Prince and the Copyright Revolution (part two)

The question is: How will the media industry will respond in the face of artists seeking to reclaim their works?

by Patrick Soon and Rebecca Bellow

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As was discussed in part one of this article, a paradigm shift is underway as entertainment companies could soon lose control of some of their most valuable hit songs, bestsellers and other core assets. Thousands of artists — including Tom Petty, Bryan Adams, and Charlie Daniels — have filed notices of termination under the provisions of Section 203 of the Copyright Act of 1976 and are seeking to reclaim the rights to their works. The question is: How will the media industry will respond in the face of this turn of events?

The right of termination = Leverage for artists

Section 203 is intended to serve as a safeguard for creative artists by allowing them to terminate transfers that may have been part of unfair contracts. However, this "right of termination" only applies to grants that were executed on or after Jan. 1, 1978, and the earliest this right can be exercised is 35 years after the date of execution. This means that Jan. 1, 2013, marked the first year grants could be terminated under Section 203.

But the full import of this right can only be fully appreciated if one first understands the provisions of the Sonny Bono Copyright Term Extension Act (CTEA) of 1998 — derisively referred to by some as the "Mickey Mouse Protection Act." The CTEA covers most copyrights, and it provides that copyright terms last for the life of the author *plus* an additional 70 years. But now, thanks to Section 203, authors get a second bite at the apple and can reclaim copyrights after waiting only 35 years.

Artists should be forewarned, however, that reclaiming the rights to their works does not automatically translate into more profits. A viable business plan that will capitalize on, and protect, their new ownership rights will be needed. After Victor Willis of the Village People terminated his grant and recaptured the rights to 33 of his compositions, he stated that he is not exactly sure what he is going to do with them.

The fact is, authors like Willis will likely still need the marketing power of big publishers even if they successfully reclaim their rights. Therefore, the best idea may be to simply renegotiate a new contract — using termination rights as a bargaining chip. Media companies should likewise be amenable to hammering out new deals as older music catalogs continue to generate vital revenue streams through synchronization and performance licenses, and bestsellers are increasingly being licensed for films.

But make no mistake, where agreements cannot be reached amicably, no company in the entertainment industry will give up property they believe to be rightfully theirs without a

fight. Artists should therefore brace themselves for the onslaught of entertainment companies that will seek to show that a grant is ineligible for termination.

Arguments against eligibility

Argument #1: The work was "made for hire."

Works created by employees, as opposed to independent contractors, are not eligible for termination as the rights for such works vest in the *employer*, not the employee. Under the CTEA, the copyright terms for such "works made for hire" last for 95 years from the date of publication, or 120 years from the date of creation, whichever expires first. Establishing that the creator was an employee requires satisfying the common law agency factors set forth in *Community for Creative Non-Violence v. Reid* (1989). This may be difficult to do, however, if the artist did not have any of the benefits or obligations typically associated with employment.

The alternative is to show that, even though the author was an independent contractor, the grant cannot be terminated because the work was "specially commissioned." This will require evidence of a signed contract specifying that the work was made for hire. Additionally, the work in question must fit into one of the nine categories established in the Copyright Act for it to be considered ineligible for termination.

Argument #2: Timely notice was not given.

Section 203 requires that notice be given to each grantee and recorded in the Copyright Office no less than 2 years and no more than 10 years prior to the expected date of termination. Since an untimely notice is fatal – thereby leaving the copyright in place for its full term – media companies may believe that the best course of action is to simply wait and hope that authors do not become aware of their right of termination until this window of opportunity has closed and it is too late.

Argument #3: The grant was executed prior to Jan.1, 1978.

If it can be shown that the grant was executed prior to Jan. 1, 1978, it would not be covered by the provisions of Section 203. For example, Tom Scholz, an original member of the music group Boston, filed a notice of termination seeking to recapture the rights to the hit songs he wrote for the group, including "More Than a Feeling" and "Peace of Mind." Paul Ahern, Boston's original co-manager, responded with a complaint that argues, among other things, that the grant was executed in 1975, thereby making it ineligible for termination.

How the courts will decide Scholz's case, and all others involving the exercise of termination rights, will depend entirely on the pertinent facts. However, there are some issues that are not clearly addressed by the provisions of Section 203, and this may lead to instances where the facts fall between the cracks.

Ambiguities in Section 203

Gap Grants

In some instances, there is a gap where authors transferred the rights to a work prior to Jan. 1, 1978, but did not actually complete the work until after that date. It remains to be seen if courts will allow for the termination of such "Gap Grants." The Copyright Office, in an amendment to its regulations, is now allowing for the recordation of Gap Grants, *but* it has also stated that this issue "will ultimately be a matter to be resolved by the courts."

Authorship

Section 203 explicitly limits the right to terminate a grant to authors or, if they have already died, their survivors. But the provisions do not define "author," nor do they set forth a list of qualifications to be satisfied. This could lead to controversies as authorship can be a very complex issue. Sound recordings, for example, may involve creative input from vocalists, musicians, engineers, producers and many others.

The issue of who qualifies as a survivor may be complicated as well, especially where the artist has been involved in multiple relationships, or where illegitimate children seek to effect termination.

The next stage of copyright law

With each passing year, more and more grants will be reaching the 35-year milestone that makes them eligible for termination under Section 203. Soon, it will be the turn of the mega-stars of 80s — such as Prince — to recapture any copyrights they may have transferred to outside entities.

But artists that reclaim the rights to their works will still face the same threat of online infringement and internet piracy that the media industry is confronting today. In part three of this article, WHGC will explore some measures that might be taken to better protect copyrights in this ever-advancing digital age.

CONTRIBUTING AUTHOR

Patrick Soon

Patrick Soon is an attorney at WHGC, P.L.C. whose practice focuses on intellectual property. Outside of his work at WHGC, Mr. Soon volunteers for the American Bar Association where he works as an editor and multimedia chair for the Technology for the Litigator Committee

within the ABA Section of Litigation. PatrickSoon@WHGCLaw.com.

CONTRIBUTING AUTHOR

Rebecca Bellow is an attorney at WHGC, P.L.C. whose practice focuses on business litigation, civil litigation and intellectual property. Ms. Bellow also represents clients in a wide array of litigation matters including general and complex civil litigation, patent and trademark infringement, and business torts. Rebeccabellow@whgclaw.com