**TERMINATION RIGHTS IN SOUND RECORDINGS**

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According to the Mayans, 2012 may be the end of the world, but if it isn't, 2013 may be the end for the recording industry.

Why, you ask?

Well, beginning in 2013, for the first time ever, authors of sound recordings may be able to recapture copyright ownership in their sound recordings based on rights they originally granted to the record companies in 1978 and thereafter. Some notable sound recordings that may become eligible for termination of the original grant include those on popular albums by luminary artists and bands such as Billy Joel, Bob Dylan, Bob Marley and the Wailers, Bruce Springsteen, The Rolling Stones, and Tom Petty, among many others.

This is likely to create conflict between the recording artists and the record companies. On the one hand, artists will attempt to terminate the grant of rights in order to begin commercially exploiting the sound recordings themselves, while on the other hand, record companies will want to retain ownership interest so that they can continue commercially exploiting the sound recordings.

The Copyright Act

The Copyright Act grants an author termination rights in all types of copyrighted works including books, photographs, and musical compositions (as may be embodied in the sound recordings). Since Federal copyright law protection was more recently extended to sound recordings in 1972, 2013 marks the first time a grant of rights in sound recordings under copyright law may be terminated.

Congress created the termination right in an attempt to create a proper balance between the author (in this case, the recording artist, and possibly others as discussed later in the article) and the entity to which the copyrighted works (in this case, the sound recordings) were transferred (in this case, the record company). In general, recording artists are often in less favorable bargaining positions relative to the record companies, especially in the beginning of their careers, and are unable to demand greater compensation for their sound recordings at the time of transfer. In addition, it is difficult to predict the true value of the sound recordings before they have ever been exploited in the marketplace. As such, this termination right allows the artist to either reclaim his/her ownership interests in the sound recordings in order to further exploit the recordings his/herself or to re-negotiate a new contract with the record company after the market value of the sound recording has been realized through exploitation.

Under Section 203 of the Copyright Act, author(s) (or their heir(s)) are allowed to terminate grants of copyrights in sound recordings executed in or after 1978 after 35 years from the date of execution of the grant (or up to 40 years in certain circumstances). This means that authors who granted rights in their sound recordings to record companies

in 1978 or thereafter can begin to regain copyrights in their sound recordings as early as 2013.

The termination right is optional and the author does not have to exercise the right. If however the author does exercise this right, then the author(s) (or their heir(s)) must take proactive steps to meet statutory formalities. For example, the artist is required to notify the original grantee that the artist wishes to exercise his/her termination rights at least two or at most ten years prior to the date on which termination is to take effect.

Works Made for Hire

Customarily, recording contracts specify that sound recordings made pursuant to the agreement are "works made for hire" for the record companies. The contracts also specify that in the instance that the sound recordings are not considered to be works made for hire by law, then the copyrights will be transferred to the record companies. Under copyright law, if a work (including a sound recording) is considered to be a work for hire, although an individual author may have created the work, the author's employer or the person or entity who commissioned the work, owns it as if they created the work themselves, and they are treated under copyright law as the "author" of the work. In this instance, the artist never owned the copyrights in the first place and therefore there is no grant of rights to terminate. For this reason, termination rights do not apply if a sound recording is determined to be a "work for hire" by law.

Merely having a written agreement that says a work was made for hire does not make it a work for hire by law. Rather, courts will follow the analysis outlined below to determine whether any given work was made for hire. Section 101 of the Copyright Act sets forth two categories for which an author's contribution is considered a "work made for hire."

The first category requires that the work (sound recording) be created "by an employee within the scope of his/her employment." This requires the existence of an employer-employee relationship between the parties. Courts analyze the existence of such a relationship using a non-exclusive list of factors set forth by the Supreme Court in Community for Creative Non-Violence v. Reid. For example, one such factor is whether the employer (the record company) had the right to control the manner and means by which the work (the sound recording) is produced. Some other factors considered in examining the existence of an employer-employee relationship between the parties include whether the employer withholds taxes from employee compensation, and whether the employer provided the instrumentalities to create the work. All factors are considered and the determination is made by the court on a case-by-case basis.

The second category involves authors operating as independent contractors. In this category, the author's contribution to the work will be considered a "work made for hire" if two criteria are met: (1) the work was "specially ordered or commissioned for use" as one of nine categories delineated in the Copyright Act and (2) "if the parties expressly agree in a written instrument signed by them that the work should be considered made for hire." Sound recordings are not specifically included amongst these nine categories.

Works Made for Hire - Application

There are arguments to be made for and against work for hire status for sound recordings.

Under the employer-employee analysis, the question is whether in the course of making the sound recordings, the artist was a "regular" employee of the record company.

Historically, record companies were more hands on than they are today. With respect to these earlier sound recordings, record companies could argue certain attributes during the process of creating the sound recordings that satisfy the factors used to determine an employer-employee relationship. For example, record companies could argue that they provided a recording fund for the artists to make the sound recordings and that certain contributors who assisted in creating the sound recording were full-time staff, such as in-house producers, musicians, and A&R (artist and repertoire) staff who worked with the artist throughout the recording process. In addition, the record company could argue they controlled the manner and means by which the recordings were produced, for example, by selecting the recording studios (including their in-house studios), providing the instruments, and setting up the sessions.

Nowadays, however, record companies are typically much more hands off. Record companies may just provide a recording fund for the artist and then allow artists to record the songs they wish, with their choice of producers, at studios of their choice (including the artist's home studios), and with their own recording equipment. In this instance, the record company may just expect the artist to deliver the completed sound recordings to the company.

Since recordings are created in a variety of manners and means, the analysis of whether a specific situation constitutes an employer-employee relationship must be determined on a case-by-case basis. This process will be arduous, as a court will not just be able to establish a one size fits all rule to cover all situations.

If record companies argue that an employer-employee relationship existed to establish the sound recordings as works for hire, a court may nevertheless find that one did not exist. In these instances, if the sound recordings are to be considered works made for hire for the record companies, the companies will have to argue that it meets the independent contractor criteria set forth above. Specifically, the record companies will have to show that the sound recordings fit within one of the nine delineated categories, eight of which are not relevant to sound recordings. Therefore, the record companies will likely argue that sound recordings as part of overall albums fit within the "contributions to a collective work" category. The artist's recording contract will usually satisfy the writing requirement.

Joint Authorship Issues

Another major issue with respect to sound recordings and termination rights is that "author" is not specifically defined in the Copyright Act. As a result, it is possible that featured artists may not be considered to have been the only author of the sound recordings. For example, music producers may also be considered "authors" of sound recordings. Other participants can also argue that they played significant enough roles in the creation of the sound recording to qualify for "author" status. This includes session musicians, sound engineers, and possibly the songwriters.

If the sound recording is determined to have been created by more than one author, the work may be a work of joint authorship. In the case of a work of joint authorship, the Copyright Act specifies that the majority of the authors must agree to terminate the grant made to the record company of the copyright in the sound recording in order for the termination to take effect.

Conclusion

In order to avoid the anticipated litigation that will likely ensue regarding these issues, Congress could consider amending the copyright law to clarify the "work made for hire" issue and provide a statutory definition of "author." However, how each individual sound recording came into existence and whether it was a work made for hire will still be made on a case-by-case determination. The ultimate goal of any such determination should be to achieve what Congress intended for the termination right- to create balance and fairness for artists and record companies.

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