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Copyright D-Day

An Obscure Provision In A 1976 Law Could Let Artists Take Back Their Work

BY WALLACE COLLINS

While the recorded-music business is left reeling from file sharing, further trouble may lurk around the corner. In a few years recording artists and songwriters will be entitled to terminate their contractual transfers and demand back their copyrights.

An often overlooked provision of the 1976 Copyright Act provides for the termination of copyright transfers. Even if an artist or a songwriter signed a contract with a record company or music publisher that purports to transfer all rights to a work in perpetuity, the Copyright Act would allow authors to terminate that grant and demand that the rights revert to them sooner.

Generally speaking, for copyright grants made on or after Jan. 1, 1978 (the effective date of the 1976 Copyright Act), the termination period is 35 years under Section 203 of the act. For pre-1978 works the termination period of 56 years after copyright was originally secured under Section 304 (c)-(d). For grants on or after 1978, termination may be exercised anytime during a five-year period starting 35 years from the execution of the grant; if the grant concerns the right of publication of the work, then the period begins on whichever comes first, 35 years after publication or 40 years after execution of the grant. Although there are certain formalities that must be complied with effect to the transfer, this essentially means that recording artists and songwriters can start exercising their right of termination as soon as 2013—which could effectively decimate record companies and publishers.

When the 1976 Copyright Act was drafted, few of us could envision a world in which artists wouldn't need record companies to finance, manufacture, promote and distribute their records. The expectation was that the label and artist would simply have to renegotiate a deal to continue working together. In the digital age, this is no longer true. Any artist could take back his masters and then offer them on his own Web site or license the rights to an online aggregator. High-profile acts with established fan bases and large catalogs—Bruce Springsteen, Billy Joel, Blondie—don't need much advertising or marketing.

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Anyone familiar with record company contracts knows that recordings are created as work for hire. (Music publishing contracts generally provide for the assignment and transfer of a copyright.) Under the 1976 Copyright Act the termination provision is not applicable to a genuine work for hire grant. But this would not preclude artists from exercising their rights of termination. Just a few years ago I litigated a case where the court held that a sound recording does not qualify as a work for hire. Basically, a great deal of case law on work for hire holds that whether or not a work created by an employee is a work for hire depends on various factors other than the language of the contract. This area of law appears to be ripe for litigation by recording artists who want to exercise their termination rights. From cases I've litigated and the case law I've researched, artists are likely to prevail over record companies on this issue.

The termination rights of artists and songwriters are generally subject to a five-year window, after which the right to terminate the grant is forfeited. To be effective, the artist or songwriter must serve a written notice of termination to the original record company or publisher—or its successor—no more than 10 and no less than two years prior to the effective date stated in the termination notice. That notice must state the effective date of termination, and a copy must also be filed with the U.S. Copyright Office prior to the effective date of termination. Although the termination rights of an artist under the 1976 Copyright Act would only be effective in U.S. territory, the size of the U.S. market still makes these rights valuable.

In this case, what's good for artists might further erode the influence of major record labels. It could even jeopardize their future. Labels would be well advised to start planning for 2013 now. ••••

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