LAW TALK

By Richard Gee

Happy New Year! Hope you found the last column informative. Your questions and comments are always welcome. Please note that neither the advice nor any opinion set forth in this column is intended to be legal advice, and that you should seek the advice of a qualified attorney to pursue any issue I may write about in this column. With that in mind, let's discuss some other legal issues that are relevant to us as folk musicians.

I am making an album and would like to record a composition from another album on it. What do I have to do?

There are a couple of ways to go about this. First, you can pay what is known as the "stat" or mechanical rate, which is a compulsory license, set by statute (hence the term "stat") and which is currently $0.085 per track per album sold. Under the Copyright Act, it is not necessary to get the approval of the songwriter for use of a song that has already been mechanically affixed on a tangible medium (i.e., recorded on another recording), so long as you pay the songwriter (or the songwriter's publisher or administrator, as the case may be) a "compulsory license" fee per record sold.

For all you history buffs (myself included), the "mechanical license" grew out of a dispute in the late 19th century concerning player pianos. Player pianos used rolls of specially perforated paper which, when passed through a mechanism on the piano, caused the piano keys to play the music the perforations formed. The problem arose because sheet music publishers were unwilling to give more than one piano roll manufacturer a license to reproduce an original song, thus stifling competition. Hence, a provision was included in the 1896 Copyright Act allowing player piano makers to use original music after the first time the song was mechanically affixed onto a "tangible medium" (i.e., the player piano roll) without a new license upon payment of a "compulsory" license to the publisher. This provision became applicable to sound recordings and is the basis of the modern mechanical royalty.

The second way to go is to attempt to negotiate the mechanical royalty that you will pay per track per album. Usually, this is done by asking the songwriter's publisher or administrator for a mechanical license at a percentage of "stat," such as ¾ stat (75% of $0.085). Whether a publisher will give this to you, obviously, depends on your bargaining power. If the songwriter is a friend of yours and is self-published, chances are you will be able to bargain him or her down. If, however, he or she is signed with a major or even minor music publishing company, chances are that you will need to have a proven sales track record before any reductions on the statutory rate will be given.

I paid an artist to design a cover for my album. Now, I'd like to use the artwork for t-shirts and posters. Who owns the artwork on my album?

The lawyerly answer is, it depends. If the artwork was original to your album cover and you paid an artist to do it, then you probably have an argument that the artwork was a "work for hire" under the Copyright Act. Under the law, the person who hired the artist to create the work in the first place owns the "work for hire". However, the picture gets murkier if the artwork was not created specially for your album. There, the artist may retain rights to the work, for which he or she can charge a license fee.

It gets worse if you had a friend do the artwork and didn't pay them. The concept that the artwork is a "work for hire" goes out the window, and the artist retains rights to the work. That means the artist can require you to pay him or her for the use of the artwork on the album or on any promotional literature you may have. Failure to pay the artist could result in an expensive lawsuit nobody wants.

In my practice, I've found that the artist will license out his or her artwork for a fee per album, up to a certain number of copies, after which (since you're making money), a higher fee per album applies. Use of the artwork in other media (posters, websites, etc.) is also subject to fees.

Obviously, the best way to avoid these disputes in general is to negotiate all rights up front. Have a written contract drawn up which specifically sets forth who owns what. If you're using artwork that wasn't originally created for the album cover, try to get a flat license fee to use the artwork in any media without limitation. In the end, this will save you both headaches and friendships.