What is Copyright? – The Theory and Practice of Protectng Your Music
By Alan S. Bergman

What is copyright? It's the exclusive protection given to original works of authorship which been fixed in a tangible form of expression that can be reproduced or communicated. The Constitution granted Congress the right to pass laws, to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. The Copyright law protects such original works and helps establish a system whereby those works can be sold, licensed or passed on to heirs and also by which the owner can prevent the work from being used without authorization. But before a work can be protected, it must be, *Fixed in a tangible medium of expression*.

When a work is fixed it assumes a form that can be perceived, like a manuscript, tape, computer disc or hard drive. Although an original work can be performed, the copyright is not created until it takes tangible form. Consequently ideas alone are not protected by copyright. The only thing that can be protected is the tangible form in which those ideas are expressed. A work of choreography can be performed but what is protected by copyright is the way it is expressed (usually with diagrams on paper) so that someone else can reproduce it. The date upon which the work is fixed in tangible form is the date of copyright.

If the work itself is copyrightable, then the ways the work is adapted, the so-called derivative works like translations, sound recordings or arrangements should also be copyrightable. But the amount of originality required to entitle a derivative work to protection is a highly subjective concept.

Music arrangements have not usually been considered by the courts to have the requisite degree of originality to entitle them to copyright protection. Chord changes are also not ordinarily protectable since it is felt that most chord patterns can be traced to unprotected sources and are therefore not original. Just look at all the jazz tunes, which have been built on "the changes" of pop standards. "All The Things You Are," for instance, probably has more jazz offspring (which, by the way, have not been credited to Jerome Kern), than it does actual versions of the Kern song.

Another issue peculiar to Jazz is the protectability and ownership of the jazz solo. For the most part, it's the owner of the underlying copyright (either the composer or the publisher depending on the wording of the contract) who technically owns the solo.

In my last article I noted that James Moody tried to claim that his "Moody_s Mood for Love" solo was a separate work, but ultimately the original publisher of "I'm In the Mood for Love" prevailed and owns the solo. Some would argue that this is the better, more practical view anyway. Just imagine having to sort out where the tune ends and the solo begins. And what about quotes of other tunes?

Another point worth mentioning is that there is no copyright protection for a title. That does not mean you should write a song and call it "Stardust," but the reason "Stardust" will be protected is that the title has become so famous that it has acquired what is known in the trademark law as a "secondary meaning." It does not, however, have any copyright protection.

While copyright is a collection of property rights to be administered by the controller of those rights, part of that administration is compliance with the procedures established under the U.S. Copyright Act (and to some extent, comparable laws of other countries). First is the ubiquitous copyright notice found at the bottom of the first page on which the work appears in print. Although this notice is no longer required for works created after 1989, it is still required for some earlier works. The best policy then is to be sure that when you publish, which means dissemination of copies to the public, whether they are sold or given away, you include a copyright notice containing the copyright symbol ©, the date of creation and the name of the copyright owner.

There are two common misconceptions about copyrights for music, which I would like to dispel. One is the "self-addressed" envelope concept where you send yourself an envelope containing your original work. When it arrives, you put it aside for safekeeping, unopened. Since it has a postmark, people think this is evidence of the date the work was created. I do not recommend to

clients that they use this device. It does not give you any rights against the public and since envelopes can be steamed open, as a method of proof, it's not very persuasive.

The second misconception relating to music copyrights is that you can use up to four bars of music without permission and without infringing a copyright. Although copyright is an exclusive right, there are limitations, the most important being the doctrine of fair use, which gives others the right to use your copyrighted work without payment or permission under some circumstances. Some examples are, excerpting a book or a play in a critical review, quotations in a scholarly work, or use in a parody where the use is just enough to evoke the original being parodied, but is not enough to be considered an appropriation. That of course is a question of fact and there are cases going both ways on whether the parody use was fair use or unlawful appropriation. The Copyright Law has a specific section on fair use (Section 107) and the U.S. Supreme Court has tried to clarify this in the famous case involving Two Live Crew and the song, "Pretty Woman." A future article will be devoted to fair use in the classroom especially as it relates to duplicating parts and arrangements for educational uses. But, as far as this belief is concerned, there is nothing in either case law or the copyright law supporting a four bar rule.

The term of a copyright is now the life of the author, plus seventy years. An exception to this is a work that was in existence in 1976, the date the present Copyright Law was enacted. These earlier works have varying terms of protection, depending on how old they were in 1976. I discussed this in detail in my last article about creating and marketing your own CD.

Music that is unprotected either by virtue of not satisfying the requirements of fixation, expression and originality or for which the copyright term has expired, is said to be in the public domain. But verifying and substantiating that can be tricky. There have been major cases won upholding the originality of the songs "Tom Dooley," "Tzena, Tzena," "Bridge Over the River Kwai" and "Those Were The Days," all of which were thought to be "traditional." Most people do not know that "Happy Birthday" is a protected work. The best way to protect yourself against such a lawsuit is to find an original source that you know is not subject to copyright and base your version strictly on that.

In one sense copyright can be viewed simply as, the right to copy. Two authors creating similar songs independent of each other do not infringe each other's copyright. To prove infringement, you have to prove that copying has occurred or should be inferred because there is substantial similarity between the two works, and that the defendant had access to the infringed work. Copyright infringement cases have been successful involving the songs "My Sweet Lord," "Hello Dolly" and "Rum and Coca Cola."

Is it hard to register a copyright? No, copyright registration is available to register almost any work and the Copyright Office does not make a thorough search of what is received, although occasionally they will bounce something back for not having what they consider to be a minimum degree of originality. I once had to fight to get them to accept an ingenious twelve bar blues, but eventually we did prevail. The cost of copyright registration on form PA is $30 per composition and that cost can add up when you are a prolific composer. It is possible to register multiple works under one registration form and for one fee, but you must then amend your original application, with a Form CA (registration fee $95 which is expected to increase soon) to cross reference each title in the Copyright Office index. Otherwise, only the original title will show up in a Copyright Office title search.

Should you always register your original music? No, not until you publish or get some serious interest, which usually means a commercial distribution, such as a record release, a printed version, or a television performance. Music publishers do not usually register compositions until they are actually recorded. After you do publish, it is then advisable to register because if registration takes place more than ninety days after publication, you will forfeit your right to claim certain types of damages otherwise available to you and you may also lose your right to recover attorney's fees. In terms of enforcing your rights in court, you must register prior to commencing an action for infringement.

This brief overview is of course, not intended to be a comprehensive discussion of copyright or of the complex administration of those rights as they relate to music and jazz. But how much do you really have to know about copyright? Some knowledge of copyright is essential to anyone who wants to be a creator, performer or teacher in this area, which is changing so rapidly

especially with so many new issues relating to the Internet and digital distribution of music via streaming and downloading.

For those who want to learn more, there are good books on the subject ranging from books of contracts written by lawyers to books about deal making written by artists or business people. I'd be glad to supply a reading list on request.

Do you need a lawyer to register a copyright? No- the forms can be obtained from the Register of Copyrights in Washington, D.C. or online at: http://lcweb.loc.gov/copyright/ and completing the forms is self-explanatory. However, as is the case with many areas of the music business, an initial consultation with a music business attorney is always a good idea.

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