

“What's Your Copyright IQ?”
10 Questions (and Answers) to
Your Top Copyright Questions

by
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What's Your Copyright IQ?

Why This Stuff Is Important

Why do you need to know anything about copyright law? Well, one reason is to keep all you creative types from getting sued when you incorporate the work of other artists into your masterpieces. But more importantly, the copyright law is the reason that *anyone* in the creative arts, whether music, film, theater, dance, literature, painting, sculpture, photography or any new and mixed digital media, has the ability to *make a living from their craft*. It is the copyright law that gives the owners of creative works the *exclusive right* to authorize, whether for free or for a fee, the copying, distribution, performance, display and adaption of their work. So there!

Most people in the creative fields, especially music and video, think they know something about copyright. Do you? Take the quiz and find out. I wrote it based on questions that my clients, students, and even lawyers in other fields, have asked me about copyright law. It's only 10 questions and nobody but you is going to know how well you did. And I'll even give you all the right answers so you've got much to gain and nothing to lose. Ready?

The Quiz

Here it is:

1. How do I get a copyright in the song I just wrote?
2. How can I copyright the name of my band?
3. If I wrote the music and my girlfriend wrote the lyrics, does she own part of my music?
4. If I write music to my granddaughter's poem, how long does the copyright in the song last?
5. I'm in an Air Supply tribute band. What permissions do I need to perform live?
6. How can I stop a really sucky band from doing a cover record of my hit tune?
7. If I'm only giving away CDs and DVDs of me performing cover tunes for promotional purposes, I don't need to get permission, right?
8. If I'm only using 20 seconds of a song in a video I'm producing I don't need permission, right?
9. I wrote new, funny lyrics to "Send In The Clowns" as part of my cabaret act, can Steven Sondheim send in the suits and sue me?
10. If I'm a high school band director and want to sell my marching band arrangement of Dave Mathews' "Ants Marching", I can do that, right?

Bonus Question: My budding politico 12-year-old just posted her autotune mash-up of Bill O'Reilly, Glenn Beck, Rachel Maddow and Keith Olbermann over the music to "New York State of Mind" on her Facebook page and her blog. If it's only on her Facebook page, she doesn't need anyone's permission to post her "Network State of Mind" mash-up right?

The Answers:

1. How do I get a copyright in the song I just wrote?

Trick question. As soon as your song (or film or play, etc.) is “fixed in a tangible medium” you automatically have a copyright. That’s it. Once you put the pencil down or hit “save” on your recorder or Sibelius program, you’ve got a copyright.

Now, there are certain benefits to *registering* a work with the US Copyright Office. For example, it provides an evidentiary presumption in your favor in case you have to sue somebody for ripping you off. Also, “statutory” damages (which can range from \$750 to \$30,000 *per infringement* and up to \$150,000 if the infringement was “willful”) aren’t available unless you register the work *prior* to the infringement taking place.

How do you know if someone is going to infringe your song? You don’t. That’s why the government created this incentive for you to voluntarily register your work. You can do this online at www.copyright.gov.

2. How can I copyright the name of my band?

Yet another trick question! You can’t.

Titles, whether of books, films, plays or bands, as well as short phrases and basic “ideas” like chord changes, aren’t copyrightable. Only *expression* of ideas is copyrightable. Think of how many songs are based on either blues or “rhythm “ changes.

You can, of course, get a trademark in your band’s name, if you’ve got a “brand” to protect like Google, Gibson, Chevrolet or Purina. Trademarks are the legal protection you can get in a name, slogan or logo. In most cases a trademark, unlike a copyright, covers the “mark” only in the goods or services for a particular category.

So, it’s possible for one company to have a valid trademark in the name “Zoom” for a car rental company and another to have the trademark in “Zoom” for a chain of fast food restaurants. Getting a trademark is a more complicated and expensive process than registering a work in the Copyright Office and usually requires the assistance of a lawyer. Go to the US Patent and Trademark web site, www.uspto.gov for more information.

3. If I wrote the music and my girlfriend wrote the lyrics, does she own part of my music?

If it was your intention to write a song together, the rule is that both of you own 50% of the *entire song*, words *and* music, unless there's a written agreement between you stating a different arrangement. So that means your girlfriend has a share in the music and you have a share in the lyrics.

If an instrumental version of the song is played, both of you get royalties. The same is true for lyric reprints. Moreover, either of you can make deals to license the song without getting your co-writer's permission – provided that whichever of you does the deal you pay over half the loot to your collaborator. If one of you has better business sense than the other, that's another reason to do a collaborator's agreement spelling out all co-writers rights and obligations, including the percentage ownership of the song, who has the right to make deals and when approval of a co-writer is required.

4. If I write music to my granddaughter's poem, how long does the copyright in the song last?

For works that were created on or after January 1, 1978, copyright lasts for the life of the author plus 70 years. That's a pretty long time. And if there is more than one writer, it's 70 years from the death of the last surviving writer. So if you're getting on in years, write those tunes with your great-grandkids if possible.

5. I'm in an Air Supply tribute band. What permissions do I need to perform live?

Putting aside the questionable artistic merit of such an endeavor, you don't need to permission to perform Air Supply or any other cover tunes live, provided the venue has licenses from the Performing Rights Organizations (PROs), ASCAP, BMI and SESAC. One of the rights a copyright owner has is the right of *public* performance, which means if your compositions are being performed in nightclubs, in concert halls, stadiums, airlines, elevators or on radio, TV or the internet, you're supposed to get paid and it's the PROs that license all of these entities, collect fees and distribute them to writers and publishers.

Imagine if you had to go to every club or radio station that plays your song and have them pay you. You can't. That's why the PROs exist to do it for you. Typically, the PROs and their licensees enter into "blanket" licenses that enable them to authorize public performances of any or all of the songs in that PRO's repertoire. Most reputable venues that have live music have their PRO licenses, so you shouldn't have to worry. In any event, if the copyright police

come knocking, it'll be on the venue's door, not yours as they generally have the deeper pockets and have lots of bands performing. FYI, singing in the shower is a private performance that doesn't require a license. For more information, go to www.ascap.com, www.bmi.com or www.sesac.com.

6. How can I stop a really sucky band from doing a cover record of my hit tune?

Sorry, you can't. Once a record has been commercially released, anybody, and I mean *anybody*, can do a cover record.

The Copyright Act allows the cover artist (or more typically, the label) to get a *compulsory mechanical license* for the cover record. It's compulsory in that the copyright owner(s), typically one or more music publishers, can't refuse permission so long as the *statutory royalties* are paid. It's called a mechanical license, because it was first applied to "mechanical" reproductions of songs in rolls for player pianos and was subsequently applied to 78s, LPs, tapes, CDs and now downloads. The current statutory royalty for a cover of a song that's 5 minutes or less is 9.1 cents per song per unit distributed. So if 100,000 albums containing your song are sold, that's \$9,100 in songwriter royalties.

Most publishers license mechanical rights through The Harry Fox Agency, which, is kind of like ASCAP and BMI, but only dealing with the rights in musical compositions in sound recordings. However, this automatic license with set rates only applies to audio-only recordings. It doesn't apply to songs used in audiovisual works like DVDs. Go to www.harryfox.com for more information. And finally, it works both ways: some group might think you're the sucky band covering their tunes!

7. If I'm only giving away CDs and DVDs of me performing cover tunes for promotional purposes, I don't need to get permission, right?

Wrong. Sorry.

The copyright owner is entitled to compensation for reproduction and distribution of copyrighted musical works, regardless of the purpose. So, just because you're giving them away to promote your career, or as party favors at your bar mitzvah, or "selling" them for a charitable purpose, like putting a new roof on your church, royalties still need to be paid as a *legal* matter.

As a practical matter, however, if you are distributing copies in very limited quantities for non-commercial uses, it's unlikely that anyone's going to go after you, but you should be

guided by your conscience and your business judgment. Just because a cop isn't there to write a ticket doesn't mean it's OK to blow through a red light at busy intersection.

8. If I'm only using 20 seconds of a song in a video I'm producing, I don't need permission, right?

I know, you're thinking this is "fair use", right? OK, let me be clear: everything you think you know about "fair use" is wrong. First of all, "fair use" isn't a right. Under section 107 of the Copyright Act, it is a *defense to infringement*. And, there are no clear cut rules as to when something is or is not fair use. Let me repeat: there are no hard and fast rules.

So, the "30 second rule" or the "only 4 bars" rule or any other one you've heard about is wrong. Fair use is determined on a case-by-case basis in accordance with case law interpreting the 4-factor test set forth in section 107. Sounds complicated, right? It is. If there's a lot of money at stake, you should talk to a lawyer for guidance.

However, you can get a sense of what might or might not be fair use by going to the Copyright Office web site and looking at FL 102, the fair use fact sheet.

9. I wrote new, funny lyrics to "Send In The Clowns" as part of my cabaret act, can Steven Sondheim sue me?

Well, actually, he probably can. But unless you're a major artist performing in a big venue he probably won't. But, like speeding, just because you don't get caught doesn't make it right (or legal).

The only way you can avoid having to get permission when you add or modify song lyrics is if it qualifies as a "parody" of the song. Parody is a type of "fair use." Under applicable case law such as the U.S. Supreme Court's 1994 decision in the case of 2 Live Crew's doing a "parody" of the Roy Orbison hit, "Oh, Pretty Woman," a parody that constitutes "fair use" must use only enough of the parodied work required to conjure up the image of the original *and* the parody lyrics must comment or reflect on the original work – they can't be about some unrelated topic.

So, the song "When You Wish Upon A Jew" from the "Family Guy" episode, "When You Wish Upon A Weinstein," was held by a court to be parody because it only used a few bars of "When You Wish Upon a Star" and clearly provided social commentary on that song. However, a parody of "Send In The Clowns" using the entire song may not be a protected parody and permission would have to be obtained. And the mechanical license for recordings (remember question 6) doesn't allow you to change the words. FYI, Weird Al gets permission for his song "parodies."

10. If I'm a high school band director and want to sell my marching band arrangement of Dave Mathews' "Ants Marching", I can do that, right?

Sorry, but your "arrangement" isn't legally yours. One of the rights a copyright owner gets is the right to create and authorize others to create, "derivative" works. Section 101 of the Copyright Act defines what is a "derivative work." Derivative works include adaptations and arrangements, like making a movie from a novel or a musical from a movie. And putting "your own" guitar tabs up on a web site doesn't cut it, either.

As a practical matter, you can perform your arrangements and with the exception of "classical works" like symphonies, you can probably even record it as your own cover rendition under the compulsory mechanical license (remember question 6) but you may not sell your charts without permission.

Bonus: My budding politico 12-year-old just posted her autotune mashup of Bill O'Reilly, Glenn Beck, Rachel Maddow and Keith Olbermann over the music to "New York State of Mind" on her Facebook page and her blog. No problem with her "Network State of Mind," right?

You're probably thinking that permission is required. Correct. But how many?

Before we get there, as a practical matter, unless your kid is selling lots of copies or getting major advertising on her blog site, it's unlikely that any of the copyright owners is going to choose to enforce their rights. If they do, they'll probably send a "notice and takedown" letter under the Digital Millennium Copyright Act (DMCA).

If you get one of these, take whatever the notice is complaining about down (often the site, such as Facebook or YouTube will receive the notice, take it down and may contact you). Most of the time if you simply take infringing stuff down, you won't get into trouble (read: get sued for infringement and have to pay lots of money).

As for the rights involved, you'd need synchronization and adaptation rights from Fox, NBC, the publishers of "Empire State of Mind" and the record label. And remember, there's no compulsory license. Each permission would have to be individually negotiated for whatever price the copyright owner wants to charge and they have an absolute right to just say no. That's why there's a whole music clearance industry. Aren't you glad you asked?

How did you do?

9-11 correct. You are a copyright maven. Give yourself a pat on the back and a cookie.

6-8 correct. You don't know as much as you thought you did, but you've got some good instincts.

4-7 correct. You need to learn a bit more. Go to my "resources" page, check some of them out and spend some time on the Copyright Office web site.

0-3 correct. If you're in the music biz or any other biz that depends upon a creator's rights (plays, films, TV, books), you and I should talk. Seriously.

FYI, the Copyright Office has its own FAQs, covering things like what's copyrightable and what isn't and everything you always wanted to know about the registration process. [Click here](#) for their FAQs.

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Marc D. Ostrow is a New York-based copyright and entertainment lawyer as well as a performing songwriter and composer. Previously, he was the head of the N.Y. office of classical music publisher, Boosey & Hawkes, where he started the jazz division. Marc has also served on the boards of the New York Chapter of the Association of Independent Music Publishers and the Music Publishers Association of the United States, as a Trustee of the Copyright Society of the USA and as a publisher member of ASCAP's Symphonic and Concert Music Committee. Prior to Boosey & Hawkes, he was a Senior Attorney in BMI's Legal Department. Marc speaks frequently on copyright and music industry topics at various educational, legal and business forums and is currently Adjunct Professor at Westminster College of the Arts of Rider University. He is a graduate of the University of Pennsylvania and the University of Chicago Law School. <http://www.ostrowesq.com>