

THE MYTHOLOGY OF COPYRIGHT

You can use four bars of music without permission, right? Wrong. I've heard this myth for years. I usually answer this question by saying that if Beethoven were still protected by copyright, and you used the famous opening of his Fifth Symphony without permission, he, or more likely his publisher, could probably sue you for copyright infringement and win. That excerpt is so famous and so identified with the Fifth Symphony, that even the use of such a small quote might constitute copyright infringement. In fact a Federal Appeals Court judge actually said just that in a sampling decision involving the Beastie Boys.

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So how much of a work can you safely use? There's no way to quantify this other than to say that the U.S. Copyright Law of 1976 does include the concept of fair use, which gives others the right to use a copyrighted work without payment or permission, under some circumstances. Some examples of fair use are: excerpting a book or a play in a critical review, quotations in a scholarly work or even as the basis of a parody, where the original work is being transformed into a new, satirical version. The jazz solo which briefly quotes another tune is clearly a fair use.

And then there's the myth about the self-addressed envelope. That's where you send yourself an envelope containing your original work and when it arrives, you put it aside thinking that because it has a postmark and has not been opened, it is persuasive proof of its date of creation. But envelopes can be steamed open, and more importantly, you don't get any of the benefits of a registration under the Copyright Law like a legally (if rebuttable) presumption of ownership (which means that the burden is on the defendant to prove you don't own it) plus the right to legal fees if you win and the superior damages available under Federal law. So my advice is to register your composition rather than sending yourself musical junk mail.

How about this myth: "I used it without permission, but it was not for profit." Profit doesn't matter. Under our law, a plaintiff does not have to prove that the infringing use made a profit to prevail. The law provides for statutory damages, which allow for up to \$150,000 in damages plus legal fees per infringing use, regardless of profitability.

I've also heard: "I wrote the publisher for permission to write a new lyric to the melody and I didn't get an answer." My answer to that is, "Yes, you did." If you don't get a 'Yes' the answer is 'No'.

On the other hand, "They recorded my song and didn't ask permission." In that case, the law provides a "compulsory license," whereby once a song has been recorded by anyone, anyone else can record that song without permission so long as the "statutory mechanical royalty" (currently \$0.091 per composition per record sold) is paid.

Another one: "They stole my blues riff idea so I'll sue them." Not so fast. Does it contain the requisite degree of originality to entitle it to copyright protection? Under the Copyright Law, ideas are not protected, only the way in which they are expressed in a "writing." Anyone can write a minor blues in 3/4 time. That's only an idea—it just can't sound too much like the one Wayne Shorter called "Footprints."

What constitutes copyright infringement? One lawyer once facetiously defined it as, “Two songs that sound alike to the ear of the average tone-deaf judge.”

Copyright is the exclusive protection given to original works of authorship that have been fixed in a tangible form or expression, which can be reproduced or communicated. If the work itself is copyrightable, then the ways the work is adapted, or the so called “derivative works” like translations, sound recordings or arrangements should be copyrightable. But the amount of originality required to entitle a derivative work to protection is a highly subjective concept.

Here are a few myths in this area:

| Are music arrangements protectable? Unfortunately, they have not usually been considered by the courts to have the requisite degree of originality to entitle them to copyright protection. Chord changes are also not ordinarily protectable, as most chord patterns can be traced to unprotected sources and are therefore not original. Tell that to a musician trying to fake the bridge to “The Song Is You” or “Body and Soul.”

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What about the copyright potential of a jazz solo? Many people think that famous solos belong to the soloist, such as Coleman Hawkins’ “Body and Soul” or James Moody’s “I’m In the Mood for Love.” Unfortunately, the artist usually does not own the solo. In general, the owner of the underlying copyright in a song (either the composer or the publisher depending on the wording of the contract) legally owns the solo.

What about protecting song titles? This is not possible, at least not under the Copyright Law. But under Trademark law there may be protection for some titles, when they refer to a specific source like “Music from Star Wars” which implies that the music comes from that source thereby leading the public to mistakenly believe that a relationship exists. It does not, however, mean that there is copyright protection in the title.

Some knowledge of copyright is essential to anyone who wants to be a creator, performer or a teacher in music. In this article I have tried to expand that knowledge of what is covered by copyright by exploring some areas which are not.