

# How Record Labels and Music Publishers Deal with Copyright Issues

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## Abstract

This paper examines how the music industry deals with certain copyright-related issues such as termination of transfer, copyright registration, copyright infringement claims, as well as some related contract issues.

Keywords: copyright, music copyright, termination of transfer, copyright registration, copyright infringement claims

## Introduction

If we think of the music business as a house, copyright law is the foundation. Everything that can be done with music is built on the rights created by copyright law. As an extension of this analogy, contracts would be the frame of the house. The music is the interior and exterior design elements, the decorations, and the comfortable furniture. In this article, we examine certain copyright and contract related issues and how the music industry is dealing with these issues.

## Overview of the Termination Process

Sections 203, 304(c) and 304(d) of the Copyright Act deal with the termination of transfer right. Section 203 pertains to grants executed on or after January 1, 1978,<sup>1</sup> and sections 304(c) and 304(d) pertain to works that existed prior to January 1, 1978, and for which grants or licenses for the renewal copyright were executed before January 1, 1978.<sup>2</sup> In addition to the Copyright Act itself, there is the Code of Federal Regulations (“CFR”) section 201.10, which provides the requirements related to the termination of transfer notice that must be sent to the party whose rights are being terminated.<sup>3</sup>

The procedures under sections 203 and 304 are not entirely identical, but they are fairly similar in that the termination can occur within a 5-year period and a notice must be sent to the original grantee or the current owner of the copyright. For the purpose of brevity, we will focus on section 203. Under section 203, termination can occur during a 5-year period that begins 35 years after the grant was executed, unless the grant includes the right of publication. If the grant includes the right of publication (which songwriter and artist agreements do), then the 5-year period begins at the earlier of 35 years after first publication or 40 years after the grant was executed.<sup>4</sup> Thus, in order to determine the date on which the 5-year period begins for a grant that includes the right of publication, the party sending the termination notice must know the date of first publication and the date on which the grant was executed. In addition, CFR section 201.10 provides that the termination notice should identify the grant. This, of course, means the terminating party

needs to have a copy of the grant. This is where things get difficult for songwriters and artists because most songwriters and artists do not have a copy of the grant. In addition, it is not always easy to locate the attorney who represented the songwriter or artist when the grant was executed to see if the lawyer has a copy. In many cases, the party preparing the termination notice finds themselves asking the music publisher or record label for a copy of the agreement.

### Termination and Record Labels

It is important to note that the termination of transfer right does not apply to a work made for hire. Also, most (if not all) recording agreements include language whereby the parties agree the masters are specially ordered or commissioned works as a contribution to a collective work, and, therefore, they are a work made for hire. This is done, at least in part, to avoid the termination of transfer right. In addition to this language in the agreements, the record labels register the copyright in the sound recording and identify the work as a work made for hire. In light of this, record labels take the position that the masters are not subject to the termination of transfer right. Thus, when a record label receives a termination of transfer notice, the label immediately objects to the notice on the grounds that the masters are works made for hire. The labels will also object for other reasons if those reasons are available to them (e.g., any other grounds for claiming the notice is not valid).

Another detail worth noting is that, with respect to works created by an independent contractor, the work made for hire definition specifies nine types of works that can be a work made for hire, and sound recordings are not one of the types of works. The types of works listed in the definition are 1) a contribution to a collective work, 2) as a part of a motion picture or other audiovisual work, 3) as a translation, 4) as a supplementary work, 5) as a compilation, 6) as an instructional text, 7) as a test, 8) as answer material for a test, or 9) as an atlas.<sup>5</sup> Sound recordings, obviously, are not included. This is why the contracts identify the masters as contributions to a collective work, a type of work that is included in the nine types of works listed in the work made for hire definition. To say the least, whether a sound recording qualifies as a work made for hire is debatable. To date, the record labels have avoided having that debate in a court of law. Several lawsuits have been filed, but they have been settled out of court. As mentioned earlier, the record labels object to any termination notice for sound recordings. After objecting, the record labels immediately attempt to negotiate with the artist (or the heirs) to reach an agreement that avoids litigating the issue of whether the sound recordings are a work made for hire.

### Termination and Music Publishers

Music publishers find themselves in a different position than the record labels in that there is no argument to be made related to the work made for hire status of the songs. The songs are not works made for hire, thus the grants are eligible for termination. A music publisher will, of course, object to a notice that is flawed. If the notice is not flawed, then the music publisher will decide whether to attempt to retain some rights in the songs. This decision is primarily based on the success of the songs. If a music publisher were to receive a termination notice for songs that do not contribute much to the value of the music publisher's catalog, then the music publisher would be less inclined to try to retain any rights. If the songs have been successful, the music publisher will likely try to retain some rights in the songs. Typically, the music publisher will be offering a more lucrative deal to the terminating party (e.g., an administration agreement whereby the publisher retains significantly less of the income from the songs).

### New Trend in Copyright Registration

An interesting policy shift among music publishers relates to copyright registration. In the past, music publishers would try to register every published song within three months after initial publication. The timing of the registrations, was, of course, driven mostly by the desire to ensure the music publisher would be eligible for statutory damages and attorney's fees in the event of a copyright infringement action. The realities of interactive streaming (i.e., low per-stream royalties and the relative ease with which independent artists can release music on the streaming platforms) have caused some music publishers to re-evaluate the practice of registering every published song. Because some releases may stand little chance of earning any significant money, some publishers are balancing the cost of registration (i.e., copyright registration fees and employee resources) against the estimated potential earnings and deciding whether registration is worth the cost. In addition to the cost analysis, some music publishers are having difficulty tracking all of the uses due to the fact that it is so easy for artists to release music. So, even publishers that try to register every published song admit that they may be missing some.

### Indemnification Provisions

Not only has there been a policy shift related to copyright registrations, some music publishers, as well as record labels, have modified policies related to the indemnification provisions in the agreements with songwriters and artists. Simply put, if there is a claim related to a breach of the agreement by the songwriter (or artist), the indemnification provision makes the songwriter (or the artist) responsible for any legal fees incurred by, and monetary judgments rendered against, the music publisher (or record label). The

change relates to language that, in the past, was not permitted by the music publishers and record labels but is now being included by some companies. The language limits the songwriter's (or artist's) liability under the indemnification provision to those claims that are either settled with the songwriter's (or artist's) consent or adjudicated to a final adverse judgment. This is a tremendous benefit to songwriters and artists, since they pay nothing if the claim is successfully defended.



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## Endnotes

1. 17 U.S.C. § 203.
2. 17 U.S.C. § 304(c) and 304(d).
3. CFR § 201.10.
4. 17 U.S.C. § 203.
5. 17 U.S.C. § 101.



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