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“Use it or Lose it”: EU’s Copyright Extension Leads to Jockeying and Uncertainty

Client Advisories

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

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As we previously reported [here](#), the EU voted in 2011 to extend copyright protection for sound recordings from 50 to 70 years. Two major record labels, Sony Music and Universal, recently received media attention for their response to provisions in the [new law](#), which is set to take official effect in EU member states on November 1, 2013. [By rushing outreleases of archival Bob Dylan and Motown material](#) just weeks before the original 50-year copyright clock on those recordings was set to expire, the labels were exercising what’s known as the “use it or lose it” option under the new law. (Although there is no similar provision in U.S. copyright law, the EU extension clearly impacts American artists who have recorded in Europe at some point in their music careers.)

Pursuant to the “use it or lose it” provision (Directive 2001/77/EU, Art. 3(1)), recordings are only entitled to the 20-year extension if they are offered for sale to the public before the expiration of the original 50-year term. Consequently, pre-1963 works that were not released to the public before December 31, 2012 have now fallen into the public domain in Europe. Indeed, [“reissue labels” have wasted no time exploiting valuable material](#) that lost copyright protection at the end of last year from artists like the Beatles and Bob Dylan.

The “use it or lose it” provision is also accompanied by a termination provision (Directive 2001/77/EU, Art. 3(2a)), designed to enable performers who previously transferred or assigned their sound recording copyright to a label to recapture their rights. The performer can issue a notice of termination of the early transfer or assignment if the label has failed to exploit the material (by offering copies of the performer’s recordings for sale in sufficient quantities or making the recordings available to the public by wire or wireless means) within 50 years of first publication or first lawful communication to the public.

Thus, if the “use it or lose it” provision of the new EU law is the sword a copyright holder can wield to extend protection, the termination provision also gives those same copyright holders a shield to prevent termination of a valuable transfer or assignment. Significantly, however, this shield has a bit of a hole in it since a label can retain and extend the copyright if, within one year of receiving the notice of termination, the label exploits the material.

Notwithstanding the strategies employed by Sony Music and Universal with their recent archival releases, the new law has yet to take full effect in EU member countries and there is still uncertainty around exactly how certain provisions of the law will operate. For example, there appears to be no established protocol for what constitutes “for sale in sufficient quantity” or what a label must do to make recordings “available” to retain copyright control. In the case of Sony Music, the Bob Dylan archival release was extremely limited: Sony produced only around 100 copies of the CD set in stripped-down packaging, and download access was limited to online buyers located in France or Germany. It is also unclear what guidelines, if any, a performer must follow to issue an effective notice of intent to terminate a transfer or assignment of copyright.

Regardless of these uncertainties, we are likely to see more labels deploying different strategies to take advantage of these new changes in the law. Whether any of these strategies are subject to challenge remains to be seen.

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