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This is a supplement to my initial Comment to the Copyright Office inquiry into the Possible Gap in Termination Provision.

As stated in my initial Comment, in addition to settling this particular Gap question, there is a need for the Copyright Office to clearly define rules for determining the effective date of a grant for a post-1977 Work that is created at a future date pursuant to a multi-year, multi-Work contract.

While the following discussion may be beyond the scope of this particular Copyright Office inquiry, I believe the Gap question begs for the date of grant questions to be addressed. To that end, following are my thoughts for consideration.

TERMINATION OF POST-1977 WORKS

In review, with respect to Works created after 12/31/1977, there are two possible scenarios that affect calculation of termination dates. They are:

- 40 years from the date of the grant for the Work, or
- If the grant included the right of publication - 40 years from the date of the grant for the Work or 35 years from the date of publication of the Work, whichever term ends earlier.

CURRENT MUSIC PUBLISHING PRACTICE

I have worked in music publishing for 20 years so my commentary is derived from this experience. In music publishing, copyright grants are made in essentially one of two ways. The first, via a single song agreement (although these can include multiple songs in one agreement). Single song agreements are for existing songs and do not include a grant of songs to be written at a future date. The second, via an exclusive songwriter agreement where the songwriter agrees to grant rights to songs they write in the future to a particular entity and for a particular period of time.

THE TERMINATION PROBLEM

For post 1977 works, the date of grant must be clearly defined in order to calculate proper termination dates and serve accurate termination notices. Even for grants subject to publication rights and where the Work is published, the parties need to know the date of grant in order to determine "which term ends earlier" (i.e. 40 years from the date of the grant or 35 years from the date of first publication).

With respect to single song agreements, as I've defined them above, because the Works are already in existence, there is no problem in identifying the date of grant...it is the date of the single song agreement as signed by the author. In this case, the date of grant is clear. If the grant includes rights of publication, then the parties just need to determine the date of first publication in order to identify the proper termination dates.

First publication is relatively easy to confirm (i.e. the first publication of the Work as released for public distribution on a particular date).

With respect to exclusive song agreements, this is where the termination problem arises for a post-1977 copyrightable work (a “Work” for the remainder of this commentary) that is subject to a multi-year, multi-Work contract (a “Contract” for the remainder of this commentary).

Assuming that the Copyright Office Gap inquiry results in a determination that a grant cannot actually be effective until a copyrightable work comes into existence (i.e. the date of creation of the Work), then we still have a myriad of termination calculation issues for Works created under a Contract.

In practice, many music publishers have not established creation dates for Works created under a Contract. And, with 32 years of music publishing history behind us (from January 1, 1978), many authors will not remember exactly when they wrote a song subject to a Contract. This leads to best-guess practices, which become subject to disagreement, or jockeying for more favorable positions regarding an applicable termination date. Authors will take positions that allow for the earliest possible termination and grant owners will take positions that allow for the latest possible termination dates. While professional legal advisors may enjoy this dynamic, it will soon become a significant and potentially costly problem for authors and grant-owners as the first possible effective post-1977 termination dates approach. This is where the Copyright Office needs to help define termination rules that are clear, fair and that mutually motivate authors and grant-owners to establish clear grant dates for a Work subject to a Contract. To that end, following are my suggestions for such rules.

POST-1977 TERMINATION CLARIFICATION RULES

As used in the following rules, a Work is a post-1977 copyrightable work, a Contract is a multi-year, multi-Work agreement to which a Work is subject, and Base Date is the applicable date from which the termination date calculations for a Work are based.

Works that Pre-exist a Contract

With respect to a Work that pre-existed the commencement date of the Contract but is specifically documented as a Work subject to the Contract:

- If the Work is unpublished – since the Work existed prior to the Contract, the date of the grant would be the effective date of the Contract.
- If the Work is published – the Base Date would be the date of the Contract (i.e. the date of grant) or the date of first publication subject to whichever is earlier based on applying the 40 and 35 year rules.

Works created during the term of a Contract

- If the Work is unpublished:
 - the effective date of the grant would be the date of creation of the Work as agreed upon by the applicable parties, however, if the creation date was

- not determinable or could not be agreed upon between the applicable parties,
- then the next applicable date of the grant would be the date of a supplementary assignment document signed by the author that attributes the unpublished Work to the Contract, however, if there is no such assignment documentation or such documentation may exist but cannot be identified,
- then the next applicable date of the grant would be the date of the Contract.
- If the Work is published:
 - the same rules as set forth above for unpublished works would apply, except,
 - for Contracts that include the right of publication, the parties would compare the date of first publication to the date of grant to determine the Base Date, i.e. whichever is earlier based on applying the 40 and 35 year rules.

Suggested New Grant Administration Protocol

For the benefit of both parties and to clearly define the effective date of the grant for a given Work, authors and grant-owners should establish an administration practice where they mutually execute a supplementary assignment document (i.e. any document that attributes a Work to a Contract) that includes the creation date specific to a given Work.

Based on the rules suggested above:

- Grant-owners would be motivated to determine a clear creation date because, without it, they may be subject to the Contract date, which would be earlier than the creation date and would make termination dating more favorable to an author.
- Authors would be motivated to determine a clear creation date because, without it, they may be subject to an Assignment document date, which could be later than the actual creation date and thus make termination dating more favorable to a grant-owner.

I fully expect that I have missed a number of nuances in this commentary. My hope is to generate the necessary discussion and dialogue to resolve these termination questions so authors and grant-owners can manage termination rights in a practical manner.

Respectfully submitted,

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