Sound Recordings In 2013: A Legal Brief

By Devon Spencer

The Mayans were partially right when they predicted something drastic would happen at the end of 2012. Yet even if the mystery of the world coming to an end will remain, one thing seems clear: copyright laws in the United States may be changed forever. As 2013 marks the first year when any transfers of ownership in sound recordings will be eligible for termination under § 203 of the 1976 Copyright Act (the "Act"), we will soon be seeing law suits from songwriters and labels to determine ownership in sound recordings. The debate, covered most recently in the October issue of The MBJ, revolves around whether or not a sound recording is, in fact, a work made for hire. To be considered as such under the Act, the work must (1) be created by an employee within the scope of their employment; or (2) be specially ordered or commissioned and fall under one of the nine specific categories enumerated in § 101 of the Act, including: (1) for use as a contribution to a collective work; (2) as part of a motion picture; (3) as a translation; (4) as a supplementary work; (5) as a compilation; (6) as an instructional text; (7) as a test; (8) as test answers; or (9) as an atlas.

Challenging The Letter Of The Law

It is easy to see why many believe there is no real contest to be had with the letter of the law, since under the plain meaning of the language in the Act, sound recordings are not specifically listed as a category of work eligible for copyright protection as a work made for hire. This point was further reinforced when an amendment incorporated into the Intellectual Property and Communications Omnibus Reform Act of 1999 (the "Amendment") added sound recordings to the list of commissioned works under § 101(2) that could be considered a work made for hire. Facing immediate backlash from songwriters and advocates everywhere, the amendment was repealed within a year. Many argued that due to its potential material effects on one's rights, the change was more than a "technical amendment" and, therefore, it was not supported by the appropriate studies, debates, and research that would be standard protocol for changes of such magnitude.

Yet the topic has been aired again. Congress' past failures to address the 1999 amendment and the significant financial and legal implications sure to follow, regardless of the outcome, only add fuel to the fire. For example, although Congress repealed the Amendment a year after it was added, they also added language to the end of § 101(2) specifically prohibiting individuals from using the amendment, or deletion of it, as a basis for determining whether or not sound recordings are a work made for hire. This left most in the industry scratching their heads for a concrete resolution.

To further complicate matters, one needs to examine past recording agreements to first determine whether an artist will be considered an employee or an independent contractor; the latter would place them into the second category of possible works made for hire, requiring an argument as to why they should be considered so. The issue there is that the relationship between labels and artists has transformed drastically since the 1960s when record companies usually exercised extreme amounts of control over the creation of sound recordings. In addition, over time, recording agreements have begun to resemble the form of independent contractor agreements, including characteristic independent contract language stating that the artists recognize they are not employees but independent contractors. These types of contracts will almost always place the record company into the second category of works made for hire, requiring extra lawyering on the side of the label.

The Modern Music Economy

It is well settled that the purpose of copyright law is to promote the progress of the useful arts and sciences by protecting the rights of authors, creating an incentive for authors to keep creating, and therefore, for science to continue evolving and society to reap these benefits. It is unquestionable that society reaps substantial benefits from songwriters, as virtually every human being on Earth listens to music in some form and garners emotional comfort from it.

Songwriters must sign away ownership of their music in exchange for its marketing and distribution (thereby allowing the public to enjoy it). However, most of the money spent by record labels on creating song recordings is directly recoupable from the songwriter's future royalty payments; in essence, labels cover their own cost. Thus, the argument that copyright ownership assignment is there to hedge the label's risk of commercial failure appears weak. In addition, with 360 deals gaining tremendous popularity recently, record labels can now go after the artist's other revenue sources to recoup their advances, something they did not do before; this also decreases the need for using copyright assignment as an insurance policy.

Furthermore, songwriters do not want to lose ownership of their work; they usually have no choice. Unless the creator is an extremely successful songwriter, copyright assignment is required to make a livelihood from music and continue to support promotion and distribution activities. This is important to consider because, as technology evolves and artist access and delivery methods to consumers become easier and less costly, record labels will be rendered less important. It is conceivable that record labels will not be in a position to require ownership rights in the future if artists stop being convinced of their marketing and promotional prowess.

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Ownership of Sound Recordings

While the record labels are blamed for deliberately perpetuating the confusion surrounding sound recordings, the truth is that they do abide the law.

Under the Act, Congress attempted to not only simplify the way to legally determine ownership, but also intended to create a form of ownership by which creators would not be punished for having unequal bargaining power. To do so, Congress created an inalienable termination right that would always vest in the author or the author's heirs. In addition, they removed the requirement of formally renewing the copyright after 28 years, and simply made the term longer, building in the "renewal" right provided under the 1909 Copyright Act into the revised Act.

Thus, Congress's intent was clear: it wanted to create a system of checks and balances to protect authors who reluctantly signed away their ownership rights for potentially hollow promises of international fame, fortune and chart topping singles. If artists entered into a contract that did not produce the anticipated results, they could reclaim their creations after 35 years and attempt to distribute them through another method, thereby allowing the public to derive some benefit from the work. Songs in such a situation, where the label acquired ownership but were unsuccessful in exploiting the works, now sit locked away in a vault, ultimately providing no benefit to society. These points were all taken into consideration during the 1965 judiciary meetings regarding the revision of the Copyright Act.

As originally written in the 1964 proposed regulation, the Act did not differentiate a work made for hire in the same way §101(2) now does. Many authors argued that such a provision "would allow publishers to use their superior bargaining position to force authors to sign work for hire agreements, thereby relinquishing all copyright rights as a condition of getting their books published." Therefore, the 1965 revision bill added § 101 as we know it today, except that originally it was only limited to four categories. In the 1966 revision bill, the other four were added. By revising the bill to include specific works under § 101(2), Congress attempted to remove any gray area as to what would be considered a work made for hire. With the proliferation of sound recordings at this time, one can only wonder why they were not included under § 101(2).

Compilations and Complications

While no court has fully answered the ownership question, a few have come close. In the 1997 case of Lulirama Ltd. v. Axess Broad. Services, Inc., the Fifth Circuit held that sound recordings would not be classified as "audiovisual works" for work made for hire purposes. In addition, a New Jersey district court in the 1999 case of Ballas v. Tedesco stated that the sound recordings at issue were "'not a work for hire under the second part of the statute because they do not fit within any of the nine enumerated categories'...'[the Act] does not provide that a sound recording standing alone qualifies as a work for hire under § 101(2).'"

In that same year, the Washington D.C. District Court in the case of Staggers v. Real Authentic Sound cited the Ballas court, holding that "a sound recording does not fit within any of the nine categories. " However, the Lulirama case didn't explain why sound recordings could not be considered works made for hire under one of the other categories, nor did the courts in Ballas or Staggers explain why sound recordings did not fall under any of the enumerated categories, leaving the door open for the Supreme Court or Congress to answer the question.

Legislative history is significant for a few reasons. As the Supreme Court stated, "legislative history underscores the clear import of the statutory language: only enumerated categories of commissioned works may be accorded work for hire status…[a] hiring party's right to control the product simply is not determinative." It also reveals Congress' intent to limit a work made for hire to the categories enumerated in the Act. The Court has also stated that determining employment status based on who had the "right" or "actual control" of the work would "unravel the 'carefully worked out compromise aimed at balancing legitimate interest on both sides.'" .
Copyright Chaos

Assuming that many songwriters will not be deemed employees but rather independent contractors, and that record labels will likely argue that sound recordings are a collective work or compilation and therefore a work made for hire, the Act may be in trouble for more than one reason.

Under the Act, some sound recordings are already considered to be compilations while others are not. For example, the sounds that accompany an audiovisual work in a motion picture - in other words, soundtracks - are not considered to be sound recordings. Logically, other sound recordings like "Now That's What I Call Music" or "Greatest Hits" albums should be classified as compilations, as they are normally "formed by the compilation of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." However, some Greatest Hits or other "compilation" albums also include songs created specifically for those compilations, broadening the gray area engulfing the law of sound recordings and compilations. It has even been argued that if a soundtrack is released prior to a movie, then it no longer accompanies the film, and as such, can be afforded protection as a sound recording; this does not make much sense, however, as the date of release does not change the substance of the soundtrack.

Overall, the definition of a song recording has become convoluted. Courts and legislators must once and for all clarify the definition of sound recordings under the Copyright Act, and before 2013. This will likely require an amendment. Currently, there is no clear guideline to attribute ownership, so Congress's intent to be an honest broker between the labels and their artists is likely to end in failure unless there is action soon. MBJ

Sources

1) Copyright Act of 1976, 17 U.S.C. § 203 (2011).
2) 17 U.S.C. § 101 (2011).
3) Marybeth Peters, *The Register of Copyrights, Statement Before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary* (May 25, 2000), http://copyright.gov/docs/regstat52500.html.
4) Id.
5) 17 U.S.C. § 102(2) (2011).
6) Peters, supra note 3.
7) U.S. CONST. art I, § 8.
8) Adam Halston Dunst, *2004 Entertainment Law Initiative Essay Competition Winner,* "It's Mine! No, It's Mine! No, It's Mine!" Works Made For Hire, Section 203 of the Copyright Act, and Sound Recordings, 7 Vand. J. Ent. L. & Prac. 381 (2004).
9) Community for Creative Non-Violence v. Reid, 490 U.S. 730, 744 – 45 (1989).
10) Id. at 746.
11) Id. at 745–46.
12) Id. at 747.
13) Id.
14) Mary LaFrance, Article, Authorship and Termination Rights in Sound Recordings, 75 S. Cal. L. Rev. 375, 381 (2002).
15) Id.
16) Id. at 382.
17) Community for Creative Non-Violence, 490 U.S. at 749.
18) M. William Krasilovsky & Sydney Shemel, *This Business of Music: The Definitive Guide to the Business and Legal Issues of the Music Industry*, (Robert Nirkind et al. eds., 10th ed. 2007), pp/63-4
19) Id.
20) Id.