

Know When To Hold 'Em ...

Law360, New York (September 30, 2011, 2:39 PM ET) -- The 1976 Copyright Act was such a significant change in the law that many outside of the copyright industry may not have noticed that Section 203 of the act gives authors (i.e., the creator of a copyrighted work) the right to terminate their grants of copyrights after 35 years from the date of publication (or 40 years from the date of grant, if earlier), starting with grants in 1978.

To exercise that right, the author (or heirs, if the author is deceased) must give a least two years' notice to the grantee and the Copyright Office. Accordingly, notices for 1978 grants must be given in 2011, so that the rights will terminate in 2013. As termination notices start to flow, the consequences have caught the attention of the general public.

1978 hits, like the Bee Gee's "Night Fever," Billy Joel's "My Life" and that perennial warhorse, "The Gambler" by Kenny Rogers, are some of the more famous works eligible for termination. The increasing number of notices is likely to turn into a flood as the clock ticks forward on the hits of 1979, 1980 and successive years. It is anticipated that litigation over the effectiveness of these notices will commence in early 2013.

The difficulties facing the music industry from the digital revolution serve as the economic backdrop for the potential body blow the terminations may deliver. Sales of recorded music have plummeted over the last decade by more than half, because new releases are often downloaded cheaply or without any payment. Almost half of all teens did not buy a CD last year. Sales are thus driven by the 36- to 50-year-old demographic, who tend to buy the older material now subject to termination. By 2013, the availability of CDs for music will noticeably wane, as big box stores that carry them find more profitable uses for their shelf space. By 2015, brick and mortar locations may not carry CDs at all.

Successful termination of grants by composers and artists will not only depress sales by depriving the traditional distributors and publishers of valuable assets but may result in a redistribution of those assets to other players perceived to be more effective in monetizing the underlying works in a digital environment.

Thus, authors who made deals with publishers in 1978 may see improved opportunities with newer publishers who specialize in digital distribution such as ringtones, games and downloads, and who promote their online financial transparency. Artists subject to older record deals may see an opportunity to make better deals with their labels (or other labels) on works which have proven their value over time, or even self-distribute online by making deals directly with iTunes and Amazon.com Inc.

Everyone is now staking out their positions. Those interested in the issue range from the major record companies — Universal Music Group, Sony Music Entertainment, Warner Music Group Corp. and EMI Group — to collective organizations such as the Recording Industry Association of America (famous for its pursuit of unlawful downloaders), the Songwriter’s Guild and others who represent groups of similarly situated parties. Authors and bands with deep pockets or major hits have engaged counsel to pursue termination rights on an individual basis. It has been reported that the major record labels are prepared to go to final judgment over this issue.

Likewise, some composers and artists dream of successful termination so that they can take advantage of the changed publishing and master recording landscape. Others have taken a less aggressive position, understanding that a negotiated deal is often more desirable than an uncertain outcome. Mitch Glazer, the RIAA’s chief lobbyist, has been quoted as predicting that “some sort of negotiation will open up. I don’t think it serves anyone’s interest to lose in court.”

If the right of termination was clear-cut and there were no uncertain legal issues, “going to court” would be unlikely. Either the grantees would concede their copyrights, or the grantors would not press for termination. Not surprisingly, the issues are not very clear.

One major issue — perhaps the one most consistently cited — is the express exception in Section 203(a) that termination rights do not apply to “a work made for hire,” a term of art defined in Section 101 of the act. Virtually everyone who signs a grant of copyright in connection with a service agreement states that they are engaged in a “work made for hire,” but are they? Under Section 101, Works made for hire are either (1) prepared by an employee within the scope of their employment or (2) are “specially ordered” as a “contribution” to certain described works, including “as a compilation.”

The United States Supreme Court has applied the traditional master-servant factual test to the term “employee” in Section 101 (*Community for Creative Non-Violence v. Reid*, 490 U.S. 730 [1989]). Composers and artists are usually not employees, but there are circumstances where they might be (such as house bands required to play solely in the company-owned studio).

Conceivably, in certain circumstances, the author could have been “specially commissioned” to prepare the work for a “compilation” (defined in Section 101 as either a collection of preexisting materials or of “data” that is arranged to create a resulting new and original work.) The authors assert that they are independent contractors, not employees, and that an album is not a compilation as conceived under the act.

Additionally, they contend that works made for hire do not specifically include “sound recordings” under the act, and that this omission was purposeful, as evidenced by the brief enactment and repeal of an amendment to the work for hire rule to expressly include sound recordings (an amendment sponsored by the RIAA). The RIAA contends the amendment was clarification only.

There are other issues. Questions about who can terminate are addressed, but as in most complex statutes, incompletely. For example, Section 203 (a)(2) specifies a list of those who have a right to terminate a single deceased author’s interest. The list includes heirs, and trustees or executors where there are no heirs. Successors in interest (such as corporations, assignees, or owners by foreclosure or execution) are not expressly included. Can they terminate?

Joint authors are also included, but the list of those eligible to terminate (the same as with a single author) must represent a “majority of the authors who executed the grant,” not who actually authored the work. This limitation is a dispute waiting to happen. In addition, it may not be clear who in fact is an author: Session musicians? Producers?

If business abhors uncertainty, the grant termination issue, which is about to erupt, appears to be in the first ranks of economic turbidity. What this damaged industry needs now is clarity and speed.

Going to judgment means someone will lose some significant rights, and the relationship between authors and business, legendarily strained, may result in further alienation. While the problems are complex, the problem is not just complexity; it is timing. Leaving resolution to the courts will mean virtually years of litigation covering some of the problems in an ad hoc, disorganized system of dispute resolution. Cases filed first may not represent important issues that need to be resolved first, and different venues may decide those issues inconsistently.

One possible solution is to organize a comprehensive dispute resolution program that will be flexible enough to be workable, fast enough to be useful, and trustworthy enough to attract all of the relevant participants. The modern alternative dispute resolution process is now sufficiently proven to meet all of these criteria.

It is not hard to imagine a conference room that includes representatives of the recording artists (the hardest group to corral), record companies, publishers and songwriters interested in the grant termination issue. While these groups have divergent positions, expectations and interests, they also have a common purpose: to resolve the question of who own the copyrights on terminated works.

The group has at its disposal tools such as mediation, arbitration and neutral evaluation (a nonbinding assessment of merit), which it can use to organize a process of resolution that resembles a union grievance procedure: Mediate where possible, and then move to neutral evaluation or arbitration for those who do not settle. The parties could also organize the disputes into subgroups comprised of those with similar or identical issues, and each of these subgroups could decide how to proceed. For example, those interested in the work made for hire issue could select their own neutral or set of neutrals to settle the claims of those who wish to do so, and arbitrate the remainder.

The results of the arbitration might, by agreement, control all members of the group who have not settled, and could be made public as moral suasion or kept confidential. To ensure timely resolution, a series of deadlines could be imposed which would require the parties to participate in each progressive step in the resolution process. The parties could even agree to an appellate process.

Obviously, these are concepts only, designed to show that with a little imagination, help from a professional neutral, and knowledge of ADR processes, a framework for resolving the variety of grant termination disputes can be created.

The advantages of such a system over one solely reliant on the courts are more or less obvious: (1) the person or persons who resolve the disputes can be selected in advance for expertise, fairness and effectiveness; (2) uniformity and certainty will emerge from the process because it will be centralized; (3) the procedural rules of engagement are made by the players to address their needs, and can be changed if necessary; (4) unlike multiple court proceedings, speed and finality can be built into the system; (5) settlement and awards will be confidential unless the parties want some or all of them made public because there is no contrary public policy; (6) the process can be more comprehensive because it includes interested individuals, entities, groups and associations without concern for the rules of standing.

ADR providers have a great deal of experience in resolving large, complex, multiparty cases. If the music industry were to take advantage of that experience and recruit enough people interested in crafting a dispute resolution program, the business of music could put this issue behind it with as little disruption and damage as possible.

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