

# LCA'S LawSmarts Making Money from Your Music

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Congratulations! You've written a song. Or, maybe, you've recorded one. The creative process may be complete, but your venture into the music business has just begun.

The music business is all about finding ways to “find work” for the music you've created – getting people or entities to pay to use your music in various ways. This description is intentionally general – there are many, many ways that music can be used in exchange for a fee. The obvious uses might include selling recordings, or even sheet music, of a specific musical composition. But your music can also generate income to you as royalties when venues license a public performance of your music, as fees paid when an artist covers your song, or as fees from a filmmaker who wants to use your song in a new movie.

This handout will walk you through the legal issues you need to understand to protect and make money from your music. For more information on common legal issues faced by musicians and bands, check out LCA's [Band Law for Bands: Second Edition](#).

## Copyright Protection & Registration

Let's start with a basic definition of copyright. Copyright is a form of protection provided under federal law to certain “works of authorship.” Copyright can be described as a “bundle” of exclusive rights, giving the copyright owner the exclusive right to do certain things with the copyrighted work. Put simply, copyright is the “right to say no” – the copyright owner has the right to exclude others from doing things that the copyright law grants as the exclusive rights of the owner. The copyright owner has the exclusive rights to:

- **Reproduce** the work;
- Create **derivative works** based upon the work;
- **Distribute** copies of the work to the public;
- **Perform the work publicly**; and
- **Display the work publicly**.

## How Does a Copyright Owner Get These Rights?

To answer this question, we need to distinguish between “authors” and “owners.” All authors are (at least initially) also owners; however, owners may, but need not, be authors. The reason for this is simple. Someone who creates a work that is subject to protection under the copyright laws is an “author” of that work,<sup>1</sup> and the author acquires the exclusive rights listed above immediately upon fixation (defined below). There may be more than one “author,” if the work was a collaborative effort. In addition, an author may transfer their rights to another person or company – and that action gives rise to the author/owner distinction. Because, in that case, the recipient of those rights becomes an “owner” or “holder” of all or some of the bundle of rights, even though the recipient was not the, or an, author of the work.

With that background, let’s now see how copyrighted works come into being in the first place. Copyright protects “original works of authorship” that are “fixed in any tangible medium of expression.” So, let’s discuss these two elements of copyright as they apply to the music business – what exactly is a “work of authorship,” and how do you “fix” it?

### “Works of Authorship” in Music

The music business is complex in many respects, not least of which because what we think of as “music” may be created in two distinct ways, with both giving rise to a copyrightable “work of authorship.” The first way to create music is by composing a song, or “musical composition” – for example, by writing down or entering into a computer the notes, chords, or lyrics (if there are any). For copyright purposes, the author(s) of this “musical composition” is the writer of the music (sometimes called a “composer” or “songwriter”) and the writer of any lyrics to the song (sometimes called a “lyricist”).

The second way to create music is to record a performance of a musical composition on CD, record, digital media or other medium. The author of this “sound recording” is the performer who contributed the actual sounds that are fixed in the recording. There may be, and usually are, more than one author of a sound recording. Band members, vocalists, and record producers are good examples of co-authors if their contributions are sufficiently creative. In fact, even sound engineers may be considered authors if they contribute elements sufficiently distinctive to generate copyright protections.

### Copyright Fixation

Importantly, copyright protects the “expression” of an idea, not the idea itself. Humming an original tune, playing it on a guitar, or singing it in the shower do not result in copyright protection. The work must be fixed in a “tangible medium of expression.” You’ve accomplished “fixation” of a musical composition if you’ve written out sheet music (or even chords or tablature)

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<sup>1</sup> There is one notable exception to this general rule – the principle of “work-made-for-hire.” If a musician or songwriter creates a copyrightable composition or recording in the course of their employment, the employer will be considered the author for purposes of copyright.

or lyrics, saved music and lyrics on your computer hard drive, or even sung the songs into your phone. Similarly, you've "fixed" a sound recording once you've made the recording. And, in all these cases, once reduced to a tangible form, the work achieves copyright protection, reserving the exclusive rights described above for the author(s).

Registration, affixing a copyright notice (the "©" symbol) to it, sending a copy to yourself in the mail – none of that is required for the bundle of rights to attach (although obtaining the ability to sue infringers does require registration, as we discuss below.)

### **Protections Provided by Copyright Registration**

Although it is not required, registering your song with the U.S. Copyright Office in Washington, D.C. can help to document your legal copyrights in the work. Copyright registration creates a public record of your claim to copyright ownership in your work, and therefore serves to notify the public that you have enforceable rights to limit the use by others of your work. Registration helps you protect your work by:

- Giving you the right to sue infringers for unlicensed uses of your work,<sup>2</sup> including the right to obtain statutory damages and attorney's fees;<sup>3</sup>
- Creating a legal presumption of the validity of the copyright in court, if registration occurs within five years of publication.

These valuable benefits make it advisable for a copyright holder to register the work with the Copyright Office – it's one of the first steps composers and musicians take to protect their musical compositions and sound recordings.

### **How Do I Register Copyright in My Song?**

To register a song with the U.S. Copyright Office online, use the [Electronic Copyright Office Registration System \(eCO\)](#). There, you can create a free account to register your works. If you are registering both the musical composition and the sound recording, use the application for a sound recording so that both works can be registered within the same form. There is a \$65 application fee,<sup>4</sup> and you'll need to submit a copy of the works with the application.

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<sup>2</sup> A recent Supreme Court decision clarified a controversy among practitioners as to how the timing of your registration affects your ability to sue infringers of your work. It is now clear that *approval* of your copyright application through the issuance of a *registration* is a jurisdictional (in other words, *absolute*) requirement for filing an infringement lawsuit.

<sup>3</sup> Statutory damages (damages fixed in amount by the Copyright Act), and your ability to make the infringer pay for your attorney's fees, are generally only available if you filed your copyright application before the infringement began. Otherwise, you will be required to prove "actual damages," rather than rely on the statutorily fixed sums specified for infringement.

<sup>4</sup> Fees for registration in other instances may vary – i.e., online registration of a claim in a single work with a single author (who is also the claimant) requires a \$45 application fee.

Processing your application generally takes about three months, and after approval you'll receive a Certification of Registration in the mail. But, your copyright will be legally "registered" as of the date the Copyright Office received the application, fee, and copy of the song.

## **Music Publishing**

So, you've created a copyrightable work once you've fixed your song in a "tangible medium of expression." And, maybe you've achieved all the additional copyright protections discussed above by registering your work with the Copyright Office. Now, you may be noticing that taking these steps doesn't usually result in an immediate influx of money. So how do you go about exploiting or profiting from the bundle of exclusive rights of copyright? The answer is that you must find ways to get others to use your musical works in ways that require payments to you.

Music "publishing" is the industry term for this effort to make money from musical compositions (selling recordings of your songs, licensing for use in film or other media, selling sheet music, etc.) and ensure that composers and recording artists receive the royalties to which they are entitled. Songwriters can do this work themselves, though many big-name composers and songwriters delegate these responsibilities to a third-party publishing company. As an up-and-coming songwriter, it's likely that you will act as your own publisher – undertaking those tasks yourself. Because of the way the music industry pays royalties, this means that when you work with certain music performing rights organizations (including ASCAP and BMI), you need to register as both a songwriter and a publisher<sup>5</sup> to collect all the money earned by your compositions.

To profit from certain uses of your compositions, you'll need to enter into individual agreements with end users or companies (i.e., if someone wants to use your music in a film or YouTube video, or if you'd like to sell sheet music). Over the years, however, several companies have been created to help songwriters collect music publishing royalties for a few specific uses. We'll describe these uses and identify the companies that most people go to for these services.

### **Public Performance Licensing**

You've written your song, created and distributed a recording, and now a bar or restaurant venue wants to add it to their playlist and "perform" it for their patrons over their sound system. Recall that as the copyright owner, you have the exclusive right to publicly perform your composition. A public performance of a musical composition occurs any time the song is sung or played, either recorded or live, on radio, television, the internet, a live concert, or a programmed music service (including elevator and on hold music). Any venue that wishes to perform a live version of a copyrighted composition at a music venue, or even play a recording

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<sup>5</sup> Don't worry, you don't need to create a formal entity (like an LLC or a Corporation) to register as a publisher.

of a song in a bar or retail store, needs the permission of the copyright owner. So, how does the venue get permission to play your song, and how do you get paid?

It would be very, very difficult for a venue to obtain individual permissions for every individual performance of every individual composition that is played in their space. And on the other side of this coin, it would be very difficult for a songwriter or publisher to track the many individual plays of their songs so that they can collect royalties from every performance. So, over the years, Performing Rights Organizations (PROs) have stepped in to assist both the copyright owner and the would-be performer of copyrighted songs.

## **Performing Rights Organizations**

A PRO is a company that licenses the right to perform a music composition in public and collects royalties for such performances on behalf of the copyright owner. By registering your song with a PRO, you enable those who want to perform it in a public setting to easily purchase those performance rights without contacting you directly. And the PRO then collects and distributes the corresponding performance royalties owed to you.

Songwriters are only allowed to register with one PRO here in the U.S., so you'll want to decide between the [American Society of Composers, Authors, and Publishers \(ASCAP\)](#) and [Broadcast Music, Inc. \(BMI\)](#), the two largest PROs in the United States. There are others, but up-and-coming songwriters tend to work with ASCAP or BMI (the other big names, SESAC and GMR, are invite-only).

Regardless of whether you choose ASCAP or BMI, you can register your song online and, unless you're working with a third-party publishing company, you'll register as both a songwriter and a publisher. Historically, songwriters and publishers have split licensing royalties 50/50, so registering as both a songwriter and a publisher ensures that you receive all of the royalties earned by your song.

**ASCAP:** Registration with ASCAP (as a songwriter and publisher) costs \$100, and can be completed [here](#). Once you have registered, you'll receive a printable Member Card in your email, and you can begin registering your musical compositions five (5) days after your membership is confirmed. Works can be registered through the Online Title Registration system (accessed through the "Members" link on the ASCAP home page or the "Register a Work" link within the Member Access account). ASCAP has a [collection of resources](#) that will help you through the process, including FAQs, a Title Registration Guide, and a video tutorial.

**BMI:** If you choose BMI, you'll need to register as a songwriter and a publisher separately. Registration as a songwriter is free of charge, but registration as a publisher costs \$150. BMI registration can be completed [here](#). After setting up a membership with BMI, compositions can be registered using the online song registration system in your user account. Like ASCAP, BMI has [useful resources](#) that will walk you through the process.

## Digital Performance Licensing for Sound Recordings

The PROs described above handle licensing and collection of royalties for public performances of musical compositions. But the owner of a sound recording is also entitled to royalties for digital transmissions of that recording through noninteractive digital streaming services. A noninteractive digital streaming service is one in which the user can only hear what the programmer decides to play, such as internet radio (i.e. Pandora & iHeart Radio), satellite radio (i.e. Sirius XM), and cable TV music services (i.e. Music Choice). If you've recorded a song, you're entitled to royalties for every play of that recording on these services.

How do you collect those royalties? SoundExchange essentially acts as a PRO for digital performances of your sound recording on the non-interactive streaming services described above. Like ASCAP or BMI, SoundExchange acts as your agent in licensing and collecting the royalties that streaming services owe you for the digital performances of your recordings. SoundExchange collects fees from these services and distributes the proceeds to recording artists.

Registration for SoundExchange is free and can be completed [online](#). Once you're registered, you can review payment details, track recordings, and check which services are playing your music. You can also become a [member](#) of SoundExchange for some additional benefits, like international collection, advocacy, invitations to SoundExchange events, and conference and equipment savings, though this is not required.

## Mechanical Licensing

Now that we know how to make money from public performances (and digital public performances) of your music, let's take a look at another side of the music business: **cover recordings** – audio only recordings of someone else's musical compositions.

When you create a musical composition, copyright law reserves you the right to designate the first artist to create a sound recording of that composition. You might make that recording yourself, or it could be made by an artist of your choosing. However, once that first sound recording is distributed publicly – streamed on Spotify, sold on a vinyl record, etc. – other recording artists are allowed to create their own cover recordings by obtaining a “mechanical license.” But, here's the rub: recording artists don't have to ask you for permission to cover your

previously recorded composition. So long as their recording retains the basic melody and character of the original composition, they get that right *without your permission* simply by following the “mechanical licensing” process set out in the Copyright Act. In effect, you (the copyright owner) have no choice in allowing these subsequent recordings. That’s why the license is referred to as a “compulsory license.”

Some basic rules govern mechanical licenses:

- The covering artist must inform the owner of the copyrighted composition that they are recording a cover version. They must provide this notice within 30 days of recording and before distribution; and
- For each copy (physical or digital) of the song the recording artist sells, the recording artist must pay a royalty rate of 9.1¢ per composition or, for songs longer than 5 minutes, 1.75¢ per minute of playing time (rounded up).

As noted above, there’s an important condition on compulsory licensing. Cover artists are only entitled to a compulsory license if their recording retains the “basic melody and character” of the original composition. Now you may be thinking, doesn’t that encourage cover artists to change enough of the melody, rhythm, etc. so that they don’t have to pay the royalty for the compulsory license? The answer is, “Not really.” If the cover artist departs too far from the original recording, they may be creating a “derivative work” of the original composition, and therefore violate the composer’s exclusive rights to create derivative works. Generally, if the recording artist is trying to replicate the original sound recording, concerns about derivative works won’t come into play. If you (the composer, original recording artist, or cover artist) think a recording may have crossed the line of what’s covered under a compulsory license, it’s best to consult an attorney.

## **The Harry Fox Agency**

Even though artists don’t need permission to make a cover recording of one of your songs, the above rules can be somewhat difficult to follow. For example, how does the artist get in touch with you to provide notice, let alone arrange to pay you for each copy the artist sells? In other words, how do you get paid? Enter **the Harry Fox Agency**, the preeminent mechanical rights licensing agency.

Both large and independent music publishers register their compositions with Harry Fox, and Harry Fox handles the issuance of mechanical licenses and collection of royalties on behalf of the publishers. Independent songwriters, like you, can take advantage of this service by signing up for a free account [online](#). Through that account, you can register your musical compositions, access royalty reports, and view current song licenses. Once you register your songs with Harry Fox, they will match cover songs recorded by other musicians to your sound recordings and distribute royalties (less Harry Fox’s 8.5% fee) owed to you, the songwriter.

And, if you're interested in recording a cover version of someone else's song, Harry Fox has a handy tool, known as SongFile, which lets you obtain a mechanical license for up to 2,500 physical or digital copies and 10,000 interactive streams. In most cases, you will receive your license within 24 hours.

## **The Mechanical Licensing Collective**

In 2018, Congress amended the Copyright Act through a complicated and much-needed statute called the Music Modernization Act (MMA). Among other updates, the MMA set in motion the creation of the [\*\*\*Mechanical Licensing Collective \(MLC\)\*\*\*](#).

The MLC is a nonprofit organization designated by the U.S. Copyright Office to administer blanket mechanical licenses to eligible streaming and download services (digital service providers or DSPs) in the United States. As of January 2021, if your music is on Spotify, Apple Music, or any number of other streaming services, you will need to register with the MLC to collect royalties from those uses.

You can sign up for a free account with the MLC [online](#). Once you've become a member, the portal will prompt you to search the MLC database to see if your song is already included in the database. Because of the way the MLC database was set up, your song may be included if it was previously registered with Harry Fox. If your work is not already listed, you can register your work with the MLC by using the Registration Wizard, which will walk you through the process. When users of streaming services stream or download your song, the streaming service collects that data (and the royalties from all such streams and downloads) and sends it to the MLC on a monthly basis. The MLC takes that data, determines the amount of royalties you are owed, and distributes those funds through your member account.<sup>6</sup>

## **Online Distribution**

But, you may be asking, how exactly do I get my music out to the public? How do I get my music on Spotify, Apple Music, or anywhere else? Well, for that, you'll need to sign up with a distributor. Unlike traditional publishing or recording deals where you may sign away some ownership of the song, when you sign up with an online distributor, you grant a limited license to distribute the song on your behalf, and you still own the rights to the song. There are plenty of online distributors to choose from, but the top three are [DistroKid](#), [CD Baby](#), and [TuneCore](#). Each one offers similar services; the main difference is pricing.

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<sup>6</sup> For more information on the MLC, check out LCA's LawSmarts Webinar: [Music Publishing and the Mechanical Licensing Collective](#).

**DistroKid:** Unlike the two following online distributors, DistroKid utilizes an annual subscription model. When you [sign up](#), you select a yearly subscription plan. While there are a number of plans to choose from, most independent songwriters/recording artists will likely be best served by the *Musician* plan – it covers one artist or band name at a rate of \$19.99 per year. This model allows for the distribution of unlimited songs and albums so long as you are a subscriber, rather than charging per single or per album. DistroKid [doesn't take a commission](#) from your sales and streaming revenue, but it does take a cut from an optional YouTube monetization service.

**CD Baby:** [Creating an account](#) with CD Baby is free of charge. Rather than charging an annual fee, CD Baby instead charges \$9.95 to distribute a single and \$29.95 to distribute an album, and CD Baby [takes a cut](#) of the proceeds you earn. This covers digital distribution to Spotify, Apple Music, Amazon, and other digital service providers. It also includes YouTube monetization, distribution to Facebook and Instagram stories, sync licensing for TV, films, and games, etc.

**TuneCore:** Like CD Baby, TuneCore does not charge an annual fee, and [creating an account](#) is free of charge. TuneCore charges \$9.99 per single. In your first year, TuneCore charges \$29.99 per album, but that fee jumps up to \$49.99 per album for each following year. TuneCore doesn't take a cut of what you earn from download and streaming revenue, but they do [take commission](#) on other forms of online distribution, including YouTube monetization and synchronization licensing (use of your music in film or TV).

Overall, the online distributor you choose largely depends on how often you plan on releasing new music. Do some research and pick the distributor that is right for you.

## Music Registration Checklist

These are the basic steps you should take to protect, and earn money from, your music. There's a lot here, so we made this quick checklist that will help you ensure that you've taken the basic steps required to protect, and exploit, your music.

Register your copyright(s)	<input type="checkbox"/>
Musical Composition	<input type="checkbox"/>
Sound Recording	<input type="checkbox"/>
Register your Musical Compositions with a PRO (ASCAP or BMI)	<input type="checkbox"/>
Register your Sound Recording with SoundExchange	<input type="checkbox"/>
Register your Musical Composition with the Harry Fox Agency and the Mechanical Licensing Collective	<input type="checkbox"/>
Register with an online distributor	<input type="checkbox"/>

Thank you for reviewing this handout – be sure to check out our other handouts if you are interested in learning more about arts and entertainment law topics. Please feel free to contact Lawyers for the Creative Arts with any specific questions. If you have questions about the content of this handout, contact Christopher Johnson, LCA's Assistant Director of Education, at [cjohnson@law-arts.org](mailto:cjohnson@law-arts.org). If you are currently facing a music-related legal issue, apply through our Legal Referral Service at [www.law-arts.org/application](http://www.law-arts.org/application).

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This guide is intended to give a brief overview of the steps musicians and composers should take to protect their work. This guide is not designed to be a comprehensive statement of the law or how it may be applied in any particular case and should not be relied upon as legal advice. Every situation has its own particular elements. If legal advice is required, consult with a competent attorney.