

Collaborator/Songwriter Agreements

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If you cowrite a song with someone, both of you own the song as “joint owners” in what the copyright law calls a “joint work.” This is irrespective of whether one of you writes the music and the other the lyrics, or you both write music and lyrics. Both of you have an “undivided” ownership in the song (i.e., you each own 50% of the whole song). There is not a separate copyright in the music and lyrics. There is one copyright in both.

The essence of cowriting is writing together to create a single song, regardless of who contributes what. This does not mean that you have to work together, or that your creative contribution be equal in quality or quantity. You also do not need to have an express “collaboration agreement,” although it is a good idea, given the myriad issues that can arise.

One of the most famous cowriting teams is Bernie Taupin and Elton John. Bernie, on his own, first writes the lyrics. John, on his own, then writes the music. Since both Bernie and Elton intend that their work be a united whole, the result is a joint work, which they co-own fifty-fifty.

Percentage Ownership

As joint owners you and your cowriter can divide your song ownership in whatever proportion you want. In the absence of an agreement you share equally, even if it is clear that your contributions are not equal. Thus, if there are two songwriters, you own the

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song fifty-fifty; three songwriters, one-third each; etc. Dividing the ownership ratably is also the most common way to divide ownership in a written collaboration agreement.

One common benchmark in dividing ownership is that the lyrics are worth 50% and the music 50%. For example, if two people write the music and one person writes the lyrics, they may agree to divide the ownership 25% each for the two music writers, with the lyricist retaining the remaining 50%. However, if there is no such agreement, each would own 33.3% of the song.

Grant of Rights

Now that we have determined who owns the song, who controls it? It is crucial to the exploitation of the song that there be a central place to license the work and collect money.

Coadministration of Licenses

It is usually more convenient for one music publisher to collect and divide all the income. Licensing can become complicated when a licensee has to seek the approval of, and document permission from, multiple publishers. However, many cowriters prefer that there be separate administration among the various publishing companies. This has its advantages. You have control over the scope of the licenses, to whom licenses are granted, how much is charged, how the money is collected and what costs are incurred.

As joint owner (in the United States), you may exploit the song yourself and also grant nonexclusive licenses. Still, you must account to your cowriters for the money that is generated from the nonexclusive licenses.

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A license is permission to use a work. It is not a transfer of copyright ownership, which requires the written permission of all songwriters (although you could transfer just your share to another without affecting the ownership interests of the other cowriters/co-owners). (See discussion below.)

- **Public Performances.** Public performances agreements must be entered into with ASCAP, BMI or SESAC. Typically, they are done in the name of the songwriter's publishing company. If cowriters want to use one company, they may use that company and divide the publisher's share of the income. Or, each of the separate publishing companies may enter into a performance agreement for its share with ASCAP, BMI or SESAC with each collecting its respective percentage of the publisher's share of the public performance income. Writers should join ASCAP, BMI or SESAC, to collect their portion of the songwriters' shares of the public performance income.

- **Mechanical Licenses.** Mechanical licenses are nonexclusive; any cowriter can grant them but must account to and pay the other cowriters, or instruct the licensed party that the cowriter's shares be paid directly to them.

- **Print Rights.** These agreements are usually exclusive, and all cowriters must agree in writing.

- **Subpublishing Rights.** Foreign subpublishing deals are usually exclusive, and all cowriters must agree in writing. Additionally, most foreign jurisdictions require that all co-owners agree to licensing, so the subpublishers are going to want to have all cowriters sign. If agreement cannot be reached on a shared subpublisher, you can, however, still make arrangements with one to represent just your interest share in the songs' copyrights.

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Division of Income

Just as a contributing author is entitled to a ratable share of ownership, the coauthor is also entitled to the same ratable share of income, absent an agreement to the contrary.

Pursuit of Infringement

One obligation that cowriters have together is to protect the copyright. This includes pursuing infringers. Can you sue even if a co-owner does not want to sue? The answer appears to be yes, at least with respect to your interest in the copyright. However, the court may require that you bring in the cowriter(s) as a coplaintiff, so it is best that you decide to sue together.

What if you have to sue a co-owner, for example, for failure to account to and pay you?

You may, but you do not have to, bring in all the other co-owners in order to sue.

Copyright Duration

The basic rule is that the copyright of a song written after January 1, 1976 lasts for the life of the author plus 70 years. In the case of a joint work, the copyright lasts for the life of the last surviving author plus 70 years.

Copyright Transfers

Each collaborator, independently of the other collaborators, has the right to transfer his or her copyright ownership to another party. That transfer may be for the full copyright share of the collaborator to a publisher, or a partial copyright transfer to a copublisher. A collaborator may also grant all administration and supervision rights of that collaborator's

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share to a third party as the publishing administrator, while still retaining ownership of the copyright.

If one collaborator transfers his or her copyright interests to a third party, but the second collaborator does not do the same, then the third party would co-own the copyright with the other collaborator. At the same time, the second collaborator has the option to transfer his or her copyright interest, in the whole or in part, or just the administration rights, to the same new owner as did the first collaborator or to a different party.

Unless either collaborator has granted to the other collaborator the administration rights in the copyright for the song, the new co-owner will have to share decision-making and the publisher's income share with the collaborator that did not transfer his or her interests. The accounting can become cumbersome if income sharing and accounting procedures are not coordinated.

Different Performing Rights Society Affiliations

It is also possible for each coauthor to belong to a different performing rights society, namely ASCAP, BMI or SESAC. If that is the case, then a share of the performance income collection would be allocated to each collaborator's affiliated performing rights society. For example, if the song is performed as a part of a soundtrack to a television program, then, with the performance rights for that song being divided between two different performing rights groups, the performance fee also would be so divided. Each performing rights group would receive its allocated share and distribute it to the collaborator affiliated with it. It is quite possible that one collaborator, being paid by a different performing rights society, would not receive the same amount of writer and

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publisher performance income as the other, since each of the performing rights societies uses a different reporting mechanism.

Songwriters as Members of Different Bands

In the event one of the collaborating songwriters is a member of a band and the other is not, the collaborator who is a member of the band will have the authority to allow the band to rehearse and perform the collaborated song in live concerts and to record the song for release on phonorecords. While, technically, it is best to have both writers approve and issue a combined use license, e.g., a mechanical license to reproduce the song on phonorecords, each has the authority to do so, but must account to the collaborator who is not a band member for their share of writer and publisher income. Most record labels will want to get both coauthors and copublishers to provide written authorization for the initial reproduction of that song on phonorecords. After the first release of the phonorecords, a compulsory mechanical license procedure may apply to any future recordings of that song, whether by that same or any other band.

Controlled Composition Clause

Of particular significance is the situation where one of the coauthors is a band member (while the other is not) and has a recording agreement with a record label that requires the writer/band member to agree to a controlled composition clause in the recording agreement. This clause authorizes the record company to pay a reduced mechanical royalty, usually 75% of the prevailing statutory mechanical rate, as the royalty fee for the right to reproduce the song on phonorecords that are sold to the public.

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Generally, the recording artist/collaborating writer will be required by the record company to represent that he or she has obtained permission from the collaborating writer who is not the band member and not a signatory to the recording agreement to issue a mechanical license for the reduced rate. But often, the recording artist/collaborating writer cannot guarantee that, and most likely will not be able to provide the record label with written authorization from the collaborator accepting a reduced mechanical royalty rate. In those situations, the record company will have to pay the collaborating writer who is not a member of the band nor a signatory to the recording agreement that cowriter's share of mechanicals, both as writer and copublisher, at full statutory rate, while paying the collaborator, who is a signatory, the reduced rate. It is also possible that the rate for the recording artist/collaborating writer will be reduced even further, given the need to pay the unsigned collaborator the higher amount, which will reduce the amount available to pay the recording artist/collaborating writer.

By way of illustration, assume that the maximum pool of mechanical royalties for all of the songs on the recording artist's album is 68.25¢ (75% of 91.1¢ or 75% of 0.091×10 songs), as distinct from the current statutory rate of 9.1¢ per song, which would earn 91¢ if ten songs are on the album. The payout to the collaborating coauthor who is not a signatory to the recording agreement will reduce the overall pool available for mechanical royalties, causing the amount payable to the collaborator/band member to be even less than the 75% fractional statutory rate. For example, if that nonsignatory collaborating coauthor has contributed half of the material on four different songs, he/she will get full statutory for his/her share of those songs, $.5 \times 9.1¢ \times 4 = 18.2¢$, which will be deducted from the maximum pool of 68.25¢, leaving 50.05¢ to be allocated to the

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signatory collaborating songwriters for the other six songs that were fully written by them and for the other four coauthored by them with the nonsignatory collaborator.

Coaccounting

Any income that either collaborating writer receives from the commercial exploitation of the song, whether it is from their own use or from use by an authorized third party, must be accounted for and apportioned to the other collaborating songwriter. Such payments should be made in a timely manner, for example, no less than 30 days after receipt. Also, statements that accompany the payments to the first collaborator should be copied and forwarded with the payment to the other collaborator.

Future Generations

The rights of each deceased coauthor will pass on to the benefit of the heir(s) and descendant(s) of that coauthor, either by way of a will (testate) or without a will (intestate). If there is no will, the distribution will be governed by state statutes, usually to surviving spouses and children, on a first priority basis, before other relatives. It then would be the heir or the executor of the estate of the deceased who will have the authority to grant and make decisions with respect to the use of a collaborated composition. By the same token, the surviving collaborator will have the authority to continue to exploit the song while having a reporting and payment sharing obligation to the deceased's descendants or executor. The estate of the deceased collaborator can exploit the song too, and must account to the surviving coauthor.

Phantom Cowriters

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Some songwriters have complained that they have been forced to acknowledge songwriters that did not make a significant (or in some cases any) contribution to a song. This group of “phantom” songwriters has allegedly included label heads, producers and nonwriting band members. The exact contribution to a song is often a subjective measurement; once a songwriter acknowledges a cowriter it is virtually impossible to undo. If the price to place a song on a record of a multiplatinum artist is sharing writing credit this pressure is difficult if not impossible to resist. It’s impossible to measure the prevalence of this practice, but most acknowledge, off the record, that it goes on. Prominent songwriters rarely if ever share credit in this context, and surely your goal should be to not share credit to phantom cowriters.