

MUSIC LAW 101: WHAT EVERY BAND NEEDS TO KNOW

Coe W. Ramsey, Thomas Varnum, and Amanda Whorton

AUGUST 26, 2018

When “Good” Bands Go “Bad”

■ Puddle of Mudd

- *Spurgeon v. Scantlin*, 502 F. Supp. 2d 1021 (W.D. Mo. 2007)
- Former Band Member’s Claim For Declaratory Judgment Of Co-Ownership Of Song Was Time-Barred

■ Squirrel Nut Zippers

- *Maxwell v. Phillips*, 2007 U.S. Dist. LEXIS 54013 (M.D.N.C. 2007)
- Former Band Member’s Claim For Accounting Of Royalties Based On Partnership Fiduciary Duty Survived Motion To Dismiss

■ Third Eye Blind

- *Fredianelli v. Jenkins*, 931 F. Supp. 2d 1001 (N.D. Ca. 2013)
- Former Band Member’s Claim That He Was A General Partner In The Ownership Of The Band Dismissed Because He Had No Effective Control Of The Band’s Affairs
- Claim To An Ownership Interest In The “Third Eye Blind” And “3EB” Trademarks Also Dismissed

When “Good” Bands Go “Bad”

■ Ariel Pink’s Haunted Graffiti

- *Sperske v. Rosenberg*, 2013 U.S. Dist. LEXIS 103121 (N.D. Ca 2013)
- Former Band Member’s Accounting Claim Based On Partnership And Copyright Co-Ownership Survived Motion For Summary Judgment

■ Exposé

- *Crystal Entertainment & Filmworks, Inc. v. Jurado*, 643 F.3d 1313 (11th 2011)
- Current Band Members Owned Band Name Because They “Controlled The Qualities And Characteristics That The Public Associated With The Exposé Mark”

■ Steppenwolf

- *Kassbaum v. Steppenwolf Productions, Inc.*, 236 F.3d 487 (9th 2000)
- Former Band Member Can Promote That He Was “Formerly Of Steppenwolf”

■ The Dead Kennedys

- *Dead Kennedys v. Biafra*, 2003 Cal. App. Unpub. LEXIS 5862 (2003)
- Band Member Transferred Copyright Interest In Songs To Band In Written Partnership Agreement And Breached His Fiduciary Duty In Failing To Account To Partners

When “Good” Bands Go “Bad”

■ The Doors

- *Densmore v. Manzarek*, 2008 Cal. App. Unpub. LEXIS 4367 (2008)
- Injunction Enjoining Use Of Band Name And Order To Pay Profits To Band Partnership Affirmed

■ Absent Element

- *Andrews v. Daughtry*, 2013 U.S. Dist. LEXIS 24355 (M.D.N.C. 2013)
- *Andrews v. Daughtry*, 994 F. Supp. 2d 728 (M.D.N.C. 2014)
- *Andrews v. Daughtry*, 2015 U.S. Dist. LEXIS 86334 (M.D.N.C., July 2, 2015)
- Motion To Remand Granted (Twice) Because Former Band Members’ Accounting Claims Were Based On State Partnership Law And Not The Copyright Act; Parallel Copyright Claim Stayed Pending State Court Proceeding

■ The Platters

- *Robi v. Reed*, 173 F.3d 736 (9th Cir. 1999)
- Former Band Member Could Not Use Band Name Because He Left The Group And Was No Longer “Continuously Involved” With The Group

Common Themes in Band Disputes

- **Trademark Law**
 - Use Of Band Names After Band Has Split Up
- **Copyright Law**
 - Claims Of Co-Authorship / Co-Ownership Of Band Songs
- **Partnership Law**
 - Accounting Claims And Breach Of Fiduciary Duty Claims

Trademark Law and Band Names

- **Trademark/Service Mark Is A Word Or Other Device Used In Commerce To Identify And Distinguish The Source Of Goods**
- **Mark Must Be Distinguishable From Others**
 - The More Distinctive, The Greater The Protection
 - Strength And Corresponding Protection From Lowest To Highest: *Generic—Descriptive—Suggestive—Arbitrary—Fanciful*
- **Concurrent Federal (Lanham Act) And State (Common Law And Statutory) Jurisdiction**
- **Ownership Is Based On Continued Use**
 - Not Necessarily Creation

Trademark Law and Band Names

- **Ownership/Use Of Band Name Is Determined By:**

1. What Qualities Or Characteristics Are The Group/Artist Known For?
2. Who Controls The Qualities Or Characteristics?
3. If Qualities And Characteristics Are Personal To And Controlled By Group/Artist, Then Group/Artist Owns The Name.
4. If Qualities And Characteristics Are Controlled By Someone Else, Like Manager, Then Owned By Manager.

- **Infringement If “Likelihood Of Confusion”**

- Generally Okay To Say “Formerly A Member Of”

- **Trademark Fair Use:**

1. Band Can’t Be Readily Identified Without Using The Band Name;
2. Use Of No More Of The Mark Than Necessary; and
3. No Suggestion Of Sponsorship By The Band

Copyright Law and Bands

- **Two Copyright Interests in Recorded Songs:**

**Musical
Work**

Michael Jackson – Songwriter

**Sound
Recording**

Michael Jackson

Pickin' On

Chris Cornell

Vitamin String Quartet

Los Pikadientes de Caborca

Copyright Law and Bands

- **A Work Is Entitled To Copyright Protection Upon The Satisfaction Of The Following Elements:**
 1. It Must Be An “Original Work[] Of Authorship”; And
 2. It Must Be Fixed “In Any Tangible Medium Of Expression, Now Known Or Later Developed,” Such As Written Sheet Music Or A CD Recording.
- **Except In The Case Of A “Work Made For Hire,” An Individual Who Creates A Work Is The Copyright Owner Of That Work**
 - A “Work Made For Hire” Is Either:
 - A Work Prepared By An Employee Within The Scope Of His Or Her Employment” Or
 - A Specially Commissioned Work (If Expressly Agreed In Writing) (Doesn’t Apply To Sound Recordings)
 - Joint Works / Co-Authorship:
 - “For Two Or More People To Become Co-Authors, Each Author Must Contribute Some Nontrivial Amount Of Creative, Original, Or Intellectual Expression To The Work And Both Must Intend That Their Contributions Be Combined.... Thus, If Person A Writes Lyrics To A Song And Intends For A Composer To Write The Score, Person B Who Writes The Score Becomes A Co-Author In The Work.”
 - No Claim For Copyright Infringement Between Co-Author/Co-Owner

Copyright Law and Bands

- **Transfer Of Copyright Ownership Generally (But Not Always) Must Be In Writing**
 - “A Transfer Of Copyright Ownership, Other Than By Operation Of Law, Is Not Valid Unless An Instrument Of Conveyance, Or A Note Or Memorandum Of The Transfer, Is In **Writing And Signed By The Owner** Of The Rights Conveyed Or Such Owner's Duly Authorized Agent.” 17 U.S.C. § 204(a)
 - Transfer Doesn't Have To Be In Writing. Transfer Just Needs To Be *Evidenced* By A Signed Writing, Even If The Writing Comes Later
 - No Magic Words. “It Doesn't Have To Be The Magna Carta; A One-Line Pro Forma Statement Will Do”
- **Statute Of Limitations For A Declaratory Judgment Action To Determine Co-Authorship / Co-Ownership**
 - 3 Years From Repudiation Of Ownership
 - “Repudiation” Must Be Express

Partnership Law and Bands:

How Does a Band Start?

Association of Musicians



Partnership Law and Bands:

What Does a Band Want?



Partnership Law and Bands:

How Does a Band Get Money?

“Carrying On” as a Business



**Association of 2 or More People
Carrying On as a Business**

Plus

Sharing in Profits and Expenses

Equals

General Partnership

Even if NOT in Writing!

Partnership Law – Oral Partnerships / Fiduciary Duties

- “[A]n association of two or more persons to carry on as co-owners of a business for profit.” N.C. Gen. Stat. § 59-36(a)
- “[A] combination of two or more persons of their property, effects, labor, or skill in a common business or venture, under an agreement to share the profits or losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business.” *Zickgraf Hardwood Co. v. Seay*, 298 S.E.2d 208 (N.C. App. 1982).
- “The receipt by a person of a share of the profits of a business is prima facie evidence that [s/]he is a partner in the business.” N.C. Gen. Stat. § 59-37(4)
- “To prove existence of a partnership, an express agreement is not required; the intent of the parties can be inferred by their conduct and an examination of all of the circumstances.” *Compton v. Kirby*, 577 S.E.2d 905 (N.C. App. 2003).
- Partners owe fiduciary duties to one another as to partnership affairs. *See Casey v. Grantham*, 79 S.E.2d 735 (N.C. 1954).

Effect of Oral Partnership

- **Who Are The Members?**
 - Side Players?
 - What Happens When Someone Leaves The Band? Voluntary? “Kicked Out”? Dissolution / Liquidation?
- **Obligations to Each Other? “Fiduciary” To Each Other (Including Former Partners!)**
 - Duty Of Loyalty
 - No Self-dealing Or Usurpation Of Partnership Opportunities
 - Can’t Use Partnership Property Without Consent Of Others
 - Accounting Rights
- **Obligations to Third Parties? Joint And Severally Liable**
 - Each Partner Is An Agent Of The Partnership; Can Bind The Partnership
 - Purchases / Debts
 - Conveyance Of Property
- **What Is Band Property?**
 - Intention; Use And Possession; Acquisition With Partnership Funds
 - Ownership Of Songs, Recordings, Band Names, Equipment, Etc.?

Everybody is happy at first

But:

What happens when things change?

- A Band Member Leaves?
- More Than One Band Members Leave And Use The Band Name?
- A Band Member Personally Guarantees A Loan For A New Van?
- One Band Member Signs All Contracts?
- Not Everyone Agrees On Direction?
- A Band Member Has A Side Project That Monopolizes Her Time?
- A Band Member Records A Hit Record With Another Band?
- A Band Member Re-Records A Band Song With Another Band?
- Someone Else “Covers” One Of The Band’s Songs?

In Other Words:

A Big Mess!

Can An Oral Partnership “Own” Songs?

- **Under Copyright Law?**
 - Co-Authorship By All Partners?
 - “Work For Hire”?
 - Transfer?
- **Remember: “Operation Of Law” Exception To The Writing Requirement In 17 U.S.C. § 204(a)**
- **State Laws Can Cause Copyright Transfers By “Operation Of Law”**
 - Probate Law
 - Equitable Dissolution
 - Bankruptcy
 - Corporate Mergers And Dissolutions

Can An Oral Partnership “Own” Songs?

■ What about State Partnership Law?

- “All property originally brought into the partnership stock or subsequently acquired by purchase *or otherwise*, on account of the partnership, is partnership property.” N.C. Gen. Stat. § 59-38(a)
- *Potter v. Homestead Preservation Association*, 412 S.E.2d 1 (N.C. 1992) (holding two parcels of real property titled in fewer than all partners’ names constituted assets of oral partnership even though there was no written transfer of property)
- **Intent** Of The Parties Is Determinative. *See In re Vannoy*, 176 B.R. 758, 768 (Bankr. M.D.N.C. 1994) (holding that apartments were partnership assets even though they were not titled in name of partnership)
 - *See also Ewing v. Caldwell*, 89 S.E.2d 774 (N.C. 1955) (“[I]t makes no difference that the legal (record) title to real estate owned by a partnership is in the name of one partner rather than in the names of all.”); *Eggleston v. Eggleston*, 47 S.E.2d 243(N.C. 1948) (“[I]t is not necessary to a partnership that property or capital involved in it should belong in common to the parties.”); *Peed v. Peed*, 325 S.E.2d 275 (N.C. 1985) (holding that dairy cows titled in only one partner’s name were assets of oral partnership); *Jones v. Shoji*, 428 S.E.2d 865 (N.C. App. 1993) (insurance policy in name of one partner is asset of partnership); *Lyon v. MacQuarrie*, 115 P.2d 594, 597 (Cal. Ct. App. 1941) (finding that based on the intent of the parties, a theatrical production created by defendant became property of oral partnership even though production originated solely from defendant’s efforts).

Can An Oral Partnership “Own” Songs?

■ Not Expressly Resolved in Copyright Law

- Mere Fact That There Is A Partnership Is Probably Not Sufficient To Transfer By Operation Of Law. *Cf. Konigsberg Int'l, Inc. v. Rice*, 16 F.3d 355 (9th Cir. Cal. 1994).
 - Requires More – Evidence Of Parties’ Intent / Application of State Partnership Law

■ Came Close in NC (Twice)

- *Brown v. Flowers*, 297 F. Supp. 2d 846 (M.D.N.C. 2003); *Brown v. Flowers*, 2005 U.S. Dist. LEXIS 23272 (M.D.N.C. 2005), *aff'd*, 196 F. App’x 178 (4th Cir. 2006) (absence of a writing was not dispositive of whether the songs belonged to the partnership)
- *Andrews v. Daughtry*, 12 CVS 5236 (Guilford County, NC, Superior Court)

Can An Oral Partnership “Own” Songs?

- **BUT: Even If There Is No Transfer Of Copyright Under The Copyright Act, The Proceeds From A Song Could Still Be A Partnership Asset Under Partnership Law.**
- **Partnership Right To Proceeds Doesn't Conflict With Copyright Act Transfer Provision Because The Right To The Economic Benefits Of A Copyright Is Not One Of The Five Exclusive Rights Under The Copyright Act**
 - *Rodrigue v. Rodrigue*, 218 F.3d 432 (5th Cir. 2000) (holding that the “economic benefits” flowing from the copyright of the authoring spouse are not governed by the Copyright Act and become property of the marriage partnership under Louisiana community property law)
 - Rights Under Copyright May Still Remain With (Co-)Author(s), but Proceeds Would Be Subject to Partnership Accounting.

“Organize” Band Relationships

At Minimum:

Band Partnership Agreement

But Strongly Consider:

**Limited Liability Company (LLC) or
Corporation Structure**

Why LLC or Corporation?



LLC or Corporation Formation

**Fairly Easy to File
Articles of Organization/Incorporation
(Secretary of State)**

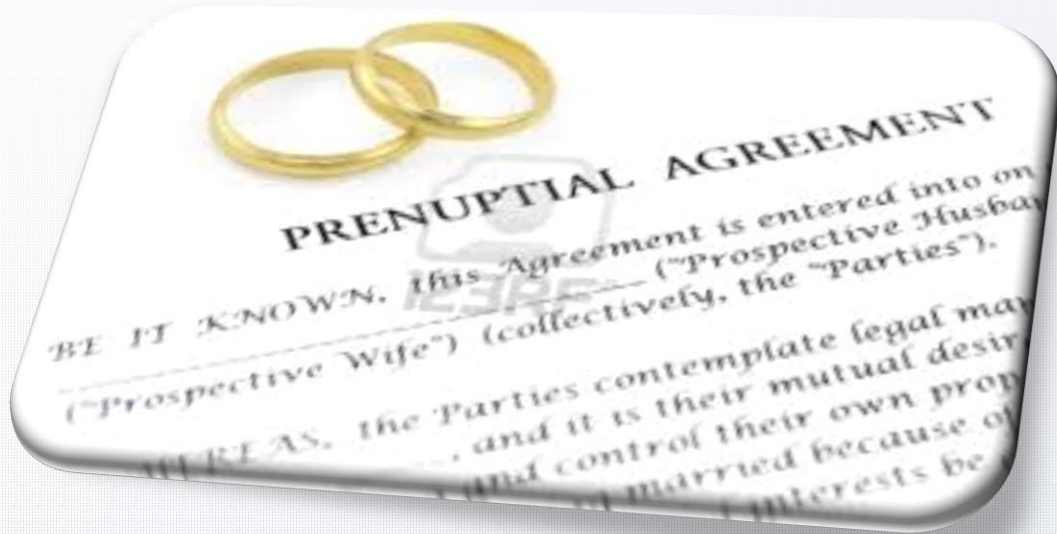
But Don't Forget:

**Operating/Shareholder
Agreement and Other
Organizational Resolutions, Etc.**

Respect Corporate/LLC Formalities

- **Do Business In The Name Of The Company**
 - Contracts
 - Concerts, Merchandise, Recording, Production, Etc.
 - Insurance
 - Vehicle Ownership
 - Registration Of Copyrights/Trademarks
- **Keep Separate Accounts**
- **Maintain Tax Records**
 - Deductions
 - Issue 1099's To "Sidemen" And Etc.
 - Issue K1's To Members

Why Don't Bands Do Band Agreements?



Creative Folks “Do Lunch, Not Contracts”

Judge Kozinski – *Effects Associates v. Cohen*, 908 F.2d 555 (9th Cir. 1990)

Band Agreements:

Basic Provisions

- **Who Are The Members/Partners**
- **What Are The Roles Of Each Member**
- **What Is Each Member Contributing**
- **How Are Profits And Losses Shared**
- **How/When Are Profits Distributed**
- **How Are Decisions Made**
 - Day-To-Day vs. Major Decisions
- **Voluntary And Involuntary Withdrawal Of Members**
- **Buyout Provisions**
- **Admission Of New Members**
- **Dispute Resolution**

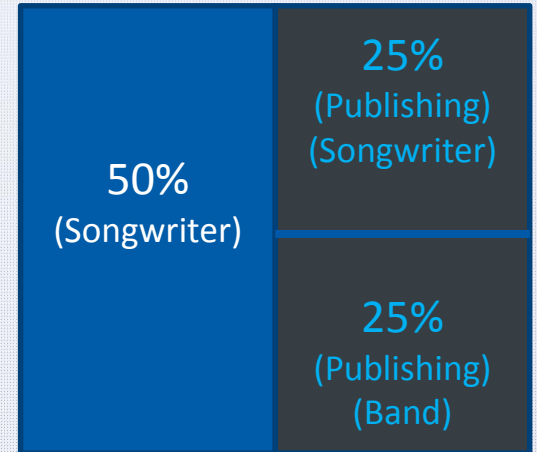
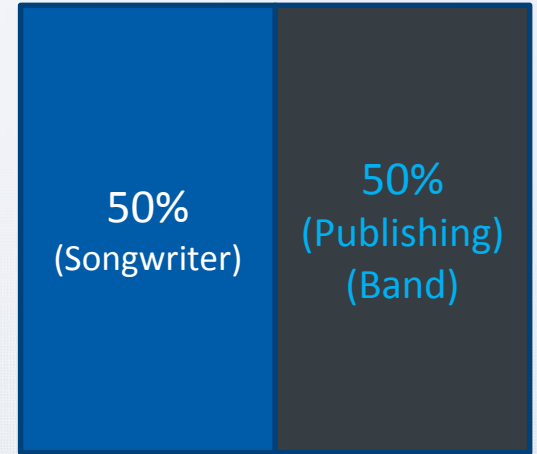
Band Agreements:

Important Band Issues

- **Who Owns the Instruments/Equipment/Vehicles?**
 - Existing Property?
 - New Property?
 - Loans/Liability?
- **Band Name Ownership?**
 - Use by Former Members; After Dissolution?
- **Outside Activities?**
 - Performing With Other Bands?
 - Songwriting?
- **Copyright Ownership?**
 - Master Recording
 - Songwriting/Publishing

Ownership of Sound Recording v. Musical Work

- **Who Owns the Instruments/Equipment/Vehicles?**
 - Existing Property?
 - New Property?
 - Loans/Liability?
- **Band Name Ownership?**
 - Use by Former Members; After Dissolution?
- **Outside Activities?**
 - Performing With Other Bands?
 - Songwriting?
- **Copyright Ownership?**
 - Master Recording
 - Songwriting/Publishing



What if I don't address copyrights in writing with other band members?

You Should!

But if you don't:

- Keep Dated Recordings (Audio/Video)
- Keep Lyric/Chord/Chart/Tab Notebooks
- Keep E-Mails, Texts, Etc.
- Keep Banking/Financial Records
- Keep Concert Records/Contracts
- Don't Acquiesce to Credit/Copyright Notices You Don't Agree With
- Do Something Before 3 Years

But Partners (Current or Former) still may have an interest in songs or proceeds

Not Just Band Members

- **Other Parties Involved?**

- “Side” Musicians/Band “Members”
- Vocalists
- Outside Songwriters
 - Covers?
- Producers
- Engineer
- Mixer

- **Get It in Writing. Address:**

- Ownership
 - “Work for Hire” Agreement
- Compensation
 - Flat Fee? Royalty? Opportunity?
- Credit
- Songwriter Splits
 - License to Use
- Use of Name and Likeness
- Confidentiality

THANK YOU!

For further questions and comments, visit our website or contact one of our attorneys:

Coe W. Ramsey
919.839.0300
cramsey@brookspierce.com

Thomas Varnum
910.444.2000
tvarnum@brookspierce.com

Amanda Whorton
919.839.0300
awhorton@brookspierce.com

Brookspierce.com

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