MusicWeek

N° and issue date : 130614 - 14/06/2013
Circulation : 5218
Frequency : Weekly
MusicWeek_130614_17_1.pdf
Page : 17
Size : 87.16 %
690 cm2

Website: http://www.musicweek.com

VIEWPOINT MAYER BROWN INTERNATIONAL LLP

LONGER-LASTING COPYRIGHT: HOW WILL IT WORK?

With the copyright term for records set to increase from 50 years to 70 later this year, Mayer Brown International LLP intellectual property partner Sarah Bryt and associate Dan Gallagher address what the change means in real terms for the wider UK music industry

ABOVE
'Cliff's Law': The copyright extension has been reportedly championed by Sir Cliff Richard

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■ BY SARAH BRYT, DAN GALLAGER

On November 1 this year the new law extending copyright in sound recordings and performers' rights from 50 to 70 years is due to take effect in the UK. While this is positive news for artists and the record industry, lots of questions remain about how it will work in practice.

Dubbed 'Cliff's Law', after reportedly being championed by Sir Cliff Richard, the European copyright term extension will apply to records that were first released on or after January 1 1963.

Although the underlying principles are established, it is still unclear how the mechanics of some key changes will operate. The UK Intellectual Property Office (IPO) published draft regulations earlier this year, which shed some light on how things might work, and industry was given until March 4 2013 to have its say.

As those within the industry who lobbied for these changes are well aware, they do more than just give longer life to copyright in records. Extras include giving performers a 'use it or lose it' right, which allows them to serve notice on record companies that fail to issue or make available "sufficient quantities" of their records during the 20-year extension. If this happens, performers can terminate their agreements and copyright in the record will immediately expire. Because performers' rights in sound recordings will continue for the full 70 years, performers will be able to prevent anyone from issuing copies of the record without consent. In other words, control passes from the record company to the artist. (None of this affects copyright in the song).

The 'use it or lose it' provision raises a number of thorny questions, the foremost being – what will qualify as "sufficient quantities"? Because the consequence for a record company can be severe, the IPO wanted to know whether this should be defined specifically and if so, how. The definition they put forward correlates sufficiency with "current and likely future demand by the public".

Rather than wait to find out what will be the final definition, some record companies have already released aptly titled "Use It Or Lose It" and "Copyright Extension" albums. The current climate on the UK's High Street suggests that the threshold for physical sales could be low.

It is also still unclear how the 'use it or lose it' provision will work for multiple performers. The IPO thought that, in practice, if one of the performers terminated his or her agreement, the record company could no longer legally exploit the record, which might activate a right to terminate in the contracts of the other performers.

"The law introduces a fund for performers who assigned their rights for a one-off fee. Labels will put 20% of gross income earned in the 20-year extension period into a central pot to be administered annually"

SARAH BRYT, MAYER BROWN LLP

Alternatively, of course, the other performers could also exercise their new termination rights, following which they could agree amongst themselves how to exploit the record. The reality may be more complicated, given that the right is available to artists who have made only a minor contribution to a record. This change will be of particular interest to producers that use lots of non-featured artists (classical labels, for example).

The new law also introduces a fund for performers who assigned their rights for a one-off fee. Record companies will have to put 20% of gross income earned on records during the 20-year extension period into a central pot to be administered annually. This has been criticised by some in the industry who thought that featured artists should also have been guaranteed a minimum royalty rate throughout the extra 20 years because otherwise this change could result in non-featured

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artists getting a better deal than featured artists.

Record companies will also have to provide performers with enough information for them to work out how much they are owed (an audit right, for example). Questions remain about whether record companies are best placed to give this or whether PPL should be doing it in some situations. It is also unclear how the 20% earned on a record should be distributed to multiple performers.

The new law also contains a 'clean-slate' provision. This means that, if a performer is entitled to receive royalties, during the 20-year extension period the record company will have to pay these in full – without making any deductions – regardless of what the contract says.

The draft regulations do not define "deduction" and the IPO did not ask for any comments on the implementation of this provision. It seems, therefore, that this will apply strictly, meaning that no deductions can be made, even if there is an outstanding debit balance from advances.

It is perhaps too early to say what impact these changes will have on the commercial terms of recording agreements but the interplay between the 'clean-slate' and the 'use it or lose it' right will surely be cause for some careful analysis. The cost of the 20% fund will also have to be factored in.

The IPO plans to publish the results of its consultation this summer at which time we will know more about what the industry faces when the changes go live on 1 November 2013.