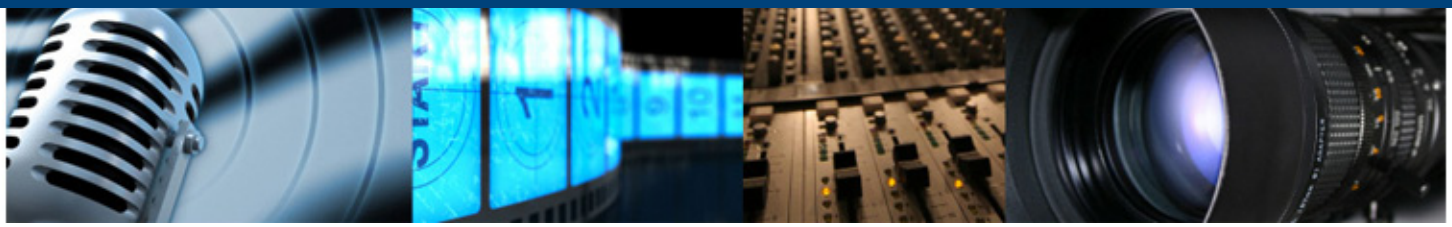


Reclaiming Old Masters ("Old Masters" as in Records, Not Paintings)

September 7, 2011 by Bob Tarantino

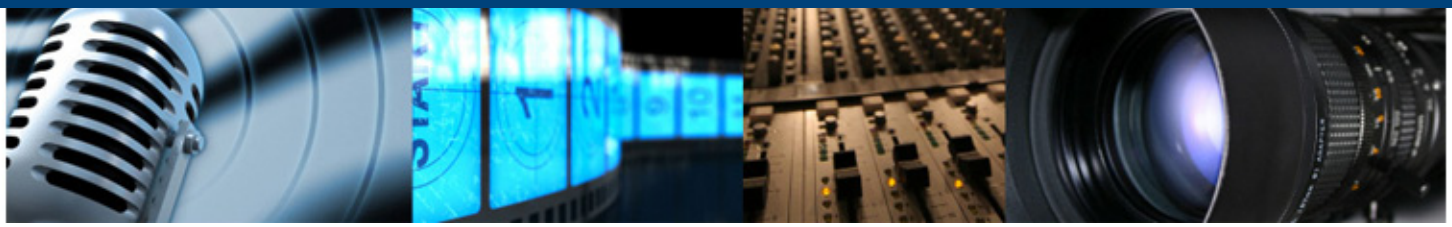
A number of news outlets have recently reported on the flood of litigation which is expected to arise in the United States as a result of recording artists seeking to terminate and reclaim ownership of their sound recordings issued in 1978 and in subsequent years (*New York Times*: Record Industry Braces for Artists' Battles Over Song Rights; *Rolling Stone*: Record Biz Braces for Legal Battles Over Copyright Law).

Steve Gordon, over at the Entertainment, Arts & Sports Law Blog, has written The Comprehensive Guide to Reclaiming Old Masters, which rather elegantly sets out the relevant legal analysis under the US Copyright Act. Gordon highlights two significant issues which will need to be addressed, the latter of which I had not seen previously raised: first, are the sound recordings "works made for hire" and, second, are the artists the only relevant "authors" of the sound recordings, or could producers be considered to be authors (and hence entitled to a reversionary interest) as well? In any event, it appears that the US music industry is in for a few years of "interesting times" (to borrow from the purported Chinese curse) - as the clock ticks down to the dates on which some of the most commercially successful sound recordings of the last fifty years start to become eligible for "reclamation" by artists and performers.

So - do any similar concerns arise under Canadian copyright law? The short answer is "not really", at least not in the same way that it is happening under US law - but Canadian copyright law does have a "reversionary interest" which will one day pose similar problems to current owners of some types of copyrighted materials.

Section 14 of the *Copyright Act* (Canada) provides that, 25 years after an author dies, the copyright in any works which the author created and for which the author was the first owner of copyright (so, basically, excluding works created "in the course of employment") automatically reverts back to the estate of the author. So, for example, if Bill Smith writes a novel, then enters into an agreement with a book publisher for that novel which grants the publisher the exclusive right to distribute the book, and then Bill dies, 25 years after Bill dies, the rights in the novel revert back to Bill's estate, irrespective of the publishing contract Bill signed or anything which might be contained in it. Thus, copyright owners should be vigilant about any works they own/control whose author is deceased - the author's estate could pop up out and assert their rights.

Does Section 14 of the *Copyright Act* (Canada) apply to sound recordings? It does not appear to, since Section 14 only applies to "works", and "sound recordings" are technically not "works", but a separate subject-matter of copyright protection found in Section 18 of the Act. The "maker" of a sound recording is the owner of copyright in that sound recording, and so the ownership of Canadian record labels in sound recordings for which they were the "maker" seems more secure than their US counterparts (setting aside for the moment the convoluted analysis which would be required for sound recordings created prior to the current iteration of the "sound recording" regime found in the Act). All



that being said, Section 14 would certainly apply to musical compositions, and so any publishing or licensing arrangements entered into in respect of a musical composition would be subject to the reversionary interest.

Is any of this a good idea? As I argued in this article published earlier this year, I don't think so:

For copyright exploiters, the existence of the reversionary clause poses a troubling challenge: the security of their tenure as owner is subject to the reversionary interest of the author's estate. For creators, the clause wreaks a counter-intuitive result: given the uncertainty in their ownership and the possibility that they may be excluded from the last twenty-five years of the copyright term, exploiters will be inclined to discount the value they are prepared to pay for a work.

Exploiters may also, given the tenuous nature of their ownership interest, be disinclined to invest resources toward the exploitation of works nearing the reversionary threshold, since they will be unsure whether an author's estate will "pop up" and assert an ownership claim. The doubtful status of ownership of the work is compounded by the fact that so few authors and estates are even aware of the existence of the reversionary interest-leaving assertions of an estate's rights to those who are well-advised by counsel or lucky enough to come across the clause.

Worse, the philosophical and logical foundations of the reversionary interest remain weak. It is unclear why, aside from sentimental reasons, the heirs of creators of copyrightable works should be entitled to an ownership interest in works which the author licensed or sold during his or her lifetime. Not only is no other form of intellectual property treated in this fashion, no other form of property whatsoever is treated this way-a patent, apartment complex or shares of capital stock once owned by a deceased individual are not suddenly snatched from their current owners and bestowed upon an estate on the twenty-fifth anniversary of the death. That threshold further highlights the arbitrary nature of the interest: if the concern is to ensure that the heirs of creators are not left destitute, why would the law require them to wait twenty-five years?

Our *Copyright Act* requires many alterations to make it easily comprehensible and coherent. Eliminating the reversionary interest would be a minor step in the right direction.
