Co-Authorship Takeaways From Pop Star Copyright Battles

By **Matthew Wilson** (November 30, 2022)

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The act of writing a song takes many forms.

For example, Brian Wilson often worked alone, delivering completed compositions to his The Beach Boys bandmates for the first time in the studio.

In the early years of The Beatles, John Lennon and Paul McCartney wrote "eyeball to eyeball," Lennon famously said, in collaborative writing sessions and continued to share equal credit for the duration of the band's existence.

Jerry Garcia merged his composed music and melodies with Robert Hunter's lyrical creations to form some of the most famous music in the Grateful Dead catalogue.

From Jerome Leiber and Michael Stoller, to Elton John and Bernie Taupin, and Richard Rodgers and Oscar Hammerstein, the songwriting processes employed by many of history's most famous composers and lyricists involved intentional and coordinated efforts that leveraged the creative strengths of the authors.

With respect to copyrights in musical works, collaborative writing activities coupled with a directed intention toward a common product yields a specific legal result: the joint work.

However, when the intentions of the parties are less clear in connection with purported collaborative writing, as illustrated this year in the lawsuits involving Post Malone and Lizzo, the question of whether a resulting song constitutes a joint work can lead to a bitter fight.

U.S. Copyright Law Background

Under the U.S. Copyright Act, the author or writer of an original song owns the copyright in that song the moment it is fixed in a tangible medium of expression.[1]

When Felice and Boudleaux Bryant co-wrote hits for The Everly Brothers, each author was considered a joint owner of the copyrights in the resulting joint works according to the Copyright Act.[2]

Although their songwriting activities were governed by a publishing agreement with Acuff-Rose Music Inc., application of the modern day Copyright Act to the facts would almost certainly lead us to a consistent conclusion.

The default rule in favor of co-ownership for joint works is rooted in common law concepts of joint labor and assumed common design — as articulated by Judge Learned Hand in the 1915 case Maurel v. Smith in the U.S. District Court for the Southern District of New York — which were subsequently codified in the Copyright Act.[3]

Of course, the default rule establishing joint ownership may be modified by the co-writers in a written agreement that reflects their contrary intentions. A written agreement offers a clear, evidentiary record of the parties' intentions as to whether a musical work should be considered a joint work and, if so, what terms will apply among the joint authors.

Disputes often arise when the expectations of the writers do not align, and their corresponding intentions cannot be confirmed by a contract or other writing. It is quite common for musicians and songwriters to work in informal settings without any consideration of legal formalities.

As a result, it is equally common for songwriters to encounter claims of joint authorship from alleged co-writers, whether based on direct participation in the initial writing process, or the production or arrangement of the musical work by a session musician, producer or engineer. The common thread flowing through many such claims is the absence of any written agreement.

Recent Copyright Battles and the Joint Work Analysis

Post Malone recently **asked** the U.S. District Court for the Central District of California to sanction an artist who claims in Tyler Armes v. Austin Richard Post that he helped write the rapper's song "Circles."

The suit, which is still pending, alleges Armes wrote the song during a jam session with Malone in August of 2018. In August, however, Malone argued that Armes hid crucial text messages from the court that contradict his claims, and that the court should dismiss the case.

Lizzo settled a similar lawsuit in March — Melissa Jefferson v. Justin Raisen, also in the U.S. District Court for the Central District of California — that claimed the 2019 hit "Truth Hurts" was co-written by Lizzo and three uncredited individuals.

According to the plaintiffs, a line from the song originally appeared in an unreleased demo that the trio co-wrote with Lizzo called, "Healthy," that was ultimately released under the name of the hit single.

Responding in a countersuit, Lizzo insisted that the claimants did not propose the inclusion of the lyric in the song, nor did they suggest how Lizzo should sing the lyric. From Lizzo's point of view, there was no intention among the parties to create unified work.

If we assume that the plaintiffs did assist with the creation of the original lyric, then the joint work analysis hinges upon the facts surrounding the creation of the demo and the subjective intentions of the co-writers. Without a written record, this is not an easy determination for any fact finder.

As a threshold matter, the song will only be considered a joint work if both the contributions of the authors are inseparable or interdependent parts of the unitary work,[4] and the authors intended that their respective contributions be merged into the resulting work.[5]

While the specific nature of the contribution involved remains an open question across the federal circuits, the consensus is that each contribution must satisfy the criteria for copyright protection under the Copyright Act.[6]

As to the question concerning the specific nature, the circuit split involves a determination as to whether each contribution is independently copyrightable[7] or merely a nontrivial expression.[8]

For purposes of the claims against Lizzo, the song would not be considered a joint work

unless the writers collectively intended that their respective, nontrivial contributions be merged into the single work.

This analysis requires an investigation of the contemporaneous actions of the parties and an attempt to infer the motivations associated with those actions.

While the intentions and expectations among band members, e.g., Lennon and McCartney, or established writing partners, e.g., Felice and Boudleaux Bryant, are often readily apparent based on historical practices, the analysis is much more difficult in the absence of a discernible course of past dealing.

When facing such a determination, the lack of a written record clouded by a fog of ambiguous actions can lead to unintended consequences when judges defer to the default finding in favor of joint ownership.

The Copyright Act provides that in the absence of a written agreement to the contrary, each joint author owns equal shares of a co-written song regardless of each author's actual contributions relative to the whole.[9] Furthermore, each joint author is deemed an owner of an undivided interest in the unitary work as tenants-in-common.[10]

As such, the respective authors possess the unilateral authority to exercise the exclusive rights reserved to copyright holders including the right to reproduce, license nonexclusively and exploit the song, along with the right to transfer the author's individual interests in the song without the permission of the other co-authors.

Regarding the commercial exploitation of the joint work, each joint author is also entitled to her pro rata share of any proceeds attributable to the exploitation of the work. In practice, this means that even de minimis contributions are sufficient to bestow an equal ownership interest to the contributors and such contributors must be accounted an equal financial share of any proceeds derived from the exploitation of the composition.

From a financial and administrative standpoint, one need not explain why the joint work characterization might be viewed as undesirable, if not wholly unacceptable, to the unwitting songwriter.

Practical Suggestions

The best way to avoid these unintended outcomes is for writers, producers and recording artists to memorialize their intentions and expectations in a signed agreement — preferably before the commencement of the writing process.

In most instances, a so-called split sheet may be used to outline ownership splits, in addition to other related terms, such as administrative rights and procedures, conditions and restrictions for third-party uses, first recording rights, and authorizations related to lyrical and/or arrangement changes.

In some instances, songwriting splits and ownership rights might be addressed in a definitive producer agreement, band member agreement or the often inaccurately titled work-for-hire agreement.

While the formalities and format are generally less important, the requirement that the intentions of the writers and contributors be documented in a signed agreement is both necessary and indispensable under the law.

In real-life terms, the failure to memorialize collaborative intentions, or lack thereof, in a signed agreement has the potential of transforming a songwriter and their fortunate houseguest into Lennon and McCartney, i.e., joint authors, in connection with a song shared among them.

While the default joint work rules established by the Copyright Act are designed to yield equitable results for co-creators, the actual fallout can prove acutely unfavorable to the controlling songwriter and incentivizes bad faith among incidental participants.

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[1] 17 U.S.C. § 102(a).

[2] 17 U.S.C. § 201(a).

[3] See Maurel v. Smith, 220 F. 195 (S.D.N.Y. 1915); Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266 (2d Cir. 1944); Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F.2d 406 (2d Cir. 1946).

[4] See Garcia v. Google, Inc., 743 F.3d 1258 (9th Cir 2014).

[5] See Aalmuhammed v. Lee, 202 F3d 1227 (9th Cir 2000).

[6] Contributing mere ideas, refinements, or direction generally does not result in a joint work for copyright purposes. See Gaylord v. United States, 595 F.3d 1364, 1379 (Fed. Cir. 2010); Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1072 (7th Cir. 1994).

[7] The U.S. Courts of Appeals for the Second, Seventh, and Ninth Circuits have held that each separate contribution to a work must be independently copyrightable for the contributors to be co-authors of a joint work.

[8] The U.S. Court of Appeals for the Third Circuit has held that a joint author must contribute only some "non-trivial" amount of creative, original, or intellectual expression to the work.

[9] See Brownstein v. Lindsay, 742 F.3d 55, 65 (3d Cir. 2014).

[10] See Cmty. for Creative Non-Violence v. Reid (C.C.N.V.), 846 F.2d 1485 (D.C. Cir. 1988), aff'd, 490 U.S. 730 (1989)).