement, the subpublisher may collect only the publisher's half of performance income. If a writer is not the publisher, he does not receive any of the publisher share income and thus the only money he will receive for domestic and foreign performance of his works is from ASCAP or BMI. However, if he owns the publishing on a work for which foreign performance income is earned, and if he employs a subpublisher, he will receive the publisher

half of the foreign performance income from his subpublisher, and the writer half from ASCAP or BMI.

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