

OWNERSHIP AND COPYRIGHT REGISTRATION IN SONGS

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One question most frequently asked by songwriters* is “How can I keep my work from being stolen and how can I prove my ownership in the songs I have written?” There are various ways that proof of ownership can be obtained. The best form of proof is registration of your copyright claim with the Copyright Office in Washington, D.C. This article explores Copyright Office registration and alternative forms of proving ownership and the merits of each of them.

OBTAINING COPYRIGHT DISTINGUISHED FROM REGISTRATION OF COPYRIGHT

Before discussing Copyright office registration procedures and alternatives, it is important to understand the distinction between obtaining a copyright and registering or otherwise proving your claim of ownership. There are three steps to distinguish when discussing copyright protection: (1) creating and fixing the work - this gives you copyright protection; (2) placing the copyright notice on all publicly distribute copies of the work - this process puts the world on notice of your copyright; and (3) registering the copyright claim with the Copyright Office - this procedure establishes your best proof of ownership.

Obtaining your copyright is a very simple and easy process. Simply by creating the work (such as composing a song), and by “fixing” it in a tangible medium of expression (such as writing it down or recording the song on tape, hard drives, or other recordable medium), you automatically obtain copyright protection under the federal law. Your claim of copyright does not have to be registered with the Copyright office (or anywhere else) to obtain the copyright. The Copyright Office does not issue copyrights; it registers copyright claims.

By putting the proper copyright notice on the copies of the work that are publicly distributed, the writer tells the rest of the world that he/she is the creator and copyright owner of the song, and satisfies the customary practice that the copyright notice be placed on all published (that is publicly distributed) copies of the work.

The copyright notice consists of three elements: a copyright symbol, the year of publication, and the identity of the owner. For all copies of the work (except sound recordings)

*The text of this article applies as well to other forms of work entitled to copyright protection, such as paintings, dramatic works and literature.

the symbol is either the word “Copyright”, the abbreviation “Copr.” or the symbol “©”. The use of the “©” (along with the other two (2) elements) also meets the notice requirement in certain foreign countries and under international treaties so its use is recommended over the use of the word “Copyright” or the abbreviation “Copr”.

For sound recordings., the first element of the notice is the symbol “℗”. The rest of the elements are the same.

The second element in the notice is the year in which the work is first published, for example, 1999.

The third element in the notice is the name of the copyright owner. The name used in the copyright notice should be the current owner of the composition and not someone who may have been the copyright owner at a prior time.

By adding the words “All Rights Reserved”, additional international copyright protection is secured in Latin American countries that are signatories to certain treaties.

If you publish the work without putting the copyright notice on the copies of the work, you run the risk of placing the work into the public domain. Under the former copyright law, the omission automatically would place the work into the public domain. Under the current law, curative steps can be taken when the copyright notice is defective or is omitted. Briefly, these steps provide that when the name or date or the entire notice is omitted, or the information is erroneous, copyright protection still can be obtained if:

- (i) the notice has been omitted from no more than a relatively small number of copies distributed to the public;
- (ii) the work is registered no later than five (5) years after the publication without notice and a reasonable effort is made to add the notice to all copies distributed in the United States after the omission has been discovered; or
- (iii) the notice has been omitted by another in violation of an express agreement to place the notice on all publicly distributed copies.

The major problem with this curative provision is that the language does not have clear meaning. Until the language has been clarified, you cannot be certain that an omission of the copyright notice falls within the scope of this provision. Consequently, you should make every effort to place the proper notice on all publicly distributed copies of the work. For that matter, even if you do not plan to publicly distribute the copies, you should place the notice on the work anyway. It costs nothing to take such a precautionary step and does not result in any lessening of your rights.

ALTERNATIVE WAYS OF PROVING OWNERSHIP

Since the owner of the composition obtains his/her copyright protection simply by creating the work and ensures that protection by placing the proper copyright notice on all copies of the work that are publicly distributed, what then is gained by pursuing some method of registering the copyright claim?

The principal reason to register a copyright - claim is to obtain independent proof of ownership apart from the testimony of the songwriter. This independent proof is extremely useful in supporting an ownership claim in any infringement action initiated by the copyright owner.

1. Registration with the Copyright Office

A. Reasons to Register

There are certain important benefits made available to a copyright owner by registering the copyright claim with the Copyright Office. The primary benefit is actually more in the nature of a requirement- an owner is not permitted to file an infringement action until the copyrighted work has been registered with the Copyright Office, even if the work is being infringed. Once the copyright claim has been registered with the Copyright Office, then the statute authorizes the owner to file suit.

The statute gives the owner what is known as a “prima facie” presumption of ownership. Essentially, the statute authorizes a court to presume that the registered copyright claimant is the actual owner of the copyrighted work and the burden of proof is shifted to the infringer to disprove the ownership of the copyright claimant.

The Copyright Act grants additional incentives to register a copyright claim before infringement. First, the statute authorizes a court to award statutory damages rather than actual damages to a successful copyright claimant. In an infringement action when a plaintiff sues a defendant for money damages, the plaintiff must prove by documented evidence exactly what his/her damages were in dollars and cents. That sum would be actual damages. Proof of actual damages can be time consuming and therefore costly, since lawyers generally charge by the hour. If, however, the plaintiff is entitled to statutory damages, then the plaintiff only has to document the infringement and ownership and the court is then authorized to find a damage award for plaintiff in an amount no less than \$750.00 per infringement and no more than \$30,000.00 per infringement. If willfulness is proven, (that is, the infringers knew they were violating your copyright but did it anyway), then the ceiling on the award increases to \$150,000.00 per infringement. The dollars to be awarded therefore can add up very fast and the costly need to prove actual damages is eliminated. With an award of statutory damages, the burden is on the defendant to persuade the court that any damages suffered by the plaintiff were too small to justify any award above the minimum. By placing this burden on the defendant, his/her costs of defense are also increased. Of course, to award damages the court must first find copyright ownership and an infringement.

Another advantage of registering before any infringement is that the plaintiff, on a successful verdict, is allowed to recover reasonable attorneys fees and costs, with the unsuccessful defendant being required to pay for fees and costs. It is easy to see that there are some very real benefits to be gained from registering a copyright claim with the Copyright Office.

As an aside, if the infringement occurs within three months after the publication of the copyrighted work but before registration, then so long as the registration is made before the end of that three month period after publication the additional benefits described above will still be available.

B. Mechanics of Registering With the Copyright Office

Registration of a copyright claim with the Copyright office is very simple. To register the copyright claim in a musical composition, the claimant must complete and file a PA (Performing Arts) Application Form. PA (and the other SR, VA, TX) registration forms may be obtained from the Copyright office at no cost. The telephone number for the Copyright Office in Washington is (202) 287-8700. Most major cities have a federal building which includes an office that handles government publications. You also can call that office for copyright registration forms, or get them from the Copyright Office's website, "www.copyright.gov". Along with the completed registration form send a check or money order in the amount of \$45.00 (do not send cash) and one (1) copy of the work if it has not been published, and two (2) copies of the work if it has been published.

The Copyright office defines a copy of music as the best copy of the work that you have, in the following order; transcribed lead sheets, or compact discs. If you do not have either of the first two (2) types of copies, then a tape of the song is sufficient.

The regulations of the Copyright Office permit the owner of songs to register a number of those songs in one filing for a single \$45.00 fee, whether by lead sheet, record or tape. If you select this process, the following procedure is recommended:

(i) If you use tape or compact disc, identify yourself on the tape by name; indicate the number of songs that are on the tape or compact disc; recite the number and title for each song before recording it on the tape or compact disc; perform the song; when finished, state that the song is completed; recite the number and title of the next song; repeat the same procedure until you have recorded all the songs you wish to register.

(ii) You will have to identify the compilation of songs by a single title on the PA Form. For example, "Collective Compositions of S. Hitmaker, Series I". Each of the PA registration forms have a continuation sheet ("PA/CON") with blank spaces. It is recommended that the titles of the individual songs be listed in the bottom blank space in the same sequence they are recorded on the tape. Next to each song title you could parenthetically reference the year in which the song was created. On the front page of the PA Form. in block #3 where you indicate the year of creation, you should put down the year for the most recently created song.

The Copyright office will not accept an application which recites in that space a year date for each of the individual songs listed on the continuation sheet.

If you want to file a claim of ownership in a sound recording along with your songs, you could use an SR form instead of the PA form to register your songs and the sound recording, identifying yourself as the author of the sound recording, words and music.

This procedure will work only if you are the owner of all the songs on the tape (and the sound recording if you also are registering your copyright claim in that). You cannot group different owners of different songs on the same tape or compact disc. If there is more than one owner of the songs (and if relevant the sound recording) and they are the same owners for all the songs (and sound recording if relevant), then you can still use this procedure.

Some attorneys and music publishers are not in favor of this process because it may complicate segregating one of the songs from the group of songs on a subsequent copyright transfer of just one of the songs, such as with a publishing agreement. On the surface, this may be a problem. Careful drafting, however, specifically identifying the song to be transferred can eliminate that concern. Further, the listing of separate titles on the continuation sheet of the registration form facilitates the process of transferring only one song. In the meantime, you will, for a very small number of dollars (\$45.00 per registration) have obtained the benefits of registering your copyright claim in a number of compositions.

One other drawback with this procedure is that the titles of the individual songs will not be indexed and cross-referenced to your name as author. Consequently, somebody trying to identify you as an author of one (1) of the songs listed as a group would not be able to locate you because the song itself is not separately indexed. One (1) way of overcoming this situation is to do a follow-up registration on what is known as a "CA" Form. On this form, you can request the Copyright Office to separately index the titles of each of the songs listed in the earlier registration and have that separate indexing cross-referenced to your name and the number assigned to that earlier registration. You must wait, however, until you receive the initial PA form registration from the Copyright office so you can refer on the CA form to the registration number issued by the Copyright Office on the PA form. The fee for this procedure is \$115.00 for the CA. Even with the additional filing fee and per title charge: the aggregate cost generally will be less than registering each song separately if you have many songs that you are registering as a group.

Make certain that you keep a copy of the date and the registration form for your own records. Do not be discouraged if it takes some time before you get a response. The Copyright Office is backlogged. It may take from twenty-four (24) to thirty (30) weeks and sometimes longer to receive the registered form.

The day of registration is the date on which the materials are received and accepted by the Copyright Office. That date will appear on the registration certificate you receive. For your own peace of mind, you can submit your package to the Copyright Office by registered mail, return receipt requested since the return card is mailed to you much sooner than the certified registration form. At least you will know that the Copyright Office has received your materials.

At your option, you can include lyric sheets with your PA registration form and tape. Make certain that all the elements, the tape, the registration form and the registration fee (and lyric sheets, if any) are securely fastened together so they do not get confused with another person's package.

2. Poor Man's Copyright

The use of the poor man's copyright entails mailing yourself a copy of a tape or lead sheets of your song by certified mail. On receipt of that certified mailing, the addressee (you) does not open it. Instead, the package is put away. If an infringement action is ever filed and the case goes to trial, the plaintiff could introduce the sealed package as evidence of ownership. This approach has some merit in that it does provide a form of documentation of a claim of ownership as of a point in time. The court must first be convinced, however, that you properly mailed the package to yourself and that it had never been tampered with or opened while in your possession. In effect, you must rely solely on your own testimony, without benefit of third party testimony, which would be provided by a private registration service, or the "prima facie" proof of ownership recognized by registration with the Copyright office. Also, none of the benefits of Copyright Office registration discussed earlier would be available to you in a litigation context under a "poor man's" copyright.