

A COMPLETELY REVISED AND UPDATED EDITION  
OF THE DEFINITIVE GUIDE TO 'MUSIC BUSINESS'

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EDITION

# MUSIC BUSINESS

A MUSICIAN'S GUIDE TO THE AUSTRALIAN MUSIC INDUSTRY  
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## COMPOSING AND WRITING WITH OTHERS

CO-WRITING CAN BE BOTH A SOURCE OF INSPIRATION AND A LEGAL NIGHTMARE. FOR IT TO WORK, THE WRITERS HAVE TO RESOLVE THE BUSINESS ELEMENTS OF THEIR RELATIONSHIP. THIS INCLUDES THE LEGAL FORM OF THE RELATIONSHIP, HOW COPYRIGHT WILL BE OWNED AND CONTROLLED, THE DIVISION OF ADVANCES AND ROYALTIES AND HOW TO DEAL WITH OTHER PARTIES SUCH AS ARRANGERS, PRODUCERS, TRANSLATORS AND ADDITIONAL WRITERS.

When musicians want to work with other people, they form a band and get involved in all of those issues discussed in earlier chapters such as Structures and Group Contracts. Composers have a less complicated existence. When they want to work with others, they get co-writers.

This chapter explores the amorphous world of co-writing. We will use the expression 'co-writers' to cover anyone who is involved in creating a musical work and acquires a copyright interest in it. (Arrangers and translators are treated separately, because their involvement comes after the original work has come into being.)

Complications are always implicit when writers work collaboratively. In a way, the legal and financial interests of each co-writer competes with the interests of the other, so it is vital that everyone involved understands their position. The principles apply regardless of the number of co-writers involved.

The separateness of the writers' interests becomes particularly evident if the relationship between the co-writers breaks down, or there is a legal problem with the work (for instance, a competing copyright claim by a third party). Because of this, co-writers should always document their intentions at the beginning of their relationship while they can still talk reasonably together about difficult issues. If problems erupt later, it is often too late for calm and reasonable discussions.

## DOCUMENTING THE RELATIONSHIP

We will use a hypothetical pair of writers - you and an acquaintance we will call Oscar. You write lyrics. He composes music. Over a meeting lasting several large drinks, you and Oscar decide to co-write a few songs, so you discuss who will write what, when you will meet, how you and he will exchange ideas and how any royalties will be split. You might even get round to discussing questions of artistic control before the bar closes.

Even if not put into writing, this is likely to be an enforceable contract, particularly if either of you perform a part of your side of the bargain. Unfortunately, there is a strong chance that you each have a slightly different recollection of the terms of your agreement. This is why making a written record is so important. Putting it in writing makes your respective lives a whole lot easier. If a dispute should arise, if you can't negotiate a solution, a court would have to decide what the terms of the agreement were, having regard to your respective versions of what was discussed over a few drinks. This isn't good for either party because if the song has been recorded, no royalties will be paid to either party until the dispute between the writers is resolved.

A court may even have to 'imply' additional terms if there is a gap in your agreement. Courts have the power to make assumptions about what you and Oscar would have agreed, had you actually got around to considering the particular issue. These assumptions are then taken as a term of your agreement. This process of telepathy usually ends up pleasing neither party.

In most cases, a brief letter confirming the agreement, even in point form, will be sufficient. However, if the project is a major one (e.g. a commissioned musical show or a major performance work) then a proper agreement would be well worthwhile. If you are already bound by a publishing agreement at the time, you should, and may be contractually obliged to, consult with your publisher in relation to the effect of the co-writing agreement on the publisher's rights in your songs. Many writers' agreements include a clause requiring the writer to try to secure (for the publisher) the publishing rights for any co-writer who is not already subject to a contract. (As you can imagine, this is rarely successful.) In any event, agreements covering major co-writing projects should be drafted by a lawyer. The resulting document can, suitably amended, then form the basis of any subsequent projects where you work with other co-writers.

You should always keep a work diary. Faithfully note your meetings and any agreements reached. Also note any significant dates or events such as the date you actually delivered your part of a song. If your diary is kept as a matter of routine, it is likely to be admissible to a court as a business record and could provide vital evidence to help you in a copyright claim, whether the

claim is by you or by another person against you claiming breach of their copyright.

Sometimes, it is useful to confirm decisions by sending an informal letter or note of some kind to the co-writer. This is particularly important if there is more than one co-writer. This way there will be a record of your mutual understandings should things become unpleasant or merely complicated.

Also, don't forget to give your publisher demos of all of your songs, together with a note stating the agreed writer shares. This is a very simple, basic part of having a professional approach towards the protection of your material and keeps your publisher fully informed about and interested in your work. (You only have one publisher; they have hundreds, even thousands of writers. Being practical, if you want your publisher's involvement in your career, which one of you is going to have to take the initiative in the relationship?)

## **PARTNERSHIPS**

If the co-writing venture is entered with the intention of making a profit then, depending upon your agreement, you and Oscar are likely to have formed a legally recognised 'partnership'. (Partnerships are discussed in some detail in Chapter 2, **Business Structures**.) A partnership is not a separate legal entity. It is a legal relationship, governed by legislation and common-law.

The good thing about partnerships is that there is a lot of law covering them so, even if you do not document it properly, the courts are usually able to unravel any problems and reach what everyone hopes will be a reasonable solution.

The downside of partnerships is that partners are individually and collectively responsible for the liabilities of the partnership. As a result, if a song has a credit 'Words and music by X (i.e. you) and Oscar', then both of you may be liable if the music infringes someone else's copyright, or the lyrics are defamatory. Claimants will always sue the partner with money, leaving the partners to sort out the contribution questions. The 'innocent' partner may have a right to recover damages from the other partner, though this is cold comfort if the other partner has no assets or money.

## **COPYRIGHT OWNERSHIP – JOINT AND COLLECTIVE WORKS**

Co-written works can be either 'joint' works or they can be (as they are sometimes called) 'collective' works (though that expression is not strictly a technical term). The distinction between joint and collective works can have important ramifications upon who controls exploitation of the song.

## COLLECTIVE WORK

When each co-writer's contribution is a literary or musical work in its own right, and is identifiable as separate from the other's contribution, the parts are owned separately. Therefore, if you write the lyrics and Oscar quite separately writes the music, then each of you has a distinct part of the song. Unless you and Oscar agree otherwise, you separately own the copyright in the lyrics and Oscar owns the copyright in the music. The song is a collective work when the two parts are combined, but each part can exist by itself too. If the credits say 'Lyrics by X. Music by Oscar' this implies it is a collective work. Bernie Taupin and Elton John work this way - Taupin writes poetry. He sends it to John, who puts it to music. They do not actually 'collaborate' in the creative process.

In a collective work, unless you both agree to the contrary, you can sell, assign or license your lyrics separately from Oscar's music and Oscar has no copyright claim to any income you might receive from that activity and vice versa. To put it simply, you own 100% of the lyrics and Oscar owns 100% of the music.

## JOINT WORKS

Remember that a song is made up of two 'works': the literary work (the lyric) and the musical work (the melody). Assume that you and Oscar write the melody together and you write the lyric alone. If you collaborate in a way that makes it impossible to separate each other's contribution to the music, then you are creating a work of joint authorship (a term defined in the Copyright Act) and together, you will own the copyright in that work in equal shares (unless you agree otherwise).

You will own 100% of the lyric and you and Oscar would each own 50% of the copyright in the music. Although you are free to licence the lyrics, you would not be entitled to exploit the copyright in the music without Oscar's permission. To do so would constitute copyright infringement even though you are a part owner of the copyright in the work.

In *Prior v Sheldon and Others* [2000] FCA 438, Zelda Sheldon was ordered to pay around \$77,000 to John Prior following her failure to acknowledge his part ownership in musical works associated with the television series "The Great Outdoors". Sheldon had attended Prior's studio with a view to composing a theme for the series based on her preliminary ideas. She drummed semi-quavers on her lap and sung 3 notes to give him an idea of what she was thinking. He recorded variations of the notes, selected the tempo, selected samples, selected sounds including bass, piano and synthesiser sounds, added notes, added structural elements including accompanying chords, bass line and counter-melody (all of which she

approved). The court regarded the theme as a work of joint authorship. The court's view was that Ms Sheldon took only a few ideas to Mr Prior's studio and that Mr Prior made a major creative contribution to the theme, "possibly the major creative contribution".

Examples of joint works are common: e.g. if the credits for the work say, 'Words and music by X and Oscar', this implies joint authorship and ownership of both the lyrics and the music.

You have to make a significant and original contribution to be considered a joint owner of a work. For example, where a group works-up a melody in the studio, it may be nothing more than an arrangement. In 1999, three members of the English group Spandau Ballet sued the fourth member, Garry Kemp, alleging that they were joint authors of the works performed by the band. It was common ground that Kemp developed the melody, the chords and the structure of the songs - in his head. He would play a song in its rough state to the others; they would develop it, arrange it, rehearse it and eventually record it. The judge held that the songs thus recorded, were not the result of a collective creation. The band members had not made a 'significant and original contribution to the creation of the work'. Their contributions were to the interpretation and performance of the work, not the creation of it. If the band members wished to receive a portion of the publishing income, they should have had a formal contract in place. (See *Hadley v. Kemp*, unreported, 30 April 1999).

## CONTROL

Right at the outset, to remove any ambiguity and avoid complications later on, you and Oscar should sort out your individual interests in the works that you are about to write together. The most important reason to do this is ensure that you have a mechanism to ensure the orderly control of the work: Do both of you have the right to record the work? Can either of you license it? Are there any limitations? What will be the splits? What will the credit be?

Each contributor is a copyright owner and therefore can have his or her own publisher to handle their share of the song. This means that two (or even more) different publishers may control the one song simultaneously. This is a common situation, but you can imagine the problems if the co-writers have not agreed upon the policy to apply when granting licences for commercial licensing. Commonly, stalemates occur and neither publisher can fully exploit the value of the song.

## THE ROYALTY SPLITS

Co-writers commonly agree to share the rights in the lyrics and the music equally, but you can make whatever arrangement you like. You can change the agreed split at any time but, if you do, remember to tell your publisher so the change can be registered in its copyright files and it can notify any sub-publishers. Similarly, where the splits are changed, APRA will continue to divide the royalty pay out on the old basis unless you or your publisher advise them to do it another way.

There are no definitive rules as to the splits. The law will generally assume equal shares between co-writers unless there is compelling evidence to the contrary. This presumption is included in many publishers' writer-agreements too. If you have a fetish about counting lines or words, and everyone is happy to go with it, then fine. Most people prefer to go for the 'all for one and one for all' principle and give equal shares, even if one person does more 'work' on a particular song than the other writers. Lennon and McCartney worked this way. Even where one wrote the whole of a particular song, the other got a credit as co-writer. It keeps things simple and, where the writing load is similar, the royalties generally average out in the long term.

## APRA REGISTRATION

Co-writers need to be careful when registering their interests with APRA because frequently this will be the only formal indication of the ownership split. Remember to advise APRA of any changes (or get the publisher to do it).

## CONTRACTUAL OBLIGATIONS

If you are bound by an 'exclusive writer' music publishing contract, remember that co-writing can have important ramifications on your royalties and advances. Most contracts stipulate that royalties and advances will be reduced pro rata in the case of songs not 100% written and owned by the relevant writer. It may also affect any minimum delivery clause in the contract. Too many co-written songs may result in an extension of the term of the contract until the minimum number of songs are delivered.

On the other hand, some writers are signed by publishers precisely because they are so good at writing with other people. They seem to do their best work with others. Agreements based on this premise need to be structured accordingly or they can disadvantage the writer. Standard writer agreements usually contain provisions that are inappropriate if the writer will be writing primarily with others. For example, most 'term' publishing agreements require that the composer will deliver 10 works a year. If you do

co-writes the drafting of the minimum commitment clause should make it clear that what is required is the 'equivalent' of 10 songs: e.g. it would be fulfilled by 5 wholly written songs and ten co-writes.

## **ARRANGERS AND TRANSLATORS**

The right to adapt a musical work is one of the exclusive rights given under the Copyright Act to the owner of a musical work. The right to adapt is defined as being the right to arrange and transcribe the work. Under the right circumstances, a separate copyright can arise in relation to the adaptation and writers need to be cautious when engaging someone to adapt a work.

### **ARRANGEMENTS**

The Copyright Act doesn't mention 'arrangements'; it talks about 'adaptations'. The Act provides that the writer of the musical work has the exclusive right to make adaptations of that work.

An adaptation must have a certain quality of creativity and an input of talent and labour by the arranger that distinguishes it from the original work. So, for example, a cover will not be an adaptation if it merely involves change of key or instrumentation. The distinction becomes blurred, however, when an arrangement is so comprehensive that it becomes a new musical work in its own right.

The test the courts apply is an objective one. Just because the arranger thinks he or she has created a new work does not really matter. What matters, is whether the court thinks a new work has been created. The law is unclear in this area but, needless to say, an arranger who needs to establish that his or her work is a new 'work', faces the prospect of a long and expensive argument.

Even if a particular arrangement meets the test and is recognised as having an independent copyright, the arranger has only limited rights. The copyright only relates to that particular arrangement, so anyone else can go to the original work and make another arrangement, which might be uncannily like the earlier, but will not infringe its copyright provided it was independently created. The arranger does not have the legal right to authorise new adaptations of the original work. If this were otherwise, the original's owner would have his or her copyrights eroded over time.

The original owner can stop various uses even of the adaptation, because the adaptation can never be completely separated from the original work. To use an analogy, if the arrangement is thought of as the paintwork on a car, the paintwork does not really have an independent existence. It cannot be driven by itself. The car's owner has final say over where the car, with its paintwork, will go.

Where an arrangement is legally recognised as a true adaptation and there is no contrary agreement, the arranger will be entitled to receive a share of income produced by that particular arrangement, but not otherwise. That share is usually worked out by negotiation between publishers. In Europe, most public performance societies will distribute part of the public performance fee to the arranger at the same time as it distributes to the composer and the publisher. The usual share is two-twelfths of the total.

If you decide to get a third party to arrange your songs, you may face a demand from the arranger (or a producer) for a share of the copyright as a condition for arranging the song. Owners should avoid giving copyright in the song to an arranger, if at all possible. At most, the arranger should get a share in his or her particular arrangement of the work rather than a share of the copyright in the original work.

A once-only fee for services is the usual basis for arranging, and is better for the composer because it saves fragmenting the copyright. Even if you agree to pay a royalty, this can be done without assigning any copyright over to the arranger. (There is a difference between granting a share of the income stream and a share of the copyright. Both result in a split of the income but only one results in a split of the copyright.) Ultimately, it depends whether the arranger can turn a dud song into a killer song. It's a decision that has to be made at the time.

## **TRANSLATORS**

Translators are essentially in the same position as arrangers. The right to authorise translations is held by the copyright owner, who can impose whatever conditions it considers appropriate. In most cases, the translation will have its own copyright, provided its creation involved the necessary degree of skill and labour.

If it has a separate copyright then, in the absence of a particular agreement, the translator will be entitled to receive a share of income from that translation. Again, publishers usually negotiate this for their writers. Your publishing agreement will determine who pays for the translator's services, and what impact this will have on your royalty income. In Europe, public performance societies will often distribute two-twelfths of the performance income to translators.

Although translation is comparatively rare in Australia, it is of course common in Europe and becoming more so in North America, where the growth in Spanish and other languages has created a market for non-English language versions of pop songs. Sting put out a Spanish and Portuguese language album of several tracks from his album '...Nothing Like the Sun'. Similarly, Bachelor Girl generated a lot of interest with their Japanese versions

of their songs and it's likely this helped them to get into a notoriously difficult market for non-Japanese artists. There are plenty of other examples of the industry recognising the value of translated lyrics, so translations will undoubtedly become more common.

The usual process for getting a lyric translated is for a literal translation to be prepared. Sometimes a translation changes the original (say for purposes of rhythm or rhyme, which is an adaptation. Good publishers will consult with their writers, to make sure they are happy with the translation before approving it. A translator will usually get a nominated percentage of all income derived from the translation (in the region of 10%). Public performance splits are determined by the local collection society's rules.

## **RECORD PRODUCERS**

Beware of record producers who insist on claiming a writer's credit on the songs they produce. These producers are very expensive.

Production of a sound recording does not automatically give any basis for a claim for copyright in the musical work or the sound recording. The claim is based purely upon the commercial clout of the producer. It may be that the cost of getting a given producer (particularly an internationally renowned name) is an enormous fee and a copyright share. You have to decide whether the cost is justified. You also have to consider the impact on your publishing agreement.

Producers who want a share of the copyright are intending to share in your on-going publishing income generated by the song. This can even include covers on which they have not worked, for the life of copyright. Consider carefully whether you can afford this person. It may be better to pay higher points under the producer agreement than to give away a share of the publishing rights forever.

Some producers are considered to be so valuable to a recording's success that they may be worth the expense. Only you and your co-writers can decide. If you do decide to part with some of the publishing, don't go mad with generosity. Make sure you get your lawyer to negotiate and document the agreement. Any producer participation in the copyright should be restricted to his or her particular arrangement of the song, but not in the original work itself.

## **ADDITIONAL WRITERS**

A slightly different situation arises where the original writers all agree to give a co-written song to (say) a third writer to finish or improve it. There is an argument that there is a creative input into the song itself which might justify the original writers each relinquishing a part of their respective shares to give the third party a share.

If the re-written song is more likely to be a hit than the original, it may be better to take 30% of a hit, than 50% of a song that no-one wants to know about. Remember that a re-written song is likely to become a new song, though the original version obviously continues to exist and remains subject to copyright. The distinction between a re-write of an incomplete song and adapting a completed one can be quite blurred at times. Re-writing involves substantially reproducing part of the original song, so re-writing without the owners' consent is a breach of copyright.

Co-writing can be artistically satisfying and financially worthwhile, but if things start going wrong, there is a lot of comfort to be gained from having an agreement which anticipates the more likely areas of dispute and then provides a mechanism for resolving them.

## ACCIDENTAL CO-WRITERS

This is not as silly as it sounds. Many songs are composed in the recording studio and are not 'written' in advance. The band gets together, a chord becomes a sequence, the sequence becomes a melody, the melody gets words which are only slightly more complicated than ga-ga, then the drummer has a great idea for a lyric line and, before the week is out, a terrific song is born - but with perhaps five proud parents. Who claims what? Unless the contributions are clearly separable, it is likely to be a joint work, and in the absence of any other agreement, copyright and proceeds will be shared equally. Those members with publishers will not be affected, provided they notify their publisher of their share. Those without a publisher should consider doing a single song assignment to the main publisher, if only to keep copyright administration simple. (More about these agreements in the next chapter.)

This process becomes harder when songs are created on computer synthesisers by the producer, particularly in electronica and hip hop, where the 'melody' is often largely replaced by a highly distinctive drum-machine pattern or sound loop. Then, sounds and samples are 'pasted' over this pattern as various people suggest new sounds and effects to add. Deciding who wrote what part is a real problem here. In fact, it raises quite nice legal points about the nature of the work and whether it has the necessary qualities to make it subject to copyright as a musical work, but that's lawyer talk. As far as you are concerned, you should make every effort to simplify your life, by thinking about the possibilities, anticipating complications and documenting your work.

If the creation process has involved the use of samples, remember that they are likely to be copyright works and you can't use them without a licence. (Samples are dealt with in more detail in Chapter 8.)