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Ozymandias: Kings Without a Kingdom

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Ozymandias: Kings without a Kingdom

Ozymandias is an English sonnet written by poet Percy Shelly in 1818. The sonnet reads: "I met a traveller from an antique land who said: Two vast and trunkless legs of stone stand in the desert. Near them, on the sand, half sunk, a shattered visage lies, whose frown, and wrinkled lip, and sneer of cold command, tell that its sculptor well those passions read which yet survive, stamped on these lifeless things, the hand that mocked them and the heart that fed: And on the pedestal these words appear: 'My name is Ozymandias, king of kings: Look on my works, ye mighty, and despair!' Nothing beside remains. Round the decay of that colossal wreck, boundless and bare the lone and level sands stretch far away."[75] There are several conflicting accounts regarding Shelly's inspiration for the sonnet, but the most widely accepted story tells that Percy Shelly was inspired by the arrival in Britain of a statute of the Egyptian pharaoh Ramesses II. Observing the irony of a pharaoh's statute, which was created to glorify the omnipotence of the ruler, being carried into port as a mere collectible in a museum, Shelly wrote the sonnet to summarize a particular irony that presents itself repeatedly throughout history. Whenever a person, group, business, or nation from humble beginnings conquers competition, the person, group, business, or nation incorrectly assumes that the newfound position of dominance will last forever. However, it is this very arrogance that provides another person, group, business, or nation the opportunity to dethrone the current champion. This sonnet perfectly represents the music industry today. Sony, Universal, and Warner preside over the music industry that is a shell of its former self. Once kings of a vast empire, these three now preside over an emaciated kingdom. Unless drastic changes are made to the business models of these

companies, Sony, Universal, and Warner will soon become kings without a kingdom to rule.

The year was 1999. The economy was in top shape. The unemployment rate hovered around 4.2%.[1] However, there was a problem looming just beneath the surface of everyone's daily lives. A world-changing event was coming. At work, at home, and even cocktail parties, whispers could be heard among people who questioned their respected peers if they had a plan if life as they knew it came crashing to a halt. [6] 1999 was the infamous year of intense preparation for the world-altering Y2K bug, which was an esoteric computing glitch with the catalytic power to bring the modern world to an end, as we knew it. The drums of doomsday began to beat as analysts began to predict this bug's effect on people's personal finances, on government contraction not seen since the Great Depression, and general confidence computers that run everyday tasks. Companies of all shapes and sizes spent millions of dollars on protection and backup software to protect their assets. The pandemonium surrounding the Y2K bug reached such an unstable level that schoolteachers were telling their students what would happen to their schools in the event of this catastrophe. The only problem is, people were bracing for the wrong world-changing event. [18]

1999 also saw another world-changing event, albeit one that started with a whimper more than a bang. Napster launched that year and offered a user-friendly service that allowed individuals to upload and download MP3 files for free. Known as a peer-to-peer file sharing service, for the first time in history Napster allowed individuals access to music beyond what was carried in local music stores. For the first time users were able to take music files known as MP3's and use the internet to trade songs with others, all while

foregoing centuries of copyright law that required appropriate payments to musicians for using their music. Individual users from all corners of the globe were able to take rare and unreleased material within their possession and share it with the world. For example, ever since 2Pac's death in 1996, there were fierce debates over how many unreleased songs he left behind. His back catalog became a story of legend, and fans eagerly waited to hear his new material. Napster proved to be the answer. For the first time, fans did not have to wait for a label to put out an unreleased 2Pac album. Nor did fans have to stomach record labels misguided attempts to remaster and remix his music for the masses. Napster unleashed 2Pac's music to the masses unaltered and allowed his legend to balloon into what it has become today. 2Pac wasn't the only beneficiary. Other artists such as Elvis suddenly became available to the masses in their original glory. At the same time, music instantly became internationalized. Local bands from Kinshasa suddenly had fans in Dubai, and singers from Edinburgh were now known in Manhattan. The penetration of music into markets worldwide grew to levels never before seen. But there was a problem.

Napster proved to be the bigger problem emanating out of 1999 because the service not only changed the way that music was consumed, but it also ignited another more important cultural shift that proved to be far bigger than music. But with this shift came a lot of questions. Would consumers begin to flock to free online services that provided free music, movies, and television shows that they would otherwise pay for? Would consumers simultaneously reject traditional media offerings like cable TV, $25 DVD's, and $20 CD's? All of these questions proved vital yet difficult to answer for their respective industries.

Napster had harnessed the Internet as a new playground for consumers who did not want more traditional and expensive offerings. There was only one problem; industry executives, especially in the music industry, dismissed new services like Napster as "fads" that would eventually disappear. Buoyed by their egos and a genuine belief that their record profits would survive this temporary enervation, the music industry co-signed its own death certificate. Even today, the music industry is still struggling to keep up with the rapid changes in the way people consume music. A recently hired A&R Executive explained it best when he summarized all the follies of the music industry when he ended his speech to several Sony interns by reminding us to never forget that the music industry in 2013 is still run by the same people who failed to understand the power of Napster and how the future of music would rest in digital consumption through purchasing singles and streaming services.

Indeed, the following story perfectly illustrates how discombobulated the industry was in 2006. "In 2006 EMI, the world's fourth-biggest recorded-music company, invited some teenagers into its headquarters in London to talk to its top managers about their listening habits. At the end of the session the EMI bosses thanked them for their comments and told them to help themselves to a big pile of CDs sitting on a table. But none of the teens took any of the CDs, even though they were free. 'That was the moment we realized the game was completely up,' says a person who was there." [2]

In other words, a full 7 years since Napster launched and turned the music world upside down, music executives were still oblivious to the idea that Napster had shown the music industry how it needed to transform its then current business model of selling CD's in stores to engaging with the customers directly via digital platforms. The music labels

fell into their own form of the "innovators dilemma."[3] This idea, created by Harvard professor Clayton Christenson held that successful companies would place too much of their focus and resources analyzing and catering to their customers current needs, and fail to undertake new business models and ideas that would meet the customers future needs, thereby causing the once successful company to fall behind.[4]

Fast forward to 2013, and the music industry is a shell of its former self. "Total revenue from U.S. music sales and licensing plunged to $6.3 billion in 2009…[i]n 1999, that revenue figure topped $14.6 billion." [5] Record labels are struggling to keep pace in a new world that does not require the services that major labels offer. The worst, and possibly most preventable, occurrence is the disastrous public relations position major music labels have positioned themselves in. Independent artists that have found their niche and amplified their position with social media by attacking labels as free promotion for their materials and have compounded major record label problems.[7] Los Angeles rapper Hopsin discussed the industry in a November 4 interview, stating that record labels approached him demanding, "[I] rap about Molly because that's what's in." [8] He said further, "They want you to rap about what's in so they can make their quick money off you. Then once they make their quick money, they're gonna kick you to the curb if you're not doing what they want you to do. When you're independent, you can do whatever you want." [9] Fellow Los Angeles rapper Nipsey Hussle's brand is built upon the slogan "Eff the middle man." [10] In a recent interview with MTV News, when the rapper, who has a career spanning 10 years, was asked whether he would charge $100 per album for his debut album like he did with his most recent mixtape, "Crenshaw," he replied, "'I can't say off top, I know I'm going to continue to pay attention to the game and I'm not

going to follow what was done. It isn't the price of the plastic case and polyurethane disc– it's the price of revolution! The price of rebellion against an industry that has tricked us all into making products that have no soul for fear of not being heard if we don't.'"[11]

Now, when the record industry seems to be on its knees, exasperated and exhausted at the music industry's unceasing implosion, a second potential watershed moment has reared its ugly head. [12] The music industry, as almost no one outside the music industry or the legal profession knows, is anchored in and largely administered through copyright law. [13] Tucked away in the 1998 Copyright Term Extension Act under sections 203 and 304, are two provisions that provide an artist with two legal weapons to reclaim masters previously assigned to a music label. [14]

Understandably, this has the music labels ringing the alarm bells because without artist recordings, the music industry will implode. Artist's master recordings are the only assets that music labels own and it is the exclusive exploitation of those recordings that makes the music industry money. [15] Musicians will clamor for a return of their masters because now that they better understand the music industry they will want to regain control and exploit their masters as they see fit rather than have the masters exploited by a middle man who then demands compensation from the revenues of the exploitation. "With their songs back under [artist] control, artists could license them directly to TV and movies, re-release albums on their own imprints, or even re-transfer their stuff to a label or publisher in a more lucrative deal." [16] However, others within the industry are not sure what the future will hold. "For now, it's unclear if master recording copyright reversion will be a big issue for the industry, as artist advocates argue, or another overhyped potential disaster like the Y2K issue turned out to be at the turn of the millennium." [17]

As a result of the above chaos, in 2013 the music industry is in a position similar to 1999 because it once again has a chance to embrace the shifting marketplace and position itself to capitalize upon these changes and reinvent the music business. Unlike before, music labels now have more data than ever before to parse out exactly how users listen to music and are able to understand exactly what marketing efforts contributed to every penny that a record label makes. Data has suggested that "music industry revenues will continue to decline until it reaches about $5.5 billion a year by 2014, as new revenue sources begin to lift sales again." [19] Therefore, as long as the record labels do not squander this opportunity, they should be able to stop the label bleeding and begin to reposition and regain lost profits.

Additionally, because of the incoming litigation by artists in pursuit of their masters, music labels now have an opportunity to reset their relationships with long disgruntled artists and use artists claims for their masters as a starting point from which both parties can renegotiate more amicable deals for the artists. [70] Therefore, unlike 1999, in 2013 events will play out differently. Despite the looming threat of artist reversion rights under sections 203 and 304 of the Copyright Act of 1976, principles and ambiguities of contract law, record label repositioning, and considerations of artist branding will all serve to prevent most artists from exercising their termination options and retrieving their masters from music labels.

Copyright Section 203

Copyright Section 203 explains how a one may terminate transfers and licenses granted by the author. Copyright Section 203 only deals with assignments of copyrights on or after January 1, 1978. [20] Therefore, from 2013 forward, termination under

Copyright Section 203 will revert all rights under the original grant back to either the author outright, only to authors that terminated their share, or anyone owning a termination interest in the assigned work and exercising their termination option, including those authors that did not join in the initial termination notice. [21]

It is worth noting however, that the termination right does not extend to derivative works that stem from the copyrighted work in question. In other words, the derivative works copyright holder can still exploit a derivative work that was lawfully created when the copyrighted work was still assigned.[22] This is a crucial point because even if certain artists are able to clear all of the hurdles set in place and reclaim their masters, any works that the record label created using the masters would still belong to them. For example, Sony Music has taken Michael Jackson's music and produced various stage performances and renditions of Michael Jackson's biggest hits. This may seem like a trivial point, but when these stage performances generate Sony millions of dollars each year, its easy to see that artists will try to claim a piece of that pie as well.

Also, Copyright Section 203 ostensibly excludes all "works made for hire" from termination by the author. [23] First, a work is made for hire if an employee within the scope of his employment prepared the work. Second, a work made for hire is a work arrangement where one party creates an asset or product for another and crucially terms of the deal are governed by "the hiring party's right to control the manner and means by which the product is accomplished." [24] The ambiguities of this provision are discussed below. The provision also outlines how multiple authors may elect to reclaim their shares in joint works and this provision closes any opportunity for a disgruntled heir to reclaim copyrighted work that the author lawfully bequeathed through a will upon the author's

death.[25] Copyright Section 203's language states that in the case of a work that is not a work for hire and not transferred by will, the transfer grant, whether it was exclusive or not and executed on or after January 1, 1978, is subject to termination if certain conditions are met.[26] If one author assigned his works during his lifetime, either the author or his or her heirs that own more than one-half control of the authors work can terminate the grant.[27] If more than one author created the work, termination can be granted by a majority of the authors or heirs of the authors that own a termination interest. [28] In other words, if one author out of five elects to assign his share of the total copyrighted work, he will be able to later reclaim his 1/5 share. In *Scorpio Music S.A. V. Victor Willis,* the court clarified this point by stating that construing the author's right in this situation any other way "would be contrary to the purpose of the Act to make it more difficult for an author to terminate an independent grant." [35]

Crucially, this termination right may only be exercised during a 5-year window that starts at the end of a 35-year term that began at the date of the grant execution. [29] If the grant deals with publication rights, the term begins 35 years from the date of initial publication or after a 40 year period from the date of publication execution, whichever ends first. [30] Further the notice must be dated within the 5-year window above yet also not be served more than 10 years prior to date or 2 years within noted date of termination. [71] For example: "(1) Date of Execution of Grant + 40 = X and Date of Publication + 35 = Y. (2) Compare X and Y. (3) Which is the earliest date? Earliest date – 10 = first date termination notice can be sent. Earliest date - 2 = last date a termination notice may be sent." (15). Finally, the termination notice must be served in writing and include signatures of the appropriate number of authors as outlined above. [31]

Many artists who created music in 1978 will have the right to file applications for termination that will come into effect in 2013. "So far, a number of acts including Pat Benatar, Devo, Journey, Billy Joel, Kool & the Gang, Lipps Inc., Roberta Flack and Peabo Bryson have filed with the U.S. Copyright Office for the termination for some or all of the album master rights held by their labels so that it will revert to them."[32] As expected, the United States Copyright Office has already received petitions for termination. "According to the United States Copyright Office, the number of notices of termination that have been filed and recorded under Section 203 of the Copyright Act stands at 534, a significant jump from nearly a year ago when there were 285." [33] Its entirely plausible that within the next five years the number quoted above will balloon exponentially as more and more artists will look to artists who claimed masters before them and follow suit in the hopes of retrieving revenue streams that artists once believed were lost forever.

Ostensibly, it seems that provision was included into the Copyright Act of 1976 because legislators at the time were pressed by special interests to remember that most new artists who were clamoring to strike it rich in the music world typically became a party to a deal that was grossly unfavorable to the artist. However, in their zest to dive head first into a world of sex, drugs, and quite literally rock and roll, new bands often ignored the practical pitfalls of their deals. As a result of the unequal bargaining power of a new artist and an established record label, considerations had to be made that allowed artists not ruin themselves. "The intent of Section 203 was to give authors and artists a second shot at reclaiming rights they assigned earlier in their careers, when they probably had little leverage against far bigger labels and publishers."[36] The United States Supreme

Court even acknowledged that "authors are congenitally irresponsible, [and] that frequently they are so sorely pressed for funds that they are willing to sell their work for a mere pittance."[37] Moreover, a House Report attached to the 1976 Copyright Act claimed that sections 203 and 304 were included because of "the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited". [38] Record contracts openly admit that the record business is a highly speculative business and that is clearly reflected in the record label's business model of recouping all advance payments and investments into the artist before the artist makes a profit. In other words, since the world of music sales was so highly subjective, it was not fair to impose the requirement that artists bargain for the value of their services long before the services were sold in the open marketplace. Finally, its important to clarify that artists who do not assign or transfer their master recordings for a period greater than 35 years are not able to exercise any rights under Copyright Section 203. [72] Alternatively, in *Walthal v. Rusk,* the court concluded that Copyright Section 203 applied to contracts that artists signed which assigned or transferred their master records to a record label for an indefinite period of time. [73]

Section 304

Section 304 is more complex. The pertinent provisions of the section as it relates to copyright reversion of masters begin at subsection C, which outlines the termination of transfers and licenses to copyrighted works created before January 1, 1978.[39] The rights outlined here are similar to the rights outlined to authors above in section 203. Subsection C states that any copyright subsisting in either renewal term on January 1, 1978 that is not a work made for hire and was assigned before January 1, 1978 can be terminated if

the following conditions are met; persons other than the author can terminate an assignment if they executed the assignment and in the case of multiple authors, termination can be grated to the extent of that particular author's ownership share in the copyrighted material.[40] In other words, if 5 authors create a master recording, and one author assigns his right to his 1/5 portion of the song, that author may then reclaim his 1/5 share as long as he meets the requirement of termination. As with section 203 above, heirs of any deceased author that own a copyright termination right may exercise the right in the deceased person's place. Termination of the grant may be triggered during a 5 year window that begins 56 years from the date the copyright was originally obtained by the author, or January 1, 1978, whichever comes later.[41] Copyright Section 304 may seem like a non-issue at the moment. But, if section 203 is any indication, Copyright Section 304 will be an inevitable problem that must be considered in tandem with any responses to Copyright Section 304, rather than revisiting this fight in a mere 20 years.[42] The urgency of Copyright Section 304 is especially evident when one considers that many of the best selling masters and albums date back to the 1950's and 1960's. These records are the lifeblood of the company. Known as "legacy records," these records make more money overall and even more money per song sold, because there are almost no overhead costs of production and minimal sums are spent on marketing because these records and artists are typically well known. Additionally, these records cater to the older generations of music lovers who have a stronger connection with the records and also have more disposable income to buy endless re-issues of Elvis or Dean Martin greatest hits CD's. A recent search of Amazon.com for Elvis Greatest Hits returned over 700 results.

So why outline the above rules so descriptively? Because in order to understand and explain the oncoming dilemma for copyright assignees in general and record labels in particular, the law must be outlined and understood. However, examining the black letter law is only key to understanding a portion of the problem artists and record labels face in the years to come. Another aspect of the trouble looming comes not from what the black letter says, but ambiguities in the law, principles and ambiguities of contract law, record label repositioning, and considerations of artist branding. "Although 2013 theoretically is the year that master sound recordings' copyright licenses begin to expire for albums and can revert from labels to the artists, no one is sure what exactly will happen." [43] Questions about reversions bring forth problems of interpretation that are usually fully understood only after the questions are the subject of a lawsuit. Typically, endless case law exists on various legal questions, and a lawyer's job is simply to parse the relevant materials and come to a conclusion regarding a person's rights and next cause of action. Unfortunately for reversion rights in music, the case law is in its infancy, so first the ambiguities must be showcased and potential litigation must be anticipated. For this reason also, initial answers are hard to find because record labels, publishers, and artists are moving very slowly out of fear that they will accidently stumble into a self-laid trap that will set a precedent and bring financial ruin to the music industry.

Ambiguity of Copyright Terms

First, "author" is not defined in The Copyright Act. [44] Generally, "in the United States, a composition written by two or more authors is generally deemed to be a 'joint work,' which 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.

Ownership of joint works is presumed to be shared equally by the authors, absent an agreement to the contrary."[45] But in the music world, this definition runs into a gamut of problems. Most notably, who counts in "preparing" the musical work? Additionally, "What defines 'author'? In the case of recorded music is the author just the artist, or does it include the producer, and what about the record label? No description of author is clarified in the Copyright Act, so interpretation will be sought in the courts."[46] This is not only a problem within itself, but it also then leads to further ambiguities when dealing the issues of authors and their right to terminate mentioned above. As mentioned above, The Copyright Act indicates that an author that owns a portion of a master has a right to file for termination of an assignment.

Further, "work made for hire" status for the assigned recording masters is hotly debated. Under the Copyright Act of 1976 there are two ways in which an author is considered to have created "a work made for hire" for a record company. [47] First, a work is made for hire if an employee within the scope of his employment prepared the work. This situation is not hard to imagine. An employee is typically an individual assigned work by another and instructed the precise manner in which that work is to be completed. The arrangement does not need to be overtly formal. [75] Additionally, the individual is monitored and changes his conduct in order to complete the task according to the wishes of the hiring party. Second, a work made for hire is a "specially ordered or commissioned work falling under one of 9 categories, including a contribution to a collective work, part of a motion picture or other audiovisual work, a compilation, or an instructional text."[48] The best indicator of a work made for hire in this situation involves the contract between the two parties stating explicitly that the work is made for hire. The rationale behind this

term stems from the understanding that the work that was created was created solely for the purposes of the hiring party, such as the record label, which is deemed legally to be the creator of the work. The "work made for hire" language spells out rather vividly which works would or would not qualify, leading most to presume that recorded masters would fall into this exception since they are most certainly "works made for hire." Unfortunately, the saga surrounding "works made for hire" goes much deeper. If an artist signed a contract with a label or publisher that said the artist's work was legally classified as "a work for hire," it is argued the artist is not eligible for the 35-year reversion clause. "The Copyright Act does not allow copyright reversions for "works made for hire."

"[Opponents] argue that Congress did not name sound recordings as one of the work for hire exclusions specifically because legislators wanted musicians to be able to recapture their copyrights 35 years later."[49] The original 1976 Copyright Act named 9 exceptions that stopped any copyrights that fell into any of the 9 exceptions from reverting to their authors. However, in 1999 a bill was passed that named sound recordings "works for hire." "The 1976 act did not specifically mention master recordings, so the artist community saw the provision as an amendment to that law that would eliminate master recordings from being eligible to revert to the artists."[50] Naturally, this provision led to an enormously negative reaction by musicians and was discarded.

Next, there is the "collective work" claim that record labels say emanates from the Copyright Act. As mentioned above, movies are one of the 9 exceptions where the right to terminate an assignment of copyright. The logic behind this exception rests in the idea that a movie has a multitude of creators and therefore it is difficult to allow such a work's

assignment to be terminated because of the problems arising from deciding who qualified as an author. As a result, the music labels have advanced an argument that this same logic could be applied to music albums. The labels argue that aside from the artist, which is often a band comprised of various individuals, there are at least several dozen other people involved with the creation of an album, including background vocals, engineers, producers, songwriters, and mixers. For example, in order to create Beyoncé's last album, titled "4", there were no less than 87 people listed in the album booklet. [51] This number does not even include all other assistance that was provided to create the album but not included in the acknowledgement section.

The Process of Termination

Copyright Section 203 states in pertinent part that an author of a work may termination by serving the assignee an advanced notice that must be in writing, signed by a majority of the authors of the work or someone with the author's termination interest. [52] Further, the Code of Federal Regulation §210.10(b)(2) explains what form and content the notice must embody. This point may seem trivial, but as with many issues in the law, authors seeking to exercise their right are often denied because the other party points to a procedural defect that prohibits the author from reclaiming copyrighted material that they have a clear right to take back. According to the Code, a notice of termination should include the following, (1) the name and address of the author or authors heirs, (2) date of the execution of the grant and the date of the first publication of the work, (3) title of the work and author. If it is a joint work…the notice should list all the authors who are requesting termination, (4) the original copyright number, the effective date of termination, and the signature of the authors or their agents." [54] For example, in 2010

several children of Ray Charles served copyright termination notices on assignees of dozens of Ray Charles songs that were authored at least in part by Ray Charles. Among other claims, the defendant Ray Charles Foundation sued the children filing the notices claiming that the termination notices are not valid because they contained incorrect dates and that they have received too many termination notices for all of them to be valid. [55] This case is still being actively litigated, but this one example highlights the ease with which termination notices can harm the parties that attempt to exercise their rights when the notices are ostensibly should be a powerful tool to give leverage to artists and their heirs. "The Copyright Act and the administrative rules that apply to termination and recapture of copyrights are dense and unforgiving. Some might call them hellish. For example, if you serve your Notice of Termination late, it is considered a fatal mistake under the law." [56]

Contract Construction

In almost all recording agreements, specific language binds the artist's future songs when he agrees to enter into a contract with a record company. Almost always, the works that are created by the artist are "works made for hire." For example, in a standard RCA agreement, the "rights" section states the following; "Each Master will be considered a work made for hire for us from the Inception of Recording. If any Master is determined not to be a work made for hire, it will be deemed transferred to us in accordance with this paragraph. In such an event…Artist hereby irrevocably assigns to us all rights in the Territory in perpetuity, including but not limited to copyright in and to all Masters, from the Inception of the Recordings thereof."[57] Many contract lawyers have remarked that the language of music contracts, like the RCA agreement, is so

unambiguous that there should be no need for any litigation. In other words, basic artist contracts often extend well beyond 50 pages and are so thorough that the contract provides solutions and binding determinations regarding any and all possible situations involving the artist. Thus the document already provides for solutions in the event that artists exercise reversion or termination claims. The following language highlights how previous master recordings are unambiguously handled: “If the Artist or you now own or control or during the Term acquire ownership or control of any Prior Masters, those Prior Masters will be assigned and conveyed to us in accordance with this [article] and be governed by [the artist] agreement. Upon execution of this agreement, with respect to Prior Masters the Artist or you now own or control, and upon the Artist’s or your acquisition of ownership or control of any other Prior Masters, you will Deliver such Prior Masters to us. [After Delivery] you will be deemed to have irrevocably assigned to us of all right, title and interest in and to the Prior Masters concerned such that we will have the same right, title, interest and all other benefits under this agreement to such Prior Masters as we have in the Masters." [58] If you look at these past artist-label negotiations from a neutral perspective, the parties to these agreements always intended sound recordings to be considered a work-for-hire," says Eric German, a partner at Mitchell Silverberg & Knupp who specializes in entertainment litigation and intellectual property and technology. "That's why the agreements use that language."[59]

However, Section 203 of the Copyright Act may nevertheless provide a remedy for music artists who agreed under the contract to hand their masters over in perpetuity.[60] Under Copyright Section 203, termination rights cannot be contracted around because the section states that the termination rights survive even if there is an agreement to the

contrary. To clarify, "that [principle] covers both the original grant, and any later agreements. So even if you published a contract stated that you would not terminate the grant of rights at a later date, you may still terminate under Section 203. By the same token, any promise you later make not to terminate is equally invalid."[61]

Forever Minus One Day

The United States Constitution provides for a copyright by allowing 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." Therefore, all other provisions of copyright law that have been formulated over the centuries are only bound by the imagination of its drafters provided the drafters adhere to one condition. The copyright in a work may not last forever. As a result, there may be claims that absent a right in perpetuity, the copyright could be granted for far greater lengths than what is currently provided for. Record labels will undoubtedly lobby Congress along with other companies such as Disney to reconsider the purpose of copyright law and provide protections that extend well beyond several generations. The strongest argument for this can be made by analogy. Looking at Mickey Mouse, it is clear that Disney's interest in keeping Mickey Mouse under copyright is paramount. It seems that Disney would have an easy time making the argument that since the purpose of copyright law is to protect the expression of ideas by its creator, short copyright periods will deter innovation. Now that one in every three children will live well into their hundreds, it will be argued that copyright protection must be lengthened accordingly. The copyright could theoretically be increased into perpetuity minus one day. This would allow hallowed songs to continue to enjoy their place in the public marketplace without

being drowned out by impersonators looking to leech money off of a clearly viable idea. Unfortunately, the above is nothing more than a very optimistic future. More likely than not, in order to keep things uniform, the law will change very little as we know it.

State of the Music Industry Today

As of 2013, despite both artists and record labels gearing up to fight, there is no consensus on what will happen moving forward. Both sides are moving very slowly to enforce their rights because there is not that much settled case law in this field and both sides are very afraid that by challenging the other side in court, that the courts may inadvertently set a bad precedent for either side dooming their chances at a favorable outcome. "[Certain] artists don't want to engage in possibly expensive lawsuits, and would rather terminate their copyrights after legal precedent has been established so that in case they have to go to court, they would pay a more reasonable amount to win in court rather than taking on pricey, precedent-setting lawsuits."[62] For example, in *Scorpio Music S.A. v. Victor Willis* one of the lead singers of the Village People served Scorpio Music with a notice of termination for dozens of songs, including "YMCA" and "In The Navy." [34] Despite what has been written above concerning record and publishing labels standing on fairly steady ground concerning the ownership of the masters, Scorpio Music nevertheless has been moving forward very slowly with its case. For example, "Scorpio Music originally claimed that Willis' work was "for hire," but dropped that claim, presumably out of the risk that it would set a precedent." [63]

While the above dilemma is slowing lurching forward, the record labels are ready in 2013 to reposition and become forward looking labels that can still make money in the new economy. For example, today, more than ever, record labels are providing a service

that is desperately needed by those artists who want to become superstars. In a market where companies and workers must achieve better results with fewer resources than ever before, major record labels stand in position of power that is in some ways better than before. As General Manager and Executive Vice President Joe Riccitelli told me, “there is just no way that an artist will be able to reach international stardom without the major label machine behind them promoting them.”

Additionally, record labels are moving into 360 deals much more aggressively than before. However, in order for this tactic to truly pay off, the record label must become more comfortable with the idea of investing in an artist’s touring infrastructure in order to maximize the record label’s investment in the artist. In other words, the current arrangement between an artist and record label allows the record label to collect anywhere from 5% to 10% of all touring revenue that is earned above a floor price, which usually is around $50,000 to $100,000 dollars. Frankly, this amount of revenue is not enough. In order for the investment to pay a better return, the record label must consume more of the tour proceeds, but in turn, provide more avenues for the artist to generate income. For example, Sony Music should launch a festival akin to Coachella or Bonnaroo that draws in massive crowds and accompanying revenue streams. This type of coordinated infrastructure and exposure will never be possible by an independent label, no matter how pervasive social becomes.

Battle of the Deep Pockets

Another reason music labels are not going to be too greatly affected by claims for reversion has to do with the costs for litigation. Who will fight in court to get their masters back? "I suspect it will be only the top 5% of artists," one [music] executive says.

[64] This messy fight may not be worth the time and effort of anyone but the top artists because after all of the bellicose rhetoric and legal posturing has been exhausted, most artists will need the meta-infrastructure music labels provide for their artists. "Sure, profit margins will be less," the executive adds, "but record companies will likely end up keeping those rights because of the leverage they can bring to negotiations."[65] This scenario can work both ways.

This may seem like a great context for record labels to operate within, but record labels are eroding hard fought relationships with very lucrative artists. By proceeding with a strategy of attrition, the record labels will further hurt their public image by looking greedy in the face of artists who provided the labels with decades of revenue. As mentioned before, the major record labels already openly draw the ire of many independent artists, and if the balance it tipped away from the record labels they will perish. Also, even if several big name artists decide to take the record labels to court in the near term future, just the onset of litigation will prove disastrous to the record labels. The labels must proceed softly with their artists, because it will just take one wealthy benefactor to start a new record label that adheres to artist gripes to dismantle the current arrangement. However, assuming that most artists will not waste millions fighting the record labels in court, the record labels may be able to gamble on this fact and negotiate separate deals with artists. By doing so, the artists will get a bigger share of royalties, which in turn will force the hand of music labels to license master recordings more aggressively in order to make up for lost revenue.

Branding Implications

In 2000, just as Napster exploded as a destination for anyone who loved music, Metallica, perhaps unintentionally, volunteered to become the first high profile band to attack Napster for what it saw as outright robbery of the band's music and copyright infringement. The band was justifiably upset that their property was being stolen and wanted to put an end to Napster. As the band became more and more vocal about their displeasure of Napster, something amazing happened. Rather than accept and understand Metallica's point of view on the matter, music lovers of all stripes, including life long Metallica fans, retaliated in anger over Metallica's campaign to shut down Napster.

This proved to be a watershed moment for the music industry. While this was not the first time that the public witnessed people's passion for music, this was the first time the public began to understand something much deeper within the music lover's psyche. For the first time, it became painfully clear to everyone that music lovers were so connected to their music that they felt and acted as if the music they listened to was partly theirs to exploit as they saw fit. In other words, the harsh blowback against Metallica showcased that, paradoxically, Metallica listeners in particular and music lovers in general abhorred the idea that musicians could prevent the public from consuming their music. This fact was highlighted in 2000 in the weeks before to the MTV Music Awards when a vicious rumor began to spread about one Metallica member, Lars Ulrich that he had been killed as a result of his vocal protestations and legal actions against Napster. "A hacker posted a 'news report' on CNN.com that reported that Metallica drummer Lars Ulrich had barely escaped death after an angry Napster fan shot him twice. 'You killed Napster' was what the well-dressed gunman allegedly said -- according to the report -- as

he approached the drummer.[66]

During this time, Napster became beloved by more and more people, leading many to side against Metallica. In fact, after Metallica used the MTV awards to attack Napster in a pre-taped sketch, in which they claimed "'sharing's only fun when it's not your stuff.' Proving the fans [were] not on his side about the issue, Ulrich met a barrage of boos and cat calls at the end of the show when he introduced the final musical act..." [67]

Thus artists may be mistaken if they think that they will be able to reclaim masters and then reintroduce them into the marketplace at more favorable rates because they may be replaced by another band in a record label's portfolio. "Even if all artists terminated their agreements with their labels, it's still not going to make a significant economic difference to labels. That's because most artists will return to a label, so even if one major loses 10 acts it's likely to pick up 10 others who have won reversion rights to their albums from another major. "Most artists will prefer the services provided by a larger company."[68]

The above example is illustrative of the fact that the fight for artists to control their works is far from as one sided as many would believe. Since almost no bands have taken record labels to court in order to flex their termination rights yet, the above example is an example of the potential outrage an artist can and will receive if the artist reclaims music that is subsequently also removed from popular services such as iTunes, Spotify, and Pandora. And this legal battle may be for very little benefit outside of artist vindication. "[An unnamed] label executive predicts that if artists win reversion of their masters, they will eventually wind up selling those rights back to their labels because they don't have the means to exploit those rights. 'If you think about it, it is time-

consuming to pitch music for film and TV, and artists usually don't have that kind of staffing," another major-label executive says. ‘Nor do they have the expertise to store their masters and tapes. The whole thing can get very messy.’"[69] Another reason why albums will likely remain with the labels that house them is that after 35 years, not many of them produce a significant amount of revenue, so their value may not be worth the anticipated expense of a court fight. At the same time, there is ample evidence to suggest that by staying the course in the current arrangement between artists and record labels, artists are winning the PR battle with fans, who then take to social media and the internet to engage with artists and then download their music, only to then support the artist, which the public perceives as a pawn that is exploited by the demon record company.

Conclusion

The above discussion paints a very grim picture of the music industry today. Nevertheless, the music labels will not repeat their blunders from 1999 and instead position themselves to become more dynamic and nimble. Therefore, unlike 1999, in 2013 events will play out differently. Despite the looming threat of artist reversion rights under sections 203 and 304 of the Copyright Act of 1976, principles and ambiguities of contract law, record label repositioning, and considerations of artist branding will all serve to prevent most artists from exercising their termination options and retrieving their masters from music labels.

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