Recent changes in the copyright laws, both in the United States and abroad, will soon cause considerable disruption to the existing paradigm of copyright protection. The European Union recently adopted a directive to extend copyright protection for sound recordings by an additional 20 years and, in a decision handed down just a few weeks ago, the United States Supreme Court upheld a law that restores copyright protection to all eligible foreign works that were previously in the American public domain. Lastly, a measure set to go into effect in the United States on January 1, 2013 may cause the greatest disruption to the copyright landscape. Starting that day, authors of works created after 1978 and assigned to third parties can regain control of their works by terminating the assignment after 35 years. Following is a brief summary of these developments.

**EU Extends Copyright for Sound Recordings by 20 Years**

In the European Union, popular music recordings from the 1960's from acts such as the Beatles and the Rolling Stones were poised to enter the public domain as a result of the expiration of their 50-year copyright term. In September 2011, however, the European Union voted to extend copyright protection for these works for another 20 years. Perhaps to assuage critics who claim that record labels (and not struggling musicians) will benefit most from the extension, the new EU directive contains a number of accompanying measures to provide balance to individual musicians who may not directly benefit from the copyright extension, including the following:

- rights to a sound recording may revert to the artist if the record label does not make the recording available for sale to the public (the “use it or lose it” clause);
- a “clean slate” provision that prevents the record label from making any deductions during the extended copyright term from the contractual royalties due to featured artists; and
- creation of a fund, financed by record labels with a percentage of benefits obtained from the copyright extension, for session musicians who signed away rights when a recording was made.

Details as to how some of these measures will be implemented or enforced is not clear from the language of the new directive. Nevertheless, it seems likely that EU Member States will be expected to implement these accompanying measures in addition to the term extension. U.S. Supreme Court Restores Copyright Protection to Foreign Works On January 18, the U.S. Supreme Court, in a decision watched closely by musicians, publishers,
Recent Changes in Copyright Law: Disrupting the Status Quo

educators, orchestra conductors, upheld a federal law restoring copyright protection to millions of books, paintings, films and musical compositions by foreign artists that were previously in the US public domain. In doing so, the Court rejected constitutional challenges to the law, holding that nothing in the Copyright Clause or the First Amendment "makes the public domain, in any and all cases, a territory that works may never exit." The case, Golan v. Holder (docket 10-545), involved a 1994 law enacted by Congress (which became Section 514 of the Copyright Act) to implement certain provisions of the Berne Convention for the Protection of Literary and Artistic Works. Article 18 of the Berne Convention required member countries to accord other countries minimum levels of copyright protection and treat authors of other countries in the same manner as they treat their own with respect to that protection. While the U.S. joined Berne in 1989, it did not implement Article 18, in effect, disregarding protection for foreign works. In 1994, the Berne Convention specifically mandated implementation of Article 18, leading Congress to enact Section 514, which was challenged in Golan. Section 514 granted copyright protection in the U.S. to foreign works on the same basis as enjoyed under foreign copyright law. Since prior to the enactment of Section 514, the U.S. did not recognize the foreign copyright protection of these works, they were considered to be in the American public domain. Thus, upholding the application of Section 514, with its equal treatment of works under foreign copyright law, has the effect of providing copyright protection to works that were previously in the public domain. As noted by Justice Ginsberg, the law merely puts "foreign works on an equal footing with their U.S. counterparts." Other provisions of Section 514 take into consideration its impact and attempt to ease transition to the new regime. In particular:

- restored works will only be protected until the expiration of the full copyright terms, whether that expiration occurs in the U.S. or in the origin country;
- reanimation of copyright will be limited to only the remainder of the copyright term the work would have been entitled had it never entered the public domain;
- "reliance parties" who used or acquired a foreign work in the public domain prior to the enactment of Section 514 will be allowed to continue to use the work until the copyright owner gives notice of an intent to enforce;
- and derivative works based on restored or reanimated work must only pay the copyright owner "reasonable compensation" to indefinitely exploit the derivation.

As the Supreme Court noted, unanswered questions remain about how Section 514 will be implemented, but the Court did not consider those questions significant enough to require rejection of the law. In particular, the treatment of "orphan works" (when the copyright owners of the newly regulated foreign material cannot be identified or located), will likely be among the first issues for Congress to resolve next. "Termination Rights" To Take Effect in the U.S. On January 1, 2013, the controversial "termination rights" provision of U.S. copyright law will be triggered, allowing authors (and their heirs) to begin regaining control of their original works from publishers and record labels to whom the works were previously assigned. For works assigned in 1978 and thereafter, Section 203 of the Copyright Act of 1976 allows an original author to exercise an option to terminate the existing owners' rights if 35 years have expired since the assignment. The wording of this provision suggests that termination rights are absolute for the original author or heirs, and thus would prevail over any written agreements assigning ownership, even if the agreements state that they are in perpetuity. There is, however, an important exception for "works for hire," which are deemed the property of the publisher or record label. Termination rights are a particularly hot topic for the music business. Once a master recording reaches its 35-year mark, it is "game on" for the artists and songwriters who wish to reclaim ownership of qualifying songs from publishers and record labels. However, it is likely that any attempt to recapture rights will hinge on the language of the applicable contracts between the artists and songwriters, on one hand, and labels and publishers, on the other, specifically whether there is clear assignment language (which would be subject to termination) or "work for hire" language (which would leave ownership of the works with the applicable label or publisher). One concern with "termination rights" is the lack of clarity in this provision as it may relate to musicians. For example, it is unclear who exactly can qualify as an "author" of a sound recording, casting some ambiguity over who can share the rights after they revert. The law is also murky for non-U.S. artists and whether those artists can exercise termination rights on
American recordings. What is clear, however, is that to enforce termination rights, authors (or their heirs) must comply strictly with the law. Some of the provisions to be aware of include:

- a requirement to file termination notices as much as ten years in advance of the effective termination date, but no less than two years before the date an author hopes to recoup their work;
- a provision stating that once a song or recording qualifies for termination, the author has five years in which to file a claim or else the right to reclaim the work relapses;
- a rule that, for works created post-1978 with multiple authors or heirs, a majority must agree to terminate; and
- a caveat that the law only has effect in the U.S., so that a publisher assigned a worldwide copyright will still retain control in foreign markets.

For publishers and other existing owners of copyrighted works who face pending terminations, there are certain considerations to keep in mind:

- time is of the essence to reach out to songwriters or their estates to attempt to negotiate a new deal;
- if a notice of termination has already been issued, only the current publisher may try to enter into a new deal with the songwriter or his estate before the termination takes effect;
- opportunities may exist for new copyright acquisitions from authors who seek to enforce their termination rights against existing copyright holders, but who may be in the market for a deal with a new publisher; and
- consider whether the “works for hire” exception applies.

We will keep abreast of developments in these areas, particularly as the new implementation and enforcement schemes are developed. And we are available to assist any copyright stakeholder seeking to assess how these changes in the copyright law may affect their rights.

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