

Contract interpretation in digital music industry

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Introduction

The digitisation of the music industry has led to the creation of popular new on-demand services, but it has also led to friction between recording artists and record labels concerning the digital use of copyrighted music.

In a recent case, the Svea Court of Appeal (T 9046-15) shed much-needed light on whether a right to digital use can be established through the interpretation of recording contracts from a time when such use did not even exist. The case shows how a party to a contract can be found to have consented to new terms regarding digital use through passivity and confirms that a recording artist has standing to seek an injunction on his or her own without the co-creators.

Facts

In 1981 the plaintiff signed a contract whereby the rights to certain recordings were assigned to a record label in order for the label to release the recordings as phonograms. The label released the recordings and paid royalties under the contract. Starting in 2006, the label also made the recordings available digitally on-demand through various digital services while continuing to pay royalties under the contract.

The plaintiff applied for an injunction against the label's digital use of the recordings on the grounds that the label did not have a right to use the recordings in this manner.

The district court found that a right to digital use was not explicitly set out in the contract and granted the plaintiff's injunction. The label appealed.

Decision

The Svea Court of Appeal confirmed the lower court's finding that the contract did not explicitly assign a right to digital use and did not include a right for the label to fully dispose of the recordings assigned. Since digital on-demand services did not exist at the time, it could not have been the parties' intent to assign a right to such digital use. A right to digital use could therefore not be established based solely on the wording of the contract.

The label also argued that the contract had over time come to include a right to digital use through the plaintiff's passivity to the label's digital use of the recordings. It was not disputed that the plaintiff had received royalties under the contract for the label's digital use. However, the plaintiff had expressed his dissatisfaction with the royalty levels for the digital use and sought a higher rate from the label. The plaintiff had also at one time taken the position that the contract did not establish a right to digital use.

The court found that by receiving these royalties since 2006 it must have been clear to the plaintiff

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that the label considered it had the right to use the recordings digitally. Despite this, the plaintiff continued to accept royalties for the label's digital use until the suit was filed in 2014. The fact that the plaintiff had objected to the size of the royalties earned at various points during the years could not be considered a clear enough objection that he considered the label's digital use to constitute copyright infringement. Through the plaintiff's passivity, the court found that the contract had come to include a right for the label to use the recordings for digital on-demand services.

On a separate procedural point, the court found that a plaintiff in a copyright case has standing to seek an injunction without the consent of co-creators of the copyrighted work in question. As a general rule, a copyrighted work created by several co-creators belongs to all co-creators. However, since it would often be impractical for several co-creators to agree to legal action in the face of ongoing and time-sensitive infringement, and since copyright infringement is often perceived as partly personal in nature, any one of the copyright holders must be entitled to seek an injunction without the consent of the co-creators.

Comment

This case has something for everyone. It manages simultaneously to shed much-needed light on the proper interpretation of old contracts in the music industry, while also raising the spectre of how parties may unwittingly consent to additions to these old contracts through passivity in the digital age.

The Svea Court of Appeal's interpretation of the wording of contracts is strict and artist friendly. If an assignment of copyright is limited in this manner, it will be hard to establish a right to digital use that is not explicitly mentioned. This benefits artists who may be in a position to renegotiate digital use at higher royalty rates than under older contracts, where the labels had to cover the significant expense of producing physical phonograms.

However, the court's application of rules and effects of passivity are equally strict and are therefore in turn label friendly. If an artist has received royalties for digital use, and has not clearly and forcefully acted to challenge the label's digital use, such use may be found to have been included in the contract over time. This benefits labels that can continue to pay artists at comparatively low royalty rates, even though digital use may not incur any significant expense to the label. Considering that digital on-demand services have been operating for many years, and in light of the requirement of a clear objection set out by the court, a great number of artists may already have passively accepted labels' digital use of their music under the royalty rates set in old contracts.

The case has been appealed to the Supreme Court and awaits leave to appeal.

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