“IN THE VAULT”

A feature article by Susan Butler that appeared as the cover story in the Aug. 12, 2006, issue of Billboard magazine.

The article focuses on the way termination rights will commercially impact the record industry since the U.S. Copyright Act does not define an “author” of a sound recording in a way that can be applied in practice to the actual participants involved, directly and indirectly, in the making and re-mixing of a musical sound recording.

[MAIN FEATURE]

Beginning in 2013, countless recording artists will be eligible to terminate their record deals and get the rights to their music back. In fact, artists who made record deals and released albums in 1978 could have petitioned the labels to start these negotiations in 2003. But so far no one publically has. The labels are preparing for a fight. And the artist attorneys are looking for the right case. Behind closed doors, top music lawyers predict there will be a state of chaos in 2013 when artists, under the 1976 Copyright Act, start making demands. If the law is not amended soon, it could cause a seismic disruption in the sale of catalog music—just when digital and mobile music services hit full stride.

It all rides on the fact that the 1976 Copyright Act does not define who is an "author" of a sound recording. As all the talented contributors (from singers to producers) begin to vie for author status, the disputes could also undermine the relationships that make up the foundation of the record industry, pitting artist vs. producer, producer vs. engineer, singer vs. musician, musician vs. union—and all of them vs. the record companies.

"The rug is going to be pulled at some point in the next few years," says Don Friedman, a partner with Grubman, Indursky & Shire in New York, who specializes in legally complex projects in the entertainment industry. "Until there is resolution as to who has the right to claim authorship [in a sound recording], a lot of works will end up essentially being taken off the market because of the disputes. You'll have people from the low end of the continuum to the top end of the continuum in terms of creative contribution making claims. Nobody will be empowered to exploit a lot of these recordings. It will be chaos."

This could prove tragic to artists who no longer sell thousands of CDs but whose single download sales are on the rise. For example, according to Nielsen SoundScan figures for 2004 through mid-June 2006, Toto's "99" and "Hold the Line" from its 1981 album, "Toto," have sold more than 53,000 downloads. CD sales of Air Supply's 1980 album, "Lost in Love," are relatively minimal, yet the single "All out of Love" has sold nearly 50,000 downloads, while the song "Lost in Love" has sold more than 23,000 downloads.

The first authors who may take advantage of the termination right must have made their deals in 1978 and released a recording, which is protected by the U.S. Copyright Act, that same year. Under this law, a majority of the authors of a copyrighted work, like a recording, may terminate certain contracts regardless of what the documents say. Authors who assigned their rights in the

copyrights, or who granted to others the right to reproduce, distribute or publicly perform the recordings, may end those contracts.

But the contracts may only be terminated during a five-year period; if specific procedures are not followed to the letter during that period, the right to terminate is lost. The period begins 35 years after the recording was first released to the public or 40 years after the contract was signed, whichever time is earlier. The authors must provide written notice to the companies of their intent to terminate no earlier than 10 years before the termination date, but at least two years before that date.

For 1978 contracts covering recordings from that same year, that notice period began in 2003 and will run until the end of 2016. So where are the notices?

"It could be they don't know about their rights," says Marybeth Peters, who heads the U.S. Copyright Office as Register of Copyright. "Under the old law, people tended to wait. They tended to come in three to four years out, and frequently there were some that went down to the wire and actually missed the deadline."

Indeed, a half dozen producers and artists who won Grammy Awards between 1978 and 1982 told Billboard that they never heard of the termination right but are very interested to learn more about it.

There is a catch, however. Contracts for copyrighted "works made for hire" may not be terminated. When record companies receive termination notices, many labels will undoubtedly claim that the artists were "hired" by the record companies, therefore they control the copyrights. But most experts do not believe that record companies will win that argument.

Nonetheless, labels are expected to wage a battle raising every legal objection possible to protect their financial investments.

"For the unwary author, there are more than enough procedural pitfalls for the labels to attack any purported termination," a high-level industry executive says.

Litigation is inevitable. "There will be litigation at some point to determine who an author is," Peters says. "If you're a background musician, you're probably not going to bring a lawsuit. It's going to be someone big."

Michael Pollack, former general counsel for Elektra Entertainment Group and Arista Records, agrees.

"In the record industry, generally speaking, litigation often is a form of negotiation, and people really do work to resolve things. There are certain people who do want to go to the mat, but very few," he says. "Do you want to know what the reality is? Money. Possibly you work out some sort of different split or you give some sort of an advance."

One other option is for the artists to re-grant rights to the label. This can be tricky. The copyright provision, section 203 of the Copyright Act, only permits a further grant of rights by certain authors during certain times tailored around the notice periods. Simply renegotiating royalties does not alter an author's right to terminate.

But many creators will not want to negotiate a new deal with the same label.

"Some of the record companies have mismanaged careers," says Elliot Scheiner, a multiple Grammy Award-winning producer/engineer. "I've done a couple records over the past couple years, and we can't even find the masters. They just mishandled the assets."

Scheiner believes the creative community will work things out. "I gotta think that deals will be struck," he says.

Friedman is among those experts who urge a legislative fix. "The recording industry ought to focus on getting some kind of amendment to the Copyright Act that will clarify who the authors are of a sound recording," he says. "The most efficient way to resolve this is by legislation."

To get legislation passed, industry members will undoubtedly need to become more involved with trade groups that have lobbying clout in Washington, D.C. Typically, legislators want the industry players affected by the current law to agree on a bill before congressional leaders make the effort to get it passed into law.

Record companies have a strong lobby through the RIAA. Unions for musicians and vocalists, the AFM and AFTRA, respectively, also have a presence in Washington, D.C. The Recording Artists' Coalition, Recording Academy and other artist rights' groups were instrumental in getting a 1999 sound recording work made-for-hire provision removed from legislation.

"The right people need to become focused and energized about this before it really becomes too late," Friedman says.

After all, it will not be long before authors of sound recordings start eyeing the sample licenses they granted to early rap and hip-hop artists who later became huge stars.

[SIDEBAR: THE LABELS' ARGUMENT by Susan Butler]

For decades most record company contracts have included paragraphs in which an artist acknowledges and agrees that the recordings will be "works for hire" under copyright law, which means the labels are employers and the artists are employees. This makes the record companies the sole authors and owners of the sound recordings/ artist masters.

Yet unlike creative contributions to a motion picture, which are classified as works for hire under the Copyright Act, sound recordings were not officially listed until 1999. Congress passed an unrelated bill that included an amendment adding sound recordings to the list. Therefore, recording artists would not be able to terminate their record deals.

"When you have a work that involves a lot of people who can come in and terminate rights, then that really affects your ability to market the work in the future," says Marybeth Peters, the U.S. Register of Copyright. "That is why most motion pictures are works made for hire."

But some members of the artist community rebelled against the 1999 amendment. Congress removed that part of the law the following year. No one knows whether Congress did it for legal or public policy reasons—the controversy brought about a massive anti-record label media frenzy.

Record companies will undoubtedly still try to claim certain recordings are works made for hire when they receive a termination notice.

"It's hard to justify under the statute as it currently exists that a sound recording is a work for hire," attorney Don Friedman says. Most experts agree with him.

Perhaps more importantly, an artist signing a contract that "agrees" with that provision does not necessarily make the label the employer or the recording a work made for hire.

"These provisions, which were take it or leave it, were not [necessarily] valid and are not really work for hire," Peters says. "At most, it's a transfer of ownership." That is the type of transfer that may be terminated by an author.

As a result, a record company that wants to claim an authorship right will have to show that it was truly involved in the making of the record, attorney Jay Cooper says. This may be hard to prove.

"There was a time when labels had in-house A&R people, and they really put it all together," Cooper says. "They started to phase them out the end of the 1960s and into the 1970s. The record companies started dropping their A&R staffs because a lot of the bands were being self-produced."

Some lawyers believe that a record company that basically puts together the producer, the artist and the studio may be at least a co-author. Most industry veterans say that a record put together by Arista Records founder and RCA Music Group chairman/CEO Clive Davis will clearly give the label co-authorship because he is so involved in the recordings.

But even his involvement varies with each recording.

"Part of Clive's deal was that he had a choice of three songs on any album that we did with Arista," Air Supply co-founder Russell Hitchcock says. "He was instrumental in song selection, arrangements. He would come to the studio for vocal sessions. Just a really hands-on guy."

Elliot Scheiner, one of the engineers who won the 1978 Grammy Award for best engineered album performed by Steely Dan, says no one from the record company (MCA Records) ever came to the studio while that band's albums were being recorded. "They didn't want anybody hanging around the studio. It was just them and myself, the producer and musicians."

Occasionally record company personnel would come to the recording sessions for other artists' albums. In the late 1980s and early 1990s, Scheiner says there was a trend among record company A&R people where they took possession of the record. "All of a sudden it was their record. It was no longer the artist's record or the producer's record. It was a different ball game. The 1990s were really scary. There were no more musicians in A&R. I don't know where they came from."

Some label representatives may have believed that they contributed to the recording, but they merely succumbed to the "dead fader" syndrome.

"I've never come across an A&R person that made a contribution that was valid. We would ignore it," one engineer says. "The A&R guy would say he wanted something up in the mix, and you'd reach for some fader that had nothing in it. As you turned the fader, he'd go, 'Oh, yeah, that's better.' So you would just ignore it."

[SIDEBAR: WHO IS AN AUTHOR? by Susan Butler]

Anyone who has contributed creatively to a sound recording could be an author. It does not depend entirely on contracts or on money.

"What I'm going to be looking at is, who is the creative force behind the recording? That is the author," says veteran music attorney Jay Cooper, chairman of Greenberg Traurig's Los Angeles entertainment practice.

For instance, someone who simply pays money for a recording is not an author under copyright law. On the other hand, someone who works on a recording and receives money—but does not receive a share of royalties like a featured artist or a producer—could still be an author.

"You have to have contributed original authorship," U.S. Register of Copyright Marybeth Peters says. "The courts are going to look at what the contribution is, as opposed to all the creative efforts as a whole, to decide who rises to the level of an author."

The record industry customarily assumes that the featured performer and, perhaps, the creative hands-on record producer are the authors. That may not be the case for every recording, however.

Grammy Award winner Giorgio Moroder and Pete Bellotte, who produced and co-wrote a slew of hits for Donna Summer in the 1970s, produced and wrote about half of Janet Jackson's second solo album, "Dream Street," in 1984, when Jackson was only 18 years old.

"At the time, Janet wasn't a great singer yet," Moroder says. "She would come in the studio, and we would just tell her how to sing. Her input was very little. So there, the influence of the singer was very little."

Divvying up authorship contributions between featured performers and other performers will be very subjective. Musicians and vocalists are often personally selected for their exceptional abilities to perform on the recordings or for their distinctive sounds.

The contribution of these distinctive sounds is different from a contribution to the musical composition. What may not amount to co-authorship of a composition may still be co-authorship of a sound recording.

"When you really do choose people because they're identifiable—and in fact maybe because they sounded so unique they get sampled—then that's an argument they are an author," Peters says. "But I have no clue how any of this is going to play itself out."

Engineers may also have a stake. "Mixing engineers might be considered authors because they are taking those sounds and changing those sounds to create the final product," an industry executive says. "Is a regular engineer that's moving dials an author? Maybe. I'm not going to rule that out, but the engineer has to do something more than just move dials."

Producer/engineer Elliot Scheiner says that it is only in the last 10-15 years that there have been separate people who work as the recording engineer, overdub engineer and mix engineer. Before then, one engineer worked from the beginning of the recording through the mix.

"You had your vision of what things would sound like," he says. "In most cases, artists or producers would hire you because they agreed with your vision. You were a part of the painting, there's no question to that."

When Scheiner mixed an album for the Foo Fighters, he was pretty much on his own. "A lot of times artists don't even show up for mixes. You'll do a mix and send it to them. Who was directing me? Not really anybody. I thought about what I would do and what they might want. There are no set rules. Each record is different."

How the authors will split the shares will be the final piece in the puzzle.

"If you find someone who contributed 98% and the other who contributed 2%, and there is nothing in writing, they are joint owners, which gives them each a 50% share," Peters says. "Courts sometimes don't like that result." Some judges will try to determine whether the authors initially intended to share the rights equally.