September 2003

NEWSLETTER

An Entertainment Industry Organization

CALIFORNIA COPYRIGHT CONFERENCE

50th Anniversary

2003 = The New Millennium for Copyright

*by Tamera H. Bennett, Esq.**

Remember the anticipation leading up to the clock striking Midnight, ringing in January 1, 2000? Groceries were purchased, water was stored, and disaster plans were practiced. Thankfully, the disaster plans were not needed, and life continued with only normal glitches throughout 2000.

Songwriters, and anyone else owning or controlling copyrighted works, should have made preparations for January 1, 2003 from a copyright perspective with the same intensity as precautions were made for the Year 2000. January 1, 2003 "rang in a new year" for termination of transfers of copyrights under the Copyright Act of 1976.

A termination of a transfer is simply the right of an author of a copyrighted work to terminate an interest in the work. The interest, or grant of rights, that may be terminated could be a publishing agreement or a license of the work.

As a general rule, pursuant to revisions to the Copyright Act of 1976, the term of copyright in a song, not written as a work for hire, is the life of the last living author plus 70 years. Most, but not all, licenses/transfers of rights are granted for the life of the copyright. There are certain procedures built into both the Copyright Act of 1976 and 1909 to terminate transfers during the life of the copyright.

Under the Copyright Act of 1976, any grant of rights made by the author on or after January 1, 1978 may effectively be terminated by the author (or certain heirs if the author is deceased) during a five year window. The window to terminate transfers begins 35 years from the date of publication or 40 years from the date of transfer, whichever is earlier. The "35 Year Termination" does not apply to works made for hire. The notice of termination may not be served more than ten years prior to the start of the window, or less than two years prior to the close of the window.

Yes, it is confusing to calculate and confusing to understand. There are numerous intricate details to consider in the process that will not be discussed in this article. In the simplest terms, imagine you entered into a single song publishing agreement on January 15, 1978 for the song "That Song is Mine." On January 15, 2003 you could send the appropriate notice to the copyright holder terminating the transfer under the single song agreement for "That Song is Mine" effective January 15, 2013.

The President's Corner

Teri Nelson Carpenter

Tonight's panel is a wonderful way to welcome everyone back from our summer hiatus. We are fortunate to have the Legal Eagles exploring the latest developments in legislation and the recording industry that will have a significant impact on the way we do business. Michael Morris and Ed Arrow will moderate and host our panel of distinguished experts. This is just the beginning of a very exciting year as we commemorate our 50th anniversary. I am especially looking forward to our plans to salute some of our past presidents during the course of the next year's meetings. We can look back with both pride and gratitude to our long history at the same time we look forward to continued accomplishments for the future.

Next Month:
October 21st
"Canada"
Moderator: Steve Winogradsky

CCC Contact Information:
Please note, we have a new mailing address and phone number.

California Copyright Conference
P.O. Box 57962
Sherman Oaks, CA 91413
(818) 379-3312

Here is how the math works:

Transfer occurs January 15, 1978. Add 35 years to 1978 = 2013 plus 5 = 2018 (2013 – 2018 is the five year window.)

In the above example, notice to terminate may be sent as early as January 15, 2003, but no later than January 14, 2016 to fall within the five year window and to meet the requirement of not being more than ten years or less than two years.

The notice must be sent to the grantee of the rights and filed with the U.S. Copyright Office prior to the effective date of termination. If notice is either not sent, or is improperly sent, the grant will not be terminated, and the grant, in most situations, will continue until the expiration of the song's copyright.

If you wrote songs prior to January 1, 1978, or you are an heir to someone who wrote songs prior to that time, the 1909 Copyright Act, 56-year termination provision applies. The "56 Year Rule" is similar, but not identical, to the "35 Year Rule." Under the 1909 Copyright Act, there were two terms of copyright protection: an initial term of 28 years and a renewal term of 28 years. Under the original version of the 1909 Copyright Act, works went into the public domain if the renewal was not properly filed, or at the end of 56 years. Revisions to the 1976 Copyright Act have extended the life of the copyright for works published pre-1978 such that the original term is 28 years and the renewal term is 67 years. Works that were published after January 1, 1978 are governed by different timelines.

To terminate a transfer under the 56 Year Rule, notice of termination must be properly sent within a five-year window of time beginning at the end of 56 years from the date of registration of the copyright in the work. This is a distinction from the 35 Year Rule. Under the 35 Year Rule, the time was measured from the date of transfer or publication, whichever was earlier, but the 56 Year Rule measures the window from the date of the copyright registration of the work. By terminating under the 56 Year Rule, the author or heirs will reclaim the work for the maximum remaining years in the copyright. In most cases, that will be 39 years.

The greatest factor in determining whether to send notice to terminate a transfer is potential income stream. The question a songwriter must ask is "whether or not the termination and reclamation of the rights granted increases money flowing to the songwriter."

Once the decision is made to terminate the transfer under either the 35 or 56 Year Rule, there are very specific procedures for granting further rights. Neither further grants nor agreements to make a further grant of any right subject to termination executed prior to the date of termination will be valid. As always, there is an exception to the rule. The original grantee (or its successor) and those authorized to make such further grants on behalf of the grantor, may enter into an enforceable agreement for a further grant prior to the effective date of termination.

Both the 35 Year Rule and 56 Year Rule allow songwriters or their heirs an opportunity at a second bite at the apple to most efficiently make money from their songs. This article does not claim to address every detail of either rule. There are many intricacies to properly effectuate a termination and a valid grant of the rights terminated. Although an individual can file their own notices of termination, legal counsel is advisable to assist in this process.

Remember, if you ©REATE. P®OTECT.™

**The Bennett Law Office counsels clients in the areas of Entertainment, Internet and Intellectual Property Law. Tamera may be reached at 972-436-8141 or by email at tbennett@tbennettlaw.com.*

Membership Opportunities

CORPORATE MEMBERSHIPS: $250

Starting new this year, we are offering Corporate Memberships. Corporate Sponsors can send up to 10 people to each dinner seminar at the member dinner price. In addition, each member can bring a guest at the discounted member rate. A Corporate Sponsor can save $60 per meeting, with a potential savings of $480 for the year.

INDIVIDUAL MEMBERSHIPS: $55

Enjoy each dinner seminar at the special member rate of $28; the non-member rate is $35

.

MONTHLY DINNER MEETINGS:

Held once a month, generally the 3rd Tuesday of each month
6:30 p.m. Cocktails & Networking
7:00 p.m. Dinner & Meeting

CCC WEBSITE

Our website has been completely redesigned. Here you will find the latest information on upcoming meetings and other events. Make meeting reservations, join, or renew your membership online.

www.theccc.org

Big Changes Afoot at Record Labels

by Dan Butler

Record labels are under pressure from teens growing up with the belief that they are entitled to free music, fueled by Internet filesharing technology that enables anyone with access to a computer to download virtually any song without paying. Many youths perceive CDs to be too expensive and performers too rich, and shrug off the industry's belief that they are pirates stealing from artists, labels and publishers.

As evidence of piracy's increasing harm to the music business, 2003 has been a year in which music sales have continued to slump. In the last three years, CD sales have declined by a whopping 31%. EMI has laid off 20% of its workforce, and other labels have suffered significant staffing cuts as well. Record company executives report that their industry is in free fall with no happy landing in sight. Perhaps urged on by a sense that if they do not act quickly to save the business, there will be no business to save, the labels have recently mapped out their boldest plans yet to shore up sagging sales and address their critics. These include big price reductions, more aggressive litigation aimed at individuals, legal downloading alternatives, and royalty accounting reform to address artists' and legislators' concerns.

UMG Drops CD Prices

In response to the argument that CDs cost too much, Universal Music Group ("UMG"), the industry leader with 29.6% of the global market share, has taken the drastic step of dropping the wholesale price to dealers on most of its top-line CDs from $12.02 to $9.09. By November, consumers will find UMG CDs formerly sold with a suggested retail list price ("SRLP") of $18.98 will now carry a SRLP of only $12.98, a reduction of more than 25%. (Classical, Latin, and multi-disc sets will not be affected by the new pricing policy.) UMG hopes that cheaper CDs will result in higher sales, which may make up for the lower profit per CD. UMG is also eliminating co-op advertising and discounting, a practice whereby the label provides retailers with dollars for advertising such as in-store displays. Co-op advertising has enabled the large chain stores like BestBuy to charge consumers less for CDs than traditional record stores (often near the wholesale price), because the chain's income was supplemented by record label advertising. Instead of co-op ads, UMG will focus more advertising dollars on direct-to-consumer campaigns, which could benefit large and small record retailers alike.

Evidence that this pricing plan may bear fruit is found outside the music business. The aggressive pricing policies of DVDs by studio home video divisions has contributed to an explosion of sales of DVDs to consumers over the last several years, even as record sales have been dropping. While CD prices increased to $14-19, many DVD titles have been discounted to $9-15. In the last few years, consumers could buy many popular movies on DVD for $14.99, yet be forced to pay $18.98 for the accompanying soundtrack album. By lowering prices, UMG is attempting to again establish music as a good entertainment value.

Whether the other major labels will follow UMG's lead and offer similar reductions remains to be seen. It is highly likely, however, that if UMG succeeds with this plan, its competitors will be forced to adopt similar pricing strategies.

RIAA Takes Aim At Individuals

Although the RIAA anti-piracy litigation was able to successfully shut down the centralized Internet filesharing system run by Napster, it found litigation ineffective as a means to rein in the decentralized peer-to-peer filesharing services such as Kazaa and Morpheus. Now, the RIAA has changed tactics and taken aim at the Internet users themselves. On September 8, 2003, the RIAA sued 261 individuals who it identified as "major offenders," i.e., persons trading in thousands of files on peer-to-peer networks. Additional lawsuits are planned. Parents and schools, as well as their children and students, are now at risk of being sued and forced to pay significant fines. The day after the first 261 suits were filed, one defendant, the mother of a twelve year-old girl who had shared over 1000 songs over the Internet, settled out her lawsuit for $2,000 and a promise to stop illegal filesharing. Several other potential defendants have since settled out in the $3,000 range. These amounts are relatively small in comparison to the potential statutory damages of $750-150,000 per song; therefore, many defendants will have plenty of incentive to settle as quickly as possible.

Except for those unlucky enough to be in the first wave of lawsuits, the RIAA has offered an "amnesty" program, whereby individuals can sign a notarized affidavit promising to respect copyright laws, refrain from illegal file trading in the future, and delete any illegally downloaded songs already on their computers. One positive benefit of the lawsuits is that parents are now on notice that they may be liable for their child's Internet activities, which in turn may inspire parents to more closely monitor what exactly their kids are doing on the computer.

This strategy may backfire, however, if the record companies are perceived as an Orwellian Big Brother going after not only kids, but moms, dads and grandparents. The RIAA has evidently decided, however, that the crisis is serious enough to risk the public relations problem. To counter this negative publicity, there will be more

anti-piracy ad campaigns for music (and motion pictures as well sponsored by the MPAA). These ads are designed to impress upon the public that the victims of copyright theft are not just wealthy rock stars and celebrities, but struggling artists and working class people.

Legal Alternatives Take Off

Many file sharers have argued that there have not been legal alternatives offered by the record labels themselves. That situation is changing rapidly, with the advent of Rhapsody, pressplay, iTunes and other services. Record labels and publishers are finally getting together to cooperate and make catalogs available to legal download services, most of which charge an average of $.99 per song. Apple Computers has sold over a million iPods, handheld devices capable of storing 10,000 songs, and its iTunes service has been the most successful legal download source yet, with over six million downloads in its first few months of operation, proving that people will pay for downloadable music if the price is right and the songs easy to access. Unfortunately for Apple Computers and its iTunes service, Apple Corp. (the successor-in-interest to the record label founded by the Beatles in 1968) may now be suing Apple Computers for violating a 1991 agreement restricting Apple Computers from using the Apple name to sell music.

Royalty Revamp

Record labels have come under fire from their own artists and legislators who have taken a hard look at longstanding industry accounting practices many perceive as unfair. In response, three of the major labels, BMG, UMG and the Warner Music Group, have instituted new royalty calculations that promise to address many of the artist concerns recently raised in the California Legislature by State Senator Kevin Murray (D-Culver City) and various high profile artists such as Don Henley and Courtney Love.

Last November, BMG announced its plan to adopt new royalty calculations, dropping the SRLP formula and instead using a calculation similar to that used for foreign sales, i.e., based on the published price to dealers ("ppd") while also eliminating packaging deductions, new media deductions and free goods deductions. The calculation for an artist earning a 12% SRLP royalty, with typical deductions of 25% for packaging, 20% for new media and 20% for free goods, thus would result in a new calculation expressed as a 9% ppd royalty without the foregoing deductions. While significant for making it easier for artists to determine the number of pennies they can expect to receive for each track on an album, the end result will be the same number of pennies.

UMG followed suit that same month with an internal memo authorizing its royalty accountants to pay the higher album rate instead of the single rate for downloaded music, as well as eliminating packaging deductions, new media deductions and free goods for downloaded tracks. UMG also decided to permit the deletion of many audit restrictions typically found in its artist agreements. No longer will UMG's artists be prohibited from making copies of royalty documents and removing them from the label's offices, from hiring auditors on a contingency basis, or conducting an audit simultaneous with another audit using the same accounting firm. UMG has even promised to grant audit rights to artists who may not have been entitled to audit under their old contracts, and stated it will double the size of its audit support staff to make UMG better able to respond to audits.

Artists have long contended that record companies' refusal to allow artists access to manufacturing records made it difficult to assess whether they were getting paid for all units sold, particularly in the pre-SoundScan era domestically and in foreign territories where SoundScan has never operated to track CD sales. Artists argued that, without disclosing manufacturing records, record companies were free to press discs and not report them sold; in effect, record companies enjoyed a license to print money. Many years ago, record labels did provide manufacturing records, but they stopped providing them after several controversies arose caused by often-inaccurate record keeping by the manufacturers. In an effort to alleviate what UMG termed "unnecessary suspicion" by auditors, and to address the perception problem raised by Sen. Murray at recent hearings, UMG will once again permit artists access to manufacturing records.

The Warner Music Group ("WMG") has also embarked upon a comprehensive overhaul of its royalty accounting practices. Like BMG, WMG announced it would go to a ppd-based system without packaging, new media or free goods deductions. Like UMG, WMG announced it would allow access to manufacturing records. WMG went even further, however, by promising that it will not only pay interest (at the prime rate) to artists discovering unpaid royalties, but it will also reimburse artists their audit costs if discrepancies greater than 10% are found in the course of the audit. Although publishing contracts sometimes contain these types of audit rights, most U.S. record labels have rarely granted these concessions until now.

The other two major labels, Sony Music and EMI, have yet to commit to an overhaul of their royalty accounting practices, but will likely be pressured into giving their artists similar benefits in the future to remain competitive.

By dropping prices, discouraging illegal filesharing with aggressive litigation, promoting legal downloading services, and revamping accounting practices, record companies are attempting to change the way they do business to bolster sagging sales and counter negative public perceptions. It is encouraging that the labels are now waking up and taking bolder steps. Whether these steps will be effective remains to be seen. The only certainty is that the music business is in for more significant changes in the very near future.