Section 203 Copyright Terminations: Practical Considerations in the Music Business

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Purpose of Copyright Law

- To encourage creativity through providing authors with exclusive rights in their works for limited times.

- Rights include:
  - reproduction
  - distribution
  - public performance
  - creation of derivative works

- Rights generally endure for 70 years following death of author. *

* Works for hire, anonymous and pseudonymous works: shorter of 95 years from publication or 120 years from creation.
Copyright Terminations

What is the right? Right of authors or successors, under 17 U.S.C. § 304 and 203 to get a U.S. copyright back once it has been transferred to a third party.

Who has right? § 304 applies to author and others; § 203 applies only to authors and heirs.

Joint Authorship? § 304 applies to either joint author; § 203 applies to majority of joint authors.

Can right be contracted away? No, it survives any agreement to the contrary (guaranteed).

What types of agreements? Not applicable to works for hire; applicable to assignments and all types of licenses.
**Section 304 vs. 203**

- **Section 304**: Applies to copyrights subsisting in first or renewal term before January 1, 1978. Termination available after 56 years.*
  
  * Or 75 years for copyrights secured on or between 1/1/1923 and 10/26/1939).

- **Section 203**: Applies to grants executed on January 1, 1978 or later. Termination available 35 years after date of execution of the grant or date of publication (if grant includes publication right).
Notice and Termination Windows

17 U.S.C. § 203(a)

Terminations for grants on Jan. 1, 1978 or later

- Applicable to grants made on or after 1/1/78 by author with a 5-year window open from the 35th anniversary through the 40th year, measured from the date of grant or publication.

- Notice must be served between 2 years and 10 years before the effective date of termination.
Issue #1: The “Gap”

Oops, Congress messed up!

How do you terminate a pre-1978 grant if the relevant work is created and copyright secured on Jan. 1, 1978 or later?

12/1/76
Contract signed

6/1/77
10 songs created, delivered

1/1/79
10 songs created, delivered

1/1/81
10 songs created, delivered
Copyright Office Opinion: Office will accept notice of termination under § 203(a) for “gap” works, but resolution by courts is awaited.

**Rationale:** Pre-1978 grant is executory in nature and is not completed until the copyright comes into existence, when the work is created (1/1/78). *Favors authors.*

**Paradox:** Are all such agreements executory, even if executed on or after 1/1/78? If so, then would the dates of transfer be the dates of the creation of the works? (assuming publication rights not granted)
**Issue #2 Work for Hire**

- U.S. federal copyright not granted before 2/11/72.
- Whether or not post-1/1/78 sound recordings by independent contractors are eligible for work for hire status is unclear. Congress added as a statutory category for sound recording’s in 1999 and deleted it a year later.
- Record companies, thus far, are not fighting the issue. Rather, they are working diligently to renegotiate contracts and keep catalogs in tact.
**Issue #3: Furnishing Companies**

- Furnishing companies commonly used by artists/composers, with inducement letter to guarantee services.

- Author would terminate the grant to furnishing company; label and publisher are downstream rights-holders who lose their rights too.
Issue #3: Furnishing Companies

- Artists and composers could unwittingly lose termination right, if deemed work for hire to the benefit of the furnishing company.
- Labels and publishers have a breach of contract claim against artists and songwriters?
Issue #4 Derivative Works Exception

§ 203(b)(1)

A derivative work prepared “under authority of the grant before its termination may continue to be utilized” even after the grant is terminated.

Issue: Would this exception prevent a new publisher from issuing a new mechanical license for recordings originally made prior to termination?
Issue #4 Derivative Works Exception

Diagram:
- Composer
- Publisher 1
- Publisher 2
- Record Label

Arrows:
- Publishing Agmt. → Publisher 1
- Recording Contract → Publisher 1
- MECHANICAL LICENSE → Record Label
- MECHANICAL LICENSE → Publisher 2
- MECHANICAL LICENSE → Publisher 1
Issue #4 Derivative Works Exception

- Legislative history: The “sole beneficiary” of the exception is the owner of the derivative work (the third party).
- Record label “may” continue to utilize mechanical license #1, but not required. Could re-license from new publisher.
- Voluntary mechanical licenses are perfunctory agreements without guarantees that record labels will not obtain rights from other sources in future.
- *Mills (Sup Ct.), Woods and Ahlert (2nd Cir.) cases would need to be distinguished.*
RENEGOTIATION IS THE TREND

An alternative to terminating or litigating: Labels and publishers are tending to creatively renegotiate new agreements amends or revokes and replaces the pre-termination contract that is subject to termination.

- Labels and publishers can leverage *worldwide* rights by offering better royalties across the board.
- Authors and heirs are negotiating for other rights, e.g., right to pursue infringements, pitching placements.