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Finding the Groove: A Path Forward on Terminations of Sound Recording Transfers

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I. INTRODUCTION

Beginning in 2013, authors who transferred ownership of their copyright in works created after January 1, 1978 will be able to terminate those transfers and renegotiate more favorable terms.[1] As the recording industry struggles to reverse the loss of billions of dollars in lost sales due to illegal online file sharing, there is likely to be contentious litigation between artists seeking to reclaim their rights and labels intent on maintaining ownership and control of their catalogs.[2]

Terminations of sound recordings transfers present two particularly knotty legal issues that are likely to be the focus of this costly, high-stakes litigation. Since transfers of "works made for hire" are statutorily ineligible for termination, the first issue is whether or not a given sound recording is a "work made for hire." The second issue is how to identify the author of a sound recording. This is a critical question because only authors are eligible to terminate copyright transfers, and yet the Copyright Act (the "Act") does not define who is the author of a sound recording.

This note seeks to identify the appropriate doctrinal analysis of these issues, as well as to develop a pragmatic approach for resolving disputes relating to sound recording terminations more generally. As a starting point, I propose that the ultimate measure of any proposal in this area ought to be whether it advances the underlying mission of copyright law derived from the Constitution: designing economic incentives for authors and publishers (in this context, artists and record companies) that are most likely to maximize the creation of new works and enhance public access to those works.[3] More specifically, I suggest that the issues surrounding sound recording terminations be considered with an eye towards creating properly calibrated incentives that fuel an ecosystem in which recorded music is created and flows to consumers efficiently and for a reasonable price.

I offer a three-prong approach. First, courts considering challenges to terminations of sound recording transfers should find that, in most cases, sound recordings are not works made for hire, and that artists are "authors" eligible to invoke termination rights. Second, Congress should amend the Act to clarify the meaning of "work made for hire" and to define authors of sound recordings as "key contributors." Third, in order to avoid costly litigation with unpredictable results, a Music Industry Working Group on Terminations should be established as a means for advancing a voluntary, cooperative effort to facilitate fair, efficient resolution of most termination claims.

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1. *See* Copyright Act of 1976, 17 U.S.C. § 203 (2006); Daniel Gould, *Time's Up: Copyright Termination, Work-For-Hire and the Recording Industry*, 31 Colum. J.L. & Arts 91, 92 (2007); Randy S. Frisch & Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 Colum. J.L. & Arts 211 (1993).

2. Sales of recorded music plummeted from $14.6 billion to about $6.3 billion between 2000 and 2009. Larry Rohter, *Record Industry Braces for Artists' Battles Over Song Rights*, N.Y. Times, Aug. 15, 2011, at C1. *See generally* Zeb G. Schorr, Note, *The Future of Music Online: Balancing the Interests of Labels, Artists, and the Public*, 3 Va. Sports & Ent. L.J. 67, 68 (2003).

3. The "IP Clause" empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8.

Part II of this note sets the stage by providing the relevant background on provisions of the Act relevant to sound recordings and the termination of copyright transfers. Part III addresses how courts should analyze terminations of sound recording transfers with regard to works made for hire and authorship. Part IV discusses statutory reform. Part V suggests the benefits of creating a Music Industry Working Group on Terminations. Part VI concludes.

II. BACKGROUND

As background for the analysis to follow, this section begins by explaining the evolution of copyright protections for sound recordings under the Act, continues with a summary of the statutory provisions pertaining to termination, and concludes with an overview of the legal and equitable issues raised by terminations of sound recording transfers.

A. Copyright Protection for Sound Recordings Today

Sound recordings are one of eight categories of works protected under U.S. copyright law.[4] As defined by the Act, sound recordings are "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."[5]

The copyright owner of a sound recording has the exclusive right to reproduce and distribute the sound recording, as well as to prepare derivative works and publicly perform the sound recording by means of digital audio transmission.[6]

At least two separate copyrights subsist in a piece of recorded music: a copyright in the underlying musical work and a separate copyright in the sound recording itself.[7] Typically the author of a musical work assigns the copyright in that musical work to a publisher, who then contracts with a collective organization (e.g., The American Society of Composers Authors and Publishers, Broadcast Music, Inc., SESAC, and the Harry Fox Agency) to license the work to third parties and collect royalties.[8] The ownership of a copyright in the sound recording of the musical work

4. Copyright Act of 1976, 17 U.S.C. § 102(a) (2006). The other seven categories of works that fall within the protections of the Act are: "literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; . . . and architectural works." *Id.*

5. *Id.* § 101.

6. *Id.* § 106(1)–(6).

7. *Id.* § 102(a).

8. These organizations administer the complex licensing structure for recorded music. ASCAP, BMI, and SESAC are performing rights organizations (PROs) (also referred to as performing rights societies), which license the musical work for public performance. *Id.* § 101. *See also* Brian Day, Note, *The Super Brawl: The History and Future of the Sound Recording Performance Right*, 16 Mich. Telecomm. & Tech.

initially vests in the "author" of the recording, who then typically assigns that copyright to the recording company under a standard recording contract.[9]

B. History of the Protection of Sound Recordings under U.S. Copyright Law

Copyright protection was first extended to sound recordings as part of the 1971 amendment to the Act, which affected recordings made after February 15, 1972.[10] Though Congress had previously considered extending copyright protection to sound recordings, it ultimately enacted the 1971 amendment in response to calls from the recording industry to curb mounting financial losses attributed to rampant, unauthorized reproductions of recorded music.[11]

However, while the 1971 Amendment granted to authors of sound recordings the exclusive rights to distribute and reproduce their works, Congress did not initially create a performance right for sound recordings.[12] This limitation reflected an accommodation to the broadcast industry, which argued that it should not have to pay license fees to labels and artists because the airtime broadcasters provided was the equivalent of free promotion.[13] Performing Rights Organizations (PROs) also resisted creation of a performance right for sound recordings, fearing that it would reduce the royalties they collected from broadcasters.[14] United in this shared interest,

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L. Rev. 179, 182 (2009). The Harry Fox Agency licenses "mechanical" rights, which relate to the reproduction and distribution of a musical work. *What Does HFA Do?*, Harry Fox Agency, http://www.harryfox.com/public/WhatdoesHFAdo.jsp (last visited Oct. 20, 2012).

9. *See* Day, *supra* note 8, at 183 (noting that, despite this typical arrangement, about 1200 artists own and manage their own sound recording copyrights).

10. Act of Oct. 15, 1971, Pub. L. 92-140, 85 Stat. 391. (1971). Sound recordings created prior to February 15, 1972 are ineligible for statutory copyright protection, but remain "widely protected under state law." 1-2 David Nimmer & Melville B. Nimmer, Nimmer on Copyright § 2.10.

11. Copyright protection for sound recordings was first proposed by the Copyright Office in 1961 and first proposed in Congress in 1964. *United States Copyright Office and Sound Recordings As Work Made For Hire: Hearing Before the Subcomm. On Courts and Intellectual Property of the H. Comm. On the Judiciary*, 106th Cong. 79, 81 (2000) [hereinafter *Peters Testimony*] (statement of Marybeth Peters, Register of Copyrights); Nimmer, *supra* note 10 ("Reliable trade sources estimated the annual volume of such piracy to be in excess of $100 million. An additional reason for such enactment was to 'resolve' the problem of federal pre-emption that had pervaded, though not controlled, the attempts to combat record and tape piracy in the state courts."); *see also* Gould, *supra* note 1, at 97 (2007) (noting that the amendment was intended to bring the United States into compliance with the Geneva Phonograms Convention of 1971). The Geneva Phonograms Convention of 1971 requires that

> [e]ach Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, art. 2, Oct. 29, 1971, 25 U.S.T. 309.

12. *See* Day, *supra* note 8, at 184.

13. *Id.*

14. *Id.*

broadcasters and PROs succeeded in blocking the addition of any performance right for sound recordings until nearly twenty years later when music distributed digitally via the Internet became increasingly popular and disrupted sales of physical albums.[15] In response, Congress enacted the 1995 Digital Performance Right in Sound Recordings Act, which amended § 106 of the Act to grant sound recording owners the exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission."[16]

C. Statutory Provisions Pertaining to the Termination of Copyright Transfers

A fundamental problem underlies transfers of copyright ownership: the commercial value of any given work is typically unknown prior to its publication, yet that is precisely when authors often transfer their copyrights.[17] As a result, authors commonly agree to terms that turn out to be less favorable than what they would have agreed to had they known that their work would become profitable.[18]

In an attempt to mitigate this problem, Congress created a dual-term structure for copyright in the 1909 Act.[19] The owner of a copyright was entitled to an initial term of twenty-eight years, after which the author could register for a renewal term of an additional twenty-eight years.[20] If the author did not register for the renewal term, copyright protection ended and the work went into the public domain after the initial twenty-eight year term.[21]

However, in 1943, the Supreme Court limited the ability of authors to take advantage of this dual-term structure by holding that contracts in which authors assigned both the initial term and the renewal term to their publisher would be upheld.[22] By permitting authors the right to contract away their renewal term, the Court effectively undermined the purpose of the dual-term system, because authors were unable to re-acquire their rights if their work turned out to be more commercially valuable than initially anticipated.

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15. *Id.*

16. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2, 109 Stat. 336, *codified at* 17 U.S.C. § 106(6)).

17. *See* Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright Law's "Inalienable" Termination Rights,* 57 J. Copyright Soc'y U.S.A. 799, 801 (2010) ("From its earliest manifestations, copyright law has struggled to deal with the equitable and efficient division of value and control between creators and the enterprises that distribute their works.").

18. *See id.* at 802.

19. H.R. Rep. No. 60-2222, at 14 (1909) ("It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum."); *see also* Stewart v. Abend, 495 U.S. 207, 219 (1990): ("In this way, Congress attempted to give the author a second chance to control and benefit from his work. . . . The renewal term permits the author, originally in a poor bargaining position, to renegotiate the terms of the grant once the value of the work has been tested.").

20. Copyright Act of 1909 § 23–24, 35 Stat. 1075 (repealed 1976).

21. *Id.*

22. Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943).

The 1976 Act replaced the dual-term approach with a unitary term. The current copyright duration for most works created after January 1, 1978 is the life of the author plus seventy years.[23] For joint works, "the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death."[24] "In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first."[25] Instead of a renewal term, the 1976 Act allows an author who has transferred his copyright to terminate that transfer thirty-five years after the grant.[26] Authors are explicitly prohibited from contracting away their right to terminate a grant.[27] Like it did with the dual-term approach in the 1909 Act, Congress designed the termination provision in the 1976 Act for the purpose of "safeguarding authors against unrenumerative transfers . . . [which is] needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's prior value until it has been exploited."[28]

Section 203 of the 1976 Act contains the provisions relating to termination of transfers for works made after January 1, 1978.[29] The termination right must be exercised within five years of the end of the thirty-five year period.[30] Notice of intent to terminate a transfer must be given between two and ten years before the date on which the transfer is eligible for termination.[31] Therefore, copyright transfers executed on the first day the 1976 Act went into effect, January 1, 1978, are eligible for termination beginning on January 1, 2013.[32]

Works made for hire constitute an important exception to the Act's termination provisions. Transfers of copyright in these works are not subject to termination.[33] The

23. 17 U.S.C. § 302(a) (2006).

24. *Id.* § 302(b).

25. *Id.* § 302(c).

26. *Id.* § 203(a)(3). For works made prior to 1978, the 1976 Act retains the dual-term structure, allowing for termination subject to the terms of § 304(c). *See id.* § 203(b)(6) ("Unless . . . termination is effected under this section, the grant . . . continues in effect for the term of copyright provided by this title.").

27. *Id.* § 203(a)(5) ("Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.").

28. H.R. Rep. No. 94-1476, at 124 (1976).

29. Though not the focus of this note, termination of transfers for works made before January 1, 1978 are governed by 17 U.S.C. § 304(c)(3).

30. *Id.* § 203(a)(3).

31. *Id.* § 203(a)(4)(A).

32. For works created prior to 1978, termination can be invoked by the author beginning fifty-six years after the grant was made. *Id.* § 304(c)(3). Sound recordings made between 1972 and 1977 therefore become eligible for termination beginning in 2028.

33. *Id.* § 203(a); *see also* § 304(a)(1)(B)(ii). Professor Paul Goldstein traces the evolution of the work made for hire doctrine to the U.S. Supreme Court's 1903 decision in *Bleistein v. Donaldson Lithographing*, 188 U.S. 239, 248 (1903), which held that "[t]here was evidence warranting the inference that the designs

1909 Copyright Act provided that an employer would be considered the author of a work made for hire, but did not define what constituted a work made for hire.[34] "Work made for hire" is defined by the 1976 Act as a work either (1) created by an employee in the course of an employment relationship (the "employment prong") or (2) where the parties have agreed in writing that it is "work made for hire" and the work falls within one of nine enumerated categories (the "independent contractor prong").[35]

But even though the Act defines "work made for hire," courts have been called upon to provide guidance in applying that definition. With regard to the "employment prong," the Supreme Court held in *Community for Creative Non-Violence v. Reid* that several factors are relevant to determining whether a author is an "employee," including: the skill required, the source of the tools used in creation, the duration of the relationship between the parties, the extent of the hired party's discretion over when and how long to work, the method of payment, the provision of employee benefits, and the tax treatment of the hired party.[36] The U.S. Court of Appeals for the Second Circuit has held that these factors should not be applied rigidly, but rather they should be weighed in relation to their significance in any particular circumstance.[37]

With regard to the "independent contractor prong," sound recordings are not specifically listed among the enumerated categories, but as discussed below, they could arguably fall within some of the categories listed, such as compilations (which are defined to include collective works), audiovisual works, or supplemental works.[38]

D. Legal Issues Relating to Terminations of Sound Recordings

As pertains to the termination of sound recordings, the ambiguous language of § 203 of the Act raises more questions than it answers. The central legal issue relating

belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things." *United States Copyright Office and Sound Recordings As Work Made For Hire: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. 139 (2000) [hereinafter *Goldstein Testimony*] (statement of Paul Goldstein, Lillick Professor of Law, Stanford University).

34. *Goldstein Testimony*, *supra* note 33, at 139.

35. 17 U.S.C. § 101. The enumerated categories are: contributions to collective works, motion pictures or other audiovisual works, translations, supplementary works, compilations, instructional texts, tests, answer material for tests, and atlases. *Id.*

36. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989).

37. Aymes v. Bonelli, 980 F.2d 857, 861–62 (2d Cir. 1992).

38. While this note focuses on works made under the Copyright Act of 1976, it should be noted that courts have applied a far different test to determine whether works made under the 1909 Act are works made for hire. For example, the Second Circuit applies an "instance and expense" test. *See* Fifty-Six Hope Road Music Ltd. v. UMG Recordings, Inc., No. 08 Civ. 6143(DLC), 2010 WL 3564258, at *7 (S.D.N.Y. Sept. 10, 2010) (holding that "[t]he copyright belongs to the person at whose 'instance and expense' the work was created . . . regardless of whether the work was created by a traditional 'employee' or an 'independent contractor.'" (citing Martha Graham Sch. & Dance Found. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 635 (2d. Cir. 2004)). In addition, the hiring party is presumed to be the author of a work made for hire, but that presumption can be overcome by evidence of a contrary agreement. *Id.* at *8.

to terminations of sound recordings is whether they are works made for hire. Interwoven within that key question are ambiguities with regard to authorship: how is authorship of a sound recording determined? Is the author the singer or band in whose name the recording is marketed? What about backup performers, producers, or engineers? Do they have all have claims to joint authorship? And even if a record company loses ownership of a sound recording, what rights might it still retain under the derivative works exception?

1. Works Made for Hire

Of the two ways a sound recording can qualify as work made for hire under the statutory definition in the Act, determining the author under the "employment prong" analysis is the most straightforward. Hardly any modern-day recording artists are formal employees of the record company for which they record.[39] Nevertheless, a recording artist might be considered an employee under the definition if the *Reid* factors are satisfied. That analysis is inherently fact-specific, but most commentators have concluded that the results will generally be either ambiguous or weigh heavily against a finding of an employment relationship.[40] The few cases where this prong might apply involve situations where a label employee—perhaps an engineer, producer, or backup musician—can assert a joint authorship claim because of their involvement in the creation of the sound recording. The implications of joint authorship are discussed in Part II.D.2. below.

More controversial is whether a sound recording falls under the "independent contractor prong" of the work made for hire definition. Standard recording contracts contain language that recordings made under the agreement are works made for hire, along with "an additional clause providing that if the work created is found by courts to fall within neither prong of the definition of works made for hire, that the performer assigns all his rights to the record company."[41] In addition to the requirement that an arrangement to create a work make for hire under the "independent contractor prong"

39. Ryan Ashley Rafoth, Note, *Limitations of the 1999 Work-For-Hire Amendment: Courts Should Not Consider Sound Recordings to Be Works-For-Hire When Artists' Termination Rights Begin Vesting in Year 2013*, 53 Vand. L. Rev. 1021, 1029 (2000).

40. *See, e.g.*, Corey Field, *Their Master's Voice? Recording Artists, Bright Lines, and Bowie Bonds: The Debate Over Sound Recordings as Works Made for Hire*, 48 J. Copyright Soc'y U.S.A 145, 171–72 (2000); Gould, *supra* note 1, at 80 ("Most commentators have concluded that recording artists will not be deemed by courts to be employees of record labels under the Reid and Aymes line of cases."); *see also* Kathryn Starshak, *It's the End of the World as Musicians Know It, Or Is It?: Artists Battle the Record Industry and Congress to Restore Their Termination Rights in Sound Recordings,* 51 DePaul L. Rev. 71, 104 (2001) (providing thorough *Reid* factor analysis and concluding that a typical recording artist would not be considered an record company employee under the test); Peter S. Menell & David Nimmer, *Defusing the Termination of Transfers Time Bomb* 3 (Interdisciplinary Center (IDC) Herzliya, Working Paper, 2005), *available at* http://www.idc.ac.il/ipatwork/PUBLICATION/Defusing.pdf ("Most of the sound recordings of significant economic value in their 35th year will likely be wholly or partially outside of the scope of works made for hire doctrine."); Rafoth, *supra* note 39.

41. *Peters Testimony*, *supra* note 11, at 88.

be memorialized in a written agreement, the work must also fall within one the enumerated categories in § 101.

According to the Recording Industry Association of America (RIAA), where there is a written agreement that a sound recording is a work made for hire, that contract should be upheld under the Act and the work deemed a work made for hire because "[a] sound recording is a work for which an entity commissions many people—featured artists, background musicians and vocalists, producers, arrangers, mixers, and studio engineers, and others—to collaborate for the purpose of creating that sound recording."[42] Nevertheless, it is unclear how such a work falls within the statutory definition of works made for hire where the recording artist is not an employee of the label and none of the enumerated categories are applicable. In an effort to clarify that ambiguity, the RIAA successfully lobbied in 2000 for sound recordings to be included among the enumerated categories of works made for hire under the "independent contractor prong,"[43] but the amendment was repealed a year later.[44] "As a result of this 'millennial flip-flop,' the issue is now left squarely indeterminate."[45] Nevertheless, even though sound recordings are not included in the enumerated categories of works that may be considered works made for hire per se, industry advocates have argued that sound recordings fit into other per se categories, such as the categories for an audiovisual work, compilation (defined as including collective works), or a supplementary work.[46]

2. Authorship

The difficulties in identifying the author of a sound recording present another legal issue with regard to terminations, because it is only the author or his heirs who may terminate a grant. Authorship of a sound recording can be exceedingly difficult to determine, because any number of people—singers, musicians, producers, engineers—may have made significant creative contributions to any given recording.

While the Act does not define authorship for sound recordings,[47] the legislative history addressed the issue by explaining that the "copyrightable elements in a sound recording" may include contributions from the performers and or the producer."[48] Ultimately, however, the law does not "fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and

42. *FAQ on Sound Recordings as Works Made for Hire,* Recording Indus. Ass'n. of Am. (May 24, 2000), http://www.riaa.com/print.php?id=00EB75A2-8B0B-CDCD-175F-1213B5DFA681.

43. *See* David Nimmer & Peter S. Menell, *Sound Recordings, Works For Hire, and the Termination-of-Transfers Time Bomb*, 49 J. Copyright Soc'y U.S.A. 387, 388–93 (2001).

44. *Id.* at 394.

45. *Id.* at 387.

46. Rafoth, *supra* note 39, at 1041–44; *see also* Gould, *supra* note 1.

47. "[T]he Revision Bill takes the ostrich tack of omitting to say who is to be the presumptive owner of the copyright—performer, manufacturer, or both." Benjamin Kaplan, *An Unhurried View of Copyright: Proposals and Prospects*, 66 Colum. L. Rev. 831, 846 (1966).

48. H.R. Rep. No. 92-487, at 1570 (1971); S. Rep. No. 92-72, at 1570 (1971).

bargaining among the interests involved."[49] Noticeably missing from Congress's calculation is any consideration of joint authorship claims asserted by record companies.

A "joint work" is defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[50] For joint works made after January 1, 1978, the majority of authors must agree to terminate the grant.[51] In contrast, transfers of joint works made prior to that date may be terminated by any of the authors "to the extent of a particular author's share in the ownership of the renewal copyright."[52]

Fortunately, the issues surrounding claims of joint authorship, as discussed in Part III, are not as dire as they may first appear, since a majority of courts have held that only those individuals who contribute independently copyrightable expression and posses a mutual intent to share authorship qualify as joint authors.[53] For example, a woman who was present during the recording session for Jay-Z's hit song "Izzo (H.O.V.A.)" contemporaneously improvised a vocal line that was eventually performed by another singer and added to the recording. While Jay-Z agreed to incorporate the woman's melody line, her argument that she was therefore entitled to joint authorship failed because "this argument misapprehends the requirement that the parties must intend to share the rights of authorship rather than merely intend to enter into a relationship that results in the creation of a copyrightable work."[54] The court held that Jay-Z was entitled to summary judgment and that the woman could not sustain a claim of joint authorship because she failed to present evidence that Jay-Z intended to share authorship with her.[55]

Limiting joint authorship claims helps promote the progress of the arts because "progress would be retarded rather than promoted, if an author could not consult with others and adopt their useful suggestions without sacrificing sole ownership of the

49. *Id.*

50. 17 U.S.C § 101 (2006).

51. *Id.* § 203(a)(1).

52. *Id.* § 304(c)(1).

53. *See* Childress v. Taylor, 945 F.2d 500, 509 (2d Cir. 1991); Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Right of Joint Authors*, 50 Emory L.J. 193, 196–97 (2001); *see also* Abbott M. Jones, *Yours, Mine, and Ours: The Joint Authorship Conundrum for Sound Recordings*, 10 Vand. J. Ent. & Tech. L. 525, 528 (2008) ("The Register of Copyrights has stated that independent copyrightability is required under the statutory standard of authorship and, perhaps, under the Constitution as well."). *But see* Gaiman v. McFarlane, 360 F.3d 644, 659 (7th Cir. 2004) (holding that mutual intent to create a joint work will support a finding of joint authorship, regardless of whether each author's contribution is independently copyrightable). The Seventh Circuit's approach is consistent with the position advanced by Nimmer, which argues that a lower threshold for joint authorship incentivizes collaboration and rewards more artists for their contributions. 1-6 David Nimmer & Melville B. Nimmer, Nimmer on Copyright § 6.07[A][3][a] (2007).

54. Ulloa v. Universal Music & Video Distrib. Corp., 303 F. Supp. 2d 409, 418 (S.D.N.Y. 2004).

55. *Id.*

work."[56] But where there are legitimate claims of joint authorship in a sound recording, termination can become vastly complicated and hamper efficient exploitation of the work. For example, if each coauthor of a joint work is entitled to terminate a grant, "the grantee who originally received exclusive rights from all of the coauthors will be transformed into a nonexclusive licensee when even a single coauthor exercises the termination right and the other coauthors do not."[57]

While transfers of post-1978 works can be terminated only upon agreement of a majority of authors who signed the transfer agreement,[58] complications arise where other joint authors may have executed separate transfer agreements. In such cases, one joint author could choose to terminate his grant, while others do not. This would allow the original grantee-record company to continue exploiting the work. If the joint author who terminated his grant negotiated terms with another record company, "multiple versions of a single sound recording could in theory be on the market simultaneously, competing with each other."[59]

Advocates of the record company's position argue that joint authorship claims will burden artists, too. Faced with multiple joint authorship claims from the wide assortment of contributors to a recording—e.g., vocalists, musicians, producers, and engineers—an artist "would be in no position to renegotiate with [his label] nor to convey exclusive rights to a third party without first coming to terms with each of his several co-authors."[60]

The record companies point to the complications of joint authorship and termination as support for their argument that all sound recordings should simply be considered works made for hire.[61] Otherwise, they warn, determining who has the right to terminate a transfer "might require years of litigation to sort out who has what rights."[62]

E. Equitable Considerations

Apart from the knotty legal issues surrounding terminations of sound recording transfers, both artists and record companies cite equitable concerns to support resolutions that would ultimately give them a greater degree of control over sound recordings. Less attention has been focused on the equities affecting the general

56. Aalmuhammed v. Lee, 202 F.3d 1227, 1234 (9th Cir. 2000).

57. *Peters Testimony*, *supra* note 11, at 85.

58. 17 U.S.C. § 203(a)(1) (2006).

59. *Peters Testimony*, *supra* note 11, at 86. This problem is exacerbated for pre-1978 sound recordings because such works are subject to the termination provisions of § 304, under which termination "may be exercised by *any* of the coauthors of a joint work, even if all the coauthors executed the same original grant of rights. Such a termination shall affect only that "particular author's share in the ownership of the renewal copyright." *Id.*; *see also* Nimmer & Menell, *supra* note 43, at 408.

60. *Goldstein Testimony*, *supra* note 33, at 145.

61. *See* Larry Rohter, *Don Henley Urges Artists to Know Their Rights*, NYTimes.com (Aug. 16, 2011, 8:00 AM), http://artsbeat.blogs.nytimes.com/2011/08/16/don-henley-urges-artists-to-know-their-rights/.

62. *Id.*

public, which is the perspective that I argue should dictate the ultimate resolution. This subsection considers each view in turn.

1. From the Standpoint of Recording Artists

Don Henley, a member of the chart-topping 1970s band The Eagles, characterizes the issue of sound recording terminations in moral terms. He states that "the recording industry has made a gazillion dollars on those masters, more than the artists have"[63] and that "[t]he artists create these works and they should own them. It's as simple as that. I want to be able to pass them on to my kids. It's part of their legacy, or should be."[64] As the U.S. Supreme Court has recognized, inequities between authors and publishers in general have historically characterized contractual arrangements affecting copyright, and termination provisions are designed to address those inequities.[65] Since the beginning of recorded music, unfair exploitation of artists due to their inferior bargaining power and inferior sophistication in business and legal matters has been common and well documented.[66]

Corporate concentration in the music industry has made these issues of control and inequity particularly acute. Three companies—Universal Music Group, Sony Music Entertainment, and Warner Music Group—control nearly every aspect of the international music industry,[67] and consolidation is accelerating: EMI, formerly a fourth industry behemoth, recently sold its record label to Universal for $1.9 billion and its publishing operation to Sony for $2.2 billion.[68]

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63. Rohter, *supra* note 2.

64. Rohter, *supra* note 61.

65. Stewart v. Abend, 495 U.S. 207, 218–19 (1990).

66. *See generally* Siva Vaidhyanathan, Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity, ch. 4 (2001).

67. Tracy C. Gardner, Note, *Expanding the Rights of Recording Artists: An Argument to Repeal Section 2855(b) of the California Labor Code*, 72 Brook. L. Rev. 721, 721–22 (2007).

> [These three companies] control manufacturing, distribution, retailing, shelf space, record clubs, and digital delivery, not only in the United States, but also in all markets worldwide. [They] specialize in marketing and promoting records to mass audiences, and they have the capital to take huge financial risks to advance an artist. Furthermore, only a few media companies control most of the nation's radio stations, making it that much more difficult for an artist to get her music on the air without the backing of one of the major labels.

Id.

68. Dana Cimilluca & Max Colchester, *Universal, Sony Split Up EMI Group*, Wall St. J., Nov. 12, 2011, at B3, *available at* http://online.wsj.com/article/SB10001424052970204224604577031694160429400.html. The expected adverse effect that the proposed deal would have on competition has drawn concern from regulators in the United States and Europe. *See* Diane Bartz, *Antitrust Group Asks for Universal, EMI Deal to be Stopped*, Reuters (August 30, 2012), http://www.reuters.com/article/2012/08/30/us-emi-universal-antitrust-idUSBRE87T1IP20120830. "The independent American Antitrust Institute said the planned purchase raised substantial concerns because it would reduce the number of major music companies to three from four, and would give Universal life-or-death power over digital entrants that rely upon being able to license music." *Id.*

Even as traditional methods of exploiting sound recordings have increasingly become less profitable, record labels have continued to exert great control over artists' careers through new types of deals that allow the record companies to claim significant portions of artists' other revenues, such as those generated by touring, ringtones, digital distribution, and film and television.[69] Typical recording contracts are long-term, requiring an artist to deliver five to seven albums, typically with a mandatory two-year time span between albums, and artists may be liable for damages if they fail to deliver the required number of albums.[70] Though artists receive royalties from the sale of their sound recordings, many artists believe their royalties are too small, and many artists actually come away owing their record company money because contracts typically require the artists to repay the record company for recording costs out of their royalties.[71]

2. From the Standpoint of Record Labels

Record companies invest large sums of money into developing and promoting new artists, most of whom will not succeed.[72] The high risk inherent in these investments is significantly heightened by the effect digital technology has had on plummeting record sales.[73] When sound recordings do generate profits, the industry argues that those funds are invested into nurturing the next generation of talent.[74] If artists could easily terminate their transfers, it might remove incentives for labels to sign new artists.[75] Furthermore, without the certainty provided by uninterrupted record label control of sound recordings, there is a fear that "a random backup guitarist will arrive at the door of the copyright owner thirty-five years after a recording is created and terminate his licensed performance on the album," thus hampering efficient exploitation and profitability for all the other stakeholders.[76]

Then there is the phenomenon referred to as the "long tail."[77] Prior to the advent of digital music, current hits dominated record sales and very few older recordings were profitable.[78] That is no longer true because digital technology makes it more

69. Gardner, *supra* note 67, at 726.

70. *Id.* at 723–25.

71. *Id.*

72. *United States Copyright Office and Sound Recordings As Work Made For Hire: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. 125 (2000) (statement of Hilary Rosen, President and CEO, Recording Industry Association of America) [hereinafter *Rosen Testimony*] ("Typically, less than 15% of all sound recordings released by major record companies will ever make back their costs. Far fewer return profit.").

73. *See generally* Rohter, *supra* note 2.

74. *Rosen Testimony*, *supra* note 72, at 124–26.

75. Starshak, *supra* note 40, at 121.

76. *Id.* at 122.

77. Gould, *supra* note 1, at 93.

78. *Id.* at 93–94.

feasible for retailers and consumers to store nearly unlimited numbers of recordings, and back catalogs from established artists are increasingly profitable.[79] Also, older recordings have higher profit margins because duplication costs are de minimis compared to the high fixed costs required to develop and promote new acts.[80] Finally, record companies are valued based on the estimated worth of their future revenues; uncertainty surrounding copyright ownership undermines the ability of these companies to sell their ownership interests.[81]

3. From the Standpoint of Consumers

This note argues that, because public benefit is the driving concern of U.S. copyright law, the only equities that should determine how sound recording terminations are resolved are those that pertain to the public interest. As Benjamin Kaplan wrote, "When the ordinary regime of the market is displaced and monopoly aids substituted, an estimate of the inducements to producers calculated to maximize public satisfactions becomes the chief rational measure of copyright protection."[82] To "maximize the public satisfactions" in the context of sound recording terminations, a successful resolution is one that: induces artists to create by promising them fair financial benefit and control relative to their commercial success; balances those inducements with incentives for industry to both invest in new acts and promote and distribute their music; facilitates efficient exploitation by unifying control and minimizing transaction costs; and enhances the predictability necessary for smooth functioning of the marketplace. The remainder of this note focuses on how to achieve these results.

III. RESOLUTION UNDER CURRENT LAW

I now turn to an analysis of how courts ought to resolve disputes over terminations of sound recording transfers under current law. As discussed in Part II.D.1., most commentators agree that sound recordings are not works made for hire, and I begin by laying out what I consider to be the appropriate analysis in support of that position.[83] Next I consider the joint authorship issue and conclude that that it is less problematic than the record industry and its defenders suggest. Finally, I argue that, insofar as these conclusions facilitate artists ability to terminate transfers of sound recordings, such a result is doctrinally sound and ultimately advances the public interest.

79. *Id.* at 93.

80. *Id.* at 94.

81. *Id.*

82. Kaplan, *supra* note 47, at 849.

83. Starshak, *supra* note 40, at 104 (providing thorough *Reid* factor analysis and concluding that a typical recording artist would not be considered a record company employee under the test); Menell & Nimmer, *supra* note 40 ("Most of the sound recordings of significant economic value in their 35th year will likely be wholly or partially outside of the scope of works made for hire doctrine."); *see*, *e.g.*, Gould, *supra* note 1, at 109 ("Most commentators have concluded that recording artists will not be deemed by courts to be employees of record labels under the Reid and Aymes line of cases."). *See generally* Rafoth, *supra* note 39.

A. Most Sound Recordings Are Not Works Made for Hire under the Act

Few courts have considered whether sound recordings created after 1978 are works made for hire, but those that have found that the particular sound recordings before them did not qualify under the statutory definition.[84] As explained below, other courts should follow suit, because most sound recordings were not made in the context of an employment relationship, and few fit within the enumerated categories necessary to satisfy the independent contractor prong.

1. Most Sound Recordings Do Not Satisfy the "Employment Prong"

Randy Frisch and Matthew Fortnow were among the first to publicly sound the alarm about the impending problems of sound recording terminations.[85] "After analyzing the relationship of artist and record company under the factors in *C.C.N.V. v. Reid, Aymes v. Bonelli,* and the terms of the [standard] record contract,"[86] they concluded in their 1993 article that "it seems that an artist is not an employee for copyright purposes."[87]

Most modern sound recordings are not works made for hire under the employment prong because the recording industry has evolved in such a way that labels exert less direct control over recording artists, particularly with regard to the *Reid* factors.[88] While it was common in the 1960s for record companies to manage all aspects of the creative process, including hiring personnel necessary to facilitate the recording

84. *See, e.g.*, Ballas v. Tedesco, 41 F. Supp. 2d 531 (D.N.J. 1999) (holding that a sound recording did not satisfy the *Reid* criteria where, although the distributor claiming ownership had exerted some creative control, the recording was made in the artist's own studio); Staggers v. Real Authentic Sound, 77 F. Supp. 2d 57 (D.D.C. 1999) (finding in dicta that sound recordings are not works made for hire because they do not fit within any of the statutory definition's enumerated categories). *But see* Fifty-Six Hope Road Music v. UMG Recordings, Inc., No. 08 Civ. 6143(DLC), 2010 WL 3564258, at *8 (S.D.N.Y. Sept. 10, 2010) (holding that pre-1978 recordings made by Bob Marley were works made for hire under the 1909 Copyright Act because they were made at the "instance and expense" of his record company). The issue has not been more widely considered by courts because it is not yet timely. Nimmer & Menell, *supra* note 43, at 390.

85. *See* Frisch & Fortnow, *supra* note 1, at 215.

86. "[M]ost record contracts specify, for liability purposes, that the artist is an independent contractor and not an employee of the record company." *Id.* at 221.

87. *Id.*; *see also* Menell & Nimmer, *supra* note 40 ("Most of the sound recordings of significant economic value in their 35th year will likely be wholly or partially outside of the scope of works made for hire doctrine.").

88. *See* Rohter, *supra* note 2.

> This is a situation where you have to use your own common sense,' said June M. Besek, executive director of the Kernochan Center for Law, Media and the Arts at the Columbia University School of Law. 'Where do they work? Do you pay Social Security for them? Do you withdraw taxes from a paycheck? Under those kinds of definitions it seems pretty clear that your standard kind of recording artist from the '70s or '80s is not an employee but an independent contractor.

Id.

process and even owning the recording studio, recording artists today exercise greater discretion in making these decisions.[89]

Illustrating how the respective contributions of artists and record labels have evolved since the 1960s, Sheryl Crow testified before Congress about the control she exercises and the costs she incurs in the recording process, contrasting the characteristics of recordings with those of films, which are a paradigmatic example of works made for hire:

> I am basically left to my devices in creating a work. I choose what the sound should be by choosing and working closely with a producer, or in my case I produce my own material. I choose the musicians, the engineers, the studio all based on what it is I am striving to express artistically. But the most important factor is that I pay for the recording of my albums and a portion of the marketing of the album out of my own royalties, as do all other recording artists.
>
> This is where we, as authors of our own work, differ from the film industry. Comparisons with regard to the work for hire amendment have been made where it is necessary to treat films as a work made for hire to avoid issues of authorship. The record business is different than the film industry in a fundamental way. In the film industry, the studio pays the production costs, they hire the director, they hire the actors, they come out with a product that they have hired to be fulfilled, and then they own the film. The cost of the production is never charged back to the creative contributors.[90]

In the 2000 congressional hearing about sound recordings as works made for hire, RIAA President and CEO Hilary Rosen sharply disputed Crow's analysis of the recording industry's financial role in the exploitation of sound recordings.[91]

> In addition to providing advance payments to artists for use by them in the recording process, a record company invests time, energy and money into advertising costs, retail store positioning fees, listening posts in record stores, radio promotions, press and public relations for the artist, television appearances and travel, publicity, and Internet marketing, promotions and contests. These costs are investments that companies make to promote the success of the artist so that both can profit from the sale of the artist's recording. In addition, the record company typically pays one half of independent radio promotions, music videos, and tour support. If a recording is not successful, the company loses its entire investment, including the advance. If a recording is successful, the advance is taken out of royalties, but the other costs I mentioned are the responsibility of the record company.[92]

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89. *Peters Testimony*, *supra* note 11, at 89. ("[F]eatured artists have increasingly come to control the creative elements of a sound recording, making it considerably more difficult now for record companies to characterize artists as employees producing works within the scope of their employment.").

90. *United States Copyright Office and Sound Recordings As Work Made For Hire: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. 161–62 (2000) (statement of Sheryl Crow).

91. *Rosen Testimony*, *supra* note 72 at 122–34.

92. *Id.* at 124.

But Rosen misses the point. The types of investments she describes are marketing costs. As Rosen describes it, a record company's "sphere of expertise and value added is the marketplace. Find the fan, sell the music. Create the demand."[93] But regardless of the risk and magnitude of such expenditures, they cannot be reasonably equated with employment. The Supreme Court in *Bleistein* found that an employer was the author of a design that was "produced by persons employed and paid by the plaintiffs in their establishment to make those very things."[94] However, spending money on marketing cannot possibly be sufficient to constitute authorship because it promotes the product *after* creation as opposed to creating the conditions necessary for its invention. Therefore, while it is essential that record companies receive the benefit of their investments by owning exclusive rights to the first thirty-five years of the sound recording's copyright term, it makes no sense to view the financial role they play in the recording's success as equivalent to ownership. To conclude otherwise is inconsistent with the work made for hire doctrine.

2. Most Sound Recordings Do Not Satisfy the "Independent Contractor Prong"

Sound recordings should also not be considered works made for hire under the "independent contractor prong." Since sound recordings are excluded from the list of enumerated categories under the works made for hire definition of § 101,[95] they cannot be works made for hire per se. In drafting the works made for hire definition, Congress methodically debated the rationale for each enumerated category. But while "sound recordings were being contemplated as copyrightable subject matter . . . they were never proffered as a category to be added to the list of commissioned works."[96]

In the congressional hearings that led to repeal of the short-lived amendment that added sound recordings to the list of enumerated categories, Professor Goldstein, who provided analysis at the request of the RIAA, argued that albums were collective works, but that "[b]ecause questions, however groundless, have been raised about the status of sound recordings as collective works, it was logical for Congress to add sound recordings as a tenth category of work for hire, an addition that does not substantially change current work for hire law or allocations of rights."[97] However, Register of Copyrights Marybeth Peters disagreed, stating that while courts may, in some situations, conclude that a specific sound recording constitutes a contribution to a collective work, "I do not consider the recent amendment to have been a technical amendment. It changed existing law by *adding* sound recordings as a category of commissioned works which may be considered works made for hire."[98]

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93. *Id.*

94. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 248 (1903).

95. 17 U.S.C. §101 (2006).

96. *Peters Testimony*, *supra* note 11, at 246.

97. *Goldstein Testimony*, *supra* note 33, at 138.

98. *Peters Testimony*, supra note 11, at 91.

Some, like Mary LaFrance, have argued, however, that distinctions between the enumerated categories are malleable and that sound recordings could easily fit within the definitions of audiovisual works, compilations, or collective works, therefore making them works made for hire if the artist had signed an agreement acknowledging it as such.[99] However, LaFrance also acknowledges that for courts to interpret sound recordings as included within one of the enumerated categories would contravene congressional intent because "one reasonably would have expected Congress to have mentioned specifically" that it intended to extend work made for hire status to such a large category of works.[100] On the other hand, one might argue that Congress could have affirmed that intent when it repealed the short-lived amendment that added sound recordings to the enumerated categories in 2000, yet chose instead to explicitly state that it was neutral on this issue.[101]

Nevertheless, determining whether any given sound recording fits within an enumerated category is highly fact-specific. For example, a court might reasonably find that *Biophilia*,[102] the 2011 album by Icelandic singer Björk, is either an audiovisual work or a compilation, or both. Although it is available for sale on iTunes as a traditional album, "[t]he far more exciting option is to acquire the "Biophilia" program from the iPad App Store."[103]

> "Biophilia" essentially turns an album into a sort of audiovisual game, delivering a miniature production studio into the world's willing hands . . . .
>
> On the iPad screen a galaxy unfolds that you can twist and zoom and pan. Each of the 10 major stars represents a song. When you tap a star, you are offered ways to explore, understand and interact with the tune. There are lyrics and detailed musical analyses. You can watch a scrolling score of the song or simply listen as a colorful visualization passes by . . . .
>
> The real magic happens when you press "play." That doesn't tell the machine to play the song; it means it's time for you to play the song . . . .

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99. Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. Cal. L. Rev. 375, 398–403 (2002).

100. *Id.* at 416; *see also* Field, *supra* note 40, at 176–77.

101. The House Report accompanying the amendment stated:

> The purpose of . . . the "Work Made for Hire and Copyright Corrections Act of 2000", is to restore the status quo as it existed before November 29, 1999, as to the issue of whether a sound recording can qualify as a "work made for hire" . . . and to do so in a manner that does not prejudice any person or entity that might have interests concerning this question.

H.R. Rep. No. 106-861 at 1 (2000).

102. Bjork, Biophilia (Nonesuch Records 2011).

103. Seth Schiesel, *Playing the New Bjork Album, and Playing Along, with Apps*, N.Y. Times, Oct. 24, 2011, at A1, *available at* http://www.nytimes.com/2011/10/25/arts/video-games/bjorks-biophilia-an-album-as-game.html?pagewanted=all.

> Bjork and her team have created a small visual toolbox for each track. A few, like "Crystalline," play much like a simple video game. In "Crystalline" you tilt and swivel the iPad to add colorful crystals to a growing agglomeration as you zoom along neon tunnels. It is one of the few elements of "Biophilia" in which you are not controlling the sound. Instead you are having a visual and motor-control experience meant to complement it . . . .
>
> In "Thunderbolt" you augment the song with flashes of lightning and waves of electronica, as if manipulating a sort of personal beat box. In "Hollow" you queue up various proteins for what is meant to be a representation of the microscopic DNA machines within us. Different proteins change the rhythm to time signatures of varying complexity, while you can drag a control to change the tempo, or beats per minute . . . .
>
> These are toys that children could play with for a moment and in some cases serious musical tools that professionals, students and enthusiasts could spend many hours exploring. Some of the programs allow you to save your creations for future editing or sharing with friends, though by handing them your iPad, not by exporting your creation to another device or program.[104]

If one accepts *The New York Times* description of *Biophilia* as "among the most creative, innovative and important new projects in popular culture,"[105] it is easy to imagine a court finding that it fits one or more of the enumerated categories, including a contribution to a collective work, audiovisual work, compilation, or supplementary work.[106] But *Biophilia* also illustrates why a sound recording should not be a work made for hire under either of the two prongs. Had Björk limited her project to only the audio components, she would almost certainly be able to terminate her transfer of copyright ownership to her record company in thirty-five years. It seems impossible to justify that copyright law ought to instead punish Björk's more ambitious innovation by denying her that termination right. Such a perverse incentive is in fact contrary to the constitutional mandate of copyright law to promote the useful arts.

Another reason courts should not hold that sound recordings fall within one of the enumerated categories is that doing so would disproportionately hurt new artists because of their unequal bargaining position. Since the "independent contractor prong" also requires a written agreement that the work is made for hire, established artists might be able to avoid the termination "trap" since they have the clout to insist that the work for hire language not be included in their contracts. But, as Representative Howard Berman observed in the 2000 Congressional hearing, "the artist who doesn't have the clout to keep that out of the contract is the artist who may most really be needing the right of termination in 35 years because no one has compensated him for the possible big hit."[107]

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104. *Id.*

105. *Id.*

106. *See* 17 U.S.C. § 101 (2006).

107. Nimmer & Menell, *supra* note 43, at 412.

B. Joint Authorship and Sound Recordings: A Red Herring?

As discussed above,[108] the recording industry and several scholars have suggested that sound recordings should be considered works made for hire on the basis that sound recordings are inherently joint works and competing claims from joint authors will increase transaction costs, lead to costly litigation, and make efficient exploitation of sound recordings burdensome if not impossible.[109]

Fortunately, this parade of horribles will not likely come to pass because joint authorship claims are sharply limited by the Act and case law.[110] The statutory definition of "joint work" requires that the authors intend for their contributions be merged into "inseparable or interdependent parts of a unitary whole."[111] And courts have held that this intent must not only be mutual, but that, at least in the majority circuits, authorship will be recognized only for those who contribute independently copyrightable expression.[112] That precludes minor players in the production of sound recordings from asserting legitimate joint authorship claims.

Furthermore, while the Act does not define authorship with regard to sound recordings, the legislative history left "these matters to the employment relationship and bargaining among the interests involved."[113] Therefore, some have suggested that artists can protect themselves by signing standard agreements with those whom they bring in to work on a recording, stipulating that their work is provided without claim of authorship.[114] While it is true that legitimate joint authorship claims might complicate termination and efficient exploitation, the scale of the problem is more manageable than has been suggested because the purportedly limitless authorship claims feared by the industry are in fact limited by the law and were envisioned by Congress as something to be addressed in a contract among the parties.

As Don Henley argues, fears of joint authorship claims should not support the withholding of termination rights from recording artists. "[I]f the producer wants the right of termination, or the percussionist, let me deal with that. Let me worry about that. Better the chaos on the artists' side than the side of the labels, which are in chaos already."[115]

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108. *See supra* Part II.C.2.

109. *Goldstein Testimony*, *supra* note 33, at 140.

110. *See supra* Parts II.B, II.C.2.

111. 17 U.S.C. § 101.

112. *See* LaFrance, *supra* note 53.

113. *Peters Testimony*, *supra* note 11, at 79 (citing H.R. Rep. No. 92-487, at 5 (1971); S. Rep. No. 92-72, at 5 (1971)).

114. Field, *supra* note 40, at 178.

115. Rohter, *supra* note 61.

C. The Public Would Not Be Served by Designating Sound Recordings as Works Made for Hire

I have argued that the doctrinal analysis supports a finding that most sound recordings under the Act are not works made for hire and that joint authorship claims will not lead to the uncontrollable inefficiencies some fear. To the extent that this conclusion means that future sound recording transfer agreements will need to be renegotiated after thirty-five years, then that is a good thing because it serves the purpose underlying termination rights: giving authors a second bite at the apple when it turns out that their work is worth far more than they initially bargained for. The public wins because the recognition of termination rights preserves the incentives necessary for artists to create work that connects with an audience and yet gives record companies ample time to benefit from their investments. Where agreements with the original record company cannot be reached, artists will be free to find a better deal with another label, or even find ways to market their own works more effectively, thus introducing increased competitiveness into an increasingly centralized music industry. Financial rewards for creative production and innovative distribution are the hallmarks of a properly calibrated copyright system.

IV. PROPOSALS FOR STATUTORY AMENDMENT

This section addresses statutory amendments to the Act that have been proposed to improve the termination process for future sound recordings. In keeping with the arguments made above, any statutory amendment should be doctrinally sound, ensure that incentives are properly calibrated to maximize consumer interest, and facilitate an efficient marketplace.

Certainly, the notion of a clarifying "fix" is deceptively simple since there is no agreement as to what that fix might be. John Conyers, the ranking Democrat on the House Judiciary Committee, has called for such an amendment "to preserve fairness and justice for artists."[116] Yet the prospects for a legislative solution to the problems of sound recording terminations appear uncertain given the contentiousness of the issue and the controversial history of amendments to the Act.[117] Representative Conyers has not publicly stated how he would amend the statute.

Some like Mary LaFrance argue that congressional inaction will foster uncertainty and unpredictability in the marketplace.[118] This would be "the worst way to address the sound recording issue [because] the authorship rules for sound recordings are an important and sensitive matter that should be resolved only after a careful assessment of the competing public and private interests" and would leave

116. Larry Rohter, *Legislator Calls for Clarifying Copyright Law*, N.Y. Times, Aug. 28, 2011, at C1, *available at* http://www.nytimes.com/2011/08/29/arts/music/representative-john-conyers-wants-copyright-law-revision.html?pagewanted=all.

117. *Id*.; *see also* Gould, *supra* note 1, at 137 n. 4 (2007) ("Given that the 1976 Act revision process lasted twenty years and that the last attempt at amendment of the work-made-for-hire provisions led to repeal without change in 2000, the odds of a statutory revision are admittedly low.").

118. LaFrance, *supra* note 98, at 395–96.

unaddressed the ambiguities of work for hire doctrine.[119] LaFrance's preferred legislative solution would be to eliminate termination rights for sound recordings and strengthen termination rights for songwriters because copyright in a musical work is valuable and less likely to be encumbered by intractable claims of joint authorship.[120] But while this proposal might make sense for songwriters who record their own work, many recording artists do not perform original music, and it seems unjustified to deny to these artists the rights that would be exclusively bestowed upon composers.

More promising are two suggestions that hold promise for clarifying the issues of authorship and control. The first is the "Key Contributors" idea advanced by Marybeth Peters, which would define the author of a sound recording as the principal artist. The second, legislative unitization, is currently being developed by David Nimmer and Peter Menell and aims to make the exploitation of sound recordings more efficient.[121] The remainder of this section considers each proposal in turn.

As Peters explained at the 2000 congressional hearing, her proposal seeks to preserve and strengthen termination rights for sound recordings by clarifying who should properly be considered an author and doing so in a way that is consistent with copyright doctrine and common sense.

> The Copyright Office believes that those who contribute significant authorship to a sound recording should have the right to terminate. I will refer to these persons as "key contributors." I use the term "key contributors" because, as the recording industry has correctly emphasized, permitting every contributor to a sound recording to exercise termination rights could make the exploitation of a sound recording unworkable. I do not proffer this term as a proposed statutory term, nor do I offer any specific legislative language at this time. Rather, I offer it as a concept that should seriously be explored.
>
> Who is a "key contributor"? It is someone who has made a major contribution of copyrightable expression to a sound recording. Ordinarily, it would include the featured performer or performers. For example, Frank Sinatra and Madonna would clearly be key contributors of authorship to the sound recordings on which they perform. Each of the members of the Beatles and Metallica would also be key contributors. In contrast, a background musician would not be a key contributor. Exempting those key contributors from the work made for hire provisions should result in only a limited number of potential terminations. This could be accomplished by retaining the inclusion of sound recordings among the categories of works eligible to be commissioned works made for hire, but excluding the contributions of these key contributors from work-made-for-hire status. The result would be that the sound recording would be a joint work that is in part a work made for hire and in part a work of individual authors . . . .

119. *Id.*

120. *Id.* at 417–18.

121. *See* Menell & Nimmer, *supra* note 40.

> Consideration should also be given to whether producers of sound recordings should, at least in some circumstances, also be able to terminate as key contributors. There are many examples of producers, such as Quincy Jones, Phil Spector, and Babyface, whose contribution of authorship to a sound recording can equal or even exceed that of the featured artist.[122]

The "key contributor" idea is not without problems. Identifying who is a "key contributor" would pose the most significant challenge. In the worst-case scenario, the potential free-for-all of joint authorship claims critics of termination fear would nonetheless ensue. Nevertheless, the "key contributor" concept finds support in case law. In *Aalmuhammed v. Lee*, the Ninth Circuit Court of Appeals held that a minor contributor to a motion picture was not a joint author under the Act.[123] Applied to the context of sound recordings, courts could find that "the only cognizable 'authors' of sound recordings are their featured artists."[124]

The "key contributor" approach "would also promote predictability and stability within the industry by preventing background musicians and others, who have a licensed contribution on the recording, from terminating their agreements . . . . By allowing sound recordings to partially qualify for work-for-hire status, this problem can be avoided."[125] The result would represent "a middle ground that would benefit both parties [by providing] new clarity in the law and a lowered transaction cost, because when the secondary contributors entered into work-made-for-hire agreements for sound recordings, they would be binding under copyright law."[126]

Another promising legislative approach to addressing the problems with terminations of sound recording transfers seeks to strike a balance between achieving efficient control and exploitation of sound recordings, while recognizing the rights of multiple owners of the work. In a draft working paper, Nimmer and Menell propose "a form of legislative unitization in which common ownership would be preserved but exploitation would be governed through a unified corporate decisionmaking structure. In this way, Congress could better protect the value of the resource, contain the transactions costs, and possibly better calibrate the distributive effects of this mechanism."[127]

While intense lobbying has historically rendered congressional action on copyright law either impossible or caused it to become mired in narrow special-interest exceptions, both of these proposals would go a long way in improving the system for future sound recordings and should therefore be seriously considered.

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122. *Peters Testimony*, *supra* note 11, at 93–94.

123. Aalmuhammed v. Lee, 202 F. 3d 1227 (9th Cir. 2000).

124. Nimmer & Menell, *supra* note 43, at 414.

125. Starshak, *supra* note 40, at 121–22.

126. Field, *supra* note 40, at 183–84.

127. Menell & Nimmer, *supra* note 40 at 183–84.

V. BEYOND BRINKSMANSHIP: THE BENEFITS OF A COOPERATIVE APPROACH

If, as this note argues, a balanced approach to resolving terminations is more likely to achieve the efficiencies and calibrated incentives I have described, then a cooperative approach should be seriously considered as an alternative to high-stakes, winner-takes-all litigation.[128] While it may be tempting for record companies, many of which are owned by deep-pocketed multi-national corporations, to wage an aggressive war of attrition against artists in the courts, they face considerable legal obstacles, as I have outlined above. And while some artists may see themselves as morally justified in reclaiming the copyrights to their recordings, most are probably unable to sustain the costs of protracted litigation and ill-equipped to administer their works on their own. Victory for either side would come not only at great expense to the parties involved, but would also do little to improve the chances of ultimately managing sound recordings more efficiently.[129] Most significantly, to the extent that a cooperative approach might minimize costs and maximize market efficiencies, consumers would ideally benefit because the marketplace would promote the proliferation of sound recordings without passing on the costs of excessive litigation.

To this end, I propose the creation of a new body, the Music Industry Working Group on Terminations (the "Working Group"). The Working Group would be directed by a board of key stakeholders, including legal scholars, consumer representatives, artists, and record companies and would serve two primary purposes. First, it would develop a set of best practices and agreed-upon principles to guide negotiations between labels and artists currently under contract, as well as standardized language for agreements between record companies and new artists. The Working Group's recommendations would encompass everything from financial terms to a system of efficient control and administration. The Working Group's second function would be to offer arbitration services for artists and labels that were interested in having their disputes resolved by a neutral third-party bound by the best practices developed by the Group. This would minimize litigation costs and enhance predictability and consistency in the resolution process. As mentioned above, these goals not only advance the interests of labels and artists, but of consumers as well.

To be sure, the creation of such a Working Group may be greeted in some quarters with cynicism. Some may dismiss such broad collaboration as Pollyanna-ish or unrealistic. It is true that the Working Group model would only work if a large number of artists and record companies participate. Of course, artists and labels would be free to take their chances in court if they could get a better deal than the

128. *See, e.g.*, Gould, *supra* note 1, at 93.

129. For example, since all sound recordings are also separately copyrightable as derivative works of an underlying music composition, the termination issue is complicated by the fact that a record company may continue to be able to exploit a sound recording even after an artist terminated the transfer. Menell & Nimmer, *supra* note 40, at 3. This would be problematic because neither the artist nor the label would have exclusive rights. However, this issue is best solved through negotiation, and in fact may provide motivation to the parties to come to an agreement. "For this reason, [record companies], recording artists, and other joint owners (such as record producers and recording engineers) will have incentives to work together in exploiting works for which transfers of copyright have been terminated." *Id*.

Working Group offered, and the record industry may prefer to wear down the other side with litigation, as it has attempted to do with online piracy.[130]

The response to such criticism is that labels and artists would participate because it would be in their financial interest to do so. First, both artists and labels have too much at stake to risk the expense and uncertainty of simply fighting all demands for termination in court. For artists, it may be challenging to organize mass participation,[131] and some might prefer to reacquire their rights on their own terms in order to most creatively find new ways to exploit their work. However, most artists will find themselves outmatched financially by their record companies and would benefit from reduced transaction costs and fair terms negotiated on their behalf. And if a large number of artists agreed to participate, record companies would be incentivized to take advantage of this efficient and comparatively inexpensive vehicle for settling artists' termination claims

Moreover, record companies may find that favorable resolution in court cannot be as easily achieved as they might hope for two reasons. First, as I have explained above, their legal position is uncertain, particularly given the challenges posed by existing case law on works made for hire and joint authorship. Though these issues have not yet been tested in court with regard to terminations of sound recordings, a recent decision in one closely watched case should give the record industry pause. In *Scorpio Music v. Willis*, a federal district court in California is considering a music publisher's challenge to a termination demand from Victor Willis, the lead singer of the Village People.[132] In May 2012, the court denied the publisher's motion to dismiss and held that a joint author who transferred his portion of the copyright to a joint work may terminate his transfer of rights to his portion of the joint work without the consent of the other joint authors. This means, if Willis ultimately prevails, the publisher will have only partial control of the works at issue. If this holding is extended to sound recordings, it would mean that record companies would be hampered in their efforts to efficiently exploit such works, even if they retain a portion of the control.

The derivative works exception is another example of how a non-negotiated resolution runs the risk of ultimately stymieing efficient sound recording ownership. If an artist successfully terminates his rights, the record company would still be able to exploit derivative works created under the original transfer, but would effectively have a non-exclusive right to do so because the label would have to compete with the

130. *Record Industry Sues Hundreds of Internet Music Swappers*, NYTimes.com (Sept. 8, 2003), http://www.nytimes.com/2003/09/08/technology/08WIRE-MUSI.html.

131. Don Henley has suggested that artists may just be predisposed to shy from group action:

> I know there's been some talk of an industry-wide global settlement . . . . Of course, artists being the bullheaded lot they are, many maybe wouldn't want to join in that settlement, and then what you got? It seems to me a majority, a great majority, would have to buy into this in order for it to work. Anything that involves artists is a herding cats situation. That's one of [the] reasons, frankly, that artists have been so mistreated and abused over so many decades in the recording industry––because they are not organized.

Rohter, *supra* note 61.

132. Scorpio Music S.A. v. Willis, No. 11-cv-1557, 2012 WL 1598043 (S.D. Cal. May 7, 2012).

artist, who would now controls the rights to the underlying work. The likely result would undercut the work's profitability for the label.[133] Given the legal risks and potential costs they may incur even if they win in court, it may be unwise for record companies to blindly wage a litigation war against every termination request.

In addition, there is at least some precedent for industry-standard agreements and cooperation in the music industry, albeit in the very different context of licensing. Performing rights organizations have, for the most part, brought order and fairness to what had previously been the inefficient, unwieldy licensing regimes that preceded it, and some have proposed that the industry consider expanding the scope of collective licensing.[134] Others have imagined a PRO-like approach to resolving termination claims.[135]

Ultimately, the potential benefits of a Working Group should be considered as preferable to the much more costly and risky alternative of a protracted legal battle, and more likely to meet the needs of consumers who seek efficient access to music at a fair price.

VI. CONCLUSION

The rapid pace of technological innovation, a dynamic marketplace, and society's appropriate recognition of evolving forms of creativity challenge U.S. copyright law to regularly evolve and readjust to ensure that the useful arts are being properly promoted, as envisioned by the U.S. Constitution. In 1966, Benjamin Kaplan defined the foundational goal of copyright law as designing "inducements to producers calculated to maximize public satisfactions."[136]

The termination right was designed to ensure that the inducements were properly calculated by recognizing the impossibility of predicting how much value the public might find in any given work of creativity. But as 2013 looms and copyright transfers in sound recordings near their eligibility for termination, the issue of whether recording artists will be able to successfully exercise their termination rights remains unresolved.

This note argued that, with regard to sound recordings, the goal of achieving balance between the doctrinal underpinning of sound recording terminations and carefully considered equitable concerns would be best served by a resolution that preserves termination rights. Under current law, this can be achieved by judicial recognition that most sound recordings are not works made for hire and separately by creation of a Music Industry Working Group on Terminations to maximize efficiency in administering sound recording terminations. Prospectively, legislative reforms to the Act, such as the "key contributor" approach and legislative unitization, would help resolve lingering ambiguities and result in predictability, fairness, and efficiency

133. Nimmer & Menell, *supra* note 43, at 415–16.

134. *See, e.g.*, Whitney Broussard, *The Promise and Peril of Collective Licensing,* 17 J. Intell. Prop. L. 21 (2009).

135. *See* Gould, *supra* note 1 at 94 ("Some organizations might aggregate termination claims on behalf of a broader set of artists.").

136. Kaplan, *supra* note 47, at 849.

for all stakeholders. Most significantly, a market in which artists can exercise their legal termination rights and disputes are settled without the high cost of extended and uncertain litigation will serve the consumer by incentivizing the creation and distribution of music at a reasonable price.