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Application of the Copyright Termination Provision to the Music Industry: Sound Recordings Should Constitute Works Made for Hire

JESSICA JOHNSON*

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I. INTRODUCTION

The year 2013 could change the music industry forever. Section 203 of the 1976 Copyright Act (the "Act") allows authors who have assigned the ownership rights in their work to reclaim copyright ownership thirty-five years later. Terminating ownership will take away the right of use, promotion, adaptation, and revenue collection from companies and put it in the hands of the individual artists who actually created

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the works. It is unclear how this provision will apply to the music industry—if the section 203 termination right is held to apply to sound recordings, record labels will lose the ability to exploit hit songs by many artists, including Bruce Springsteen, Billy Joel, and Kenny Rogers.¹ A flood of litigation is undoubtedly imminent: Record companies make a great deal of money from these recordings and have publicly announced that they have no plans to give them up without a fight.² Some scholars predict that this “legal conundrum” will reshape the structure of the music industry.³

The Copyright Act provides that copyright ownership in a work “vests initially in the author or authors of the work.”⁴ Generally, the author of a work is the person who “actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”⁵ In guaranteeing the author of a work the exclusive right to exploit the work and collect revenue accrued by it, copyright law furthers the arts and sciences by creating an incentive for authors to keep creating.⁶

However, authors may assign their exclusive rights in their works of authorship. When they do, the assignee enjoys the right to exploit the work as if he were the creator. The section 203 copyright termination right allows authors who have assigned their exclusive rights in their works to terminate that assignment thirty-five years later.⁷ In this way, the provision allows the assignee to collect the initial rewards for investing time and money into the creation of the work, but allows the original creator the opportunity to reconsider the assignment after the work has been exploited in the market for quite some time.

Most copyright assignments qualify for this termination right, but

1. Christopher Bird, *It's Not Work-For-Hire: The Music Industry's New (And Not At All New) Problem with Copyright*, NEWSTEX WEB BLOGS (Sept. 26, 2011, 3:18 AM), <http://www.bloggingcanadians.ca/LiberalBlogs/its-not-work-for-hire-the-music-industrys-new-and-not-at-all-new-problem-with-copyright/>.

2. See, e.g., Bruce Epperson, *Copyright & Fair Use*, 42 ARSC J. 231, 231 (2011); Eric Gardner, *Copyright Battle Comes Home*, LAW.COM (Oct. 8, 2009), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202434372952> (quoting Ross Charap, a representative of the National Music Publishers Association, as saying: “Litigation is going to get bloody, and record labels are legitimately very nervous over copyright termination”); Mike Masnick, *Dear Musicians: The RIAA Is About to Totally Screw You Over (Again!)*, TECHDIRT (Aug. 16, 2011, 10:14 PM), <http://www.techdirt.com/articles/20110816/09574115549/dear-musicians-riaa-is-about-to-totally-screw-you-over-again.shtml> (quoting Steven Marks, general counsel for RIAA).

3. Frederic Choquette, *Artists and Their Masters: Conflict in 2013*, MUSIC BUS. J. (Oct. 2011), <http://www.thembj.org/2011/10/artists-and-their-masters-conflict-looming-in-2013/>.

4. 17 U.S.C. § 201(a) (2006).

5. *Id.*

6. Devon Spencer, *Sound Recordings in 2013: A Legal Brief*, MUSIC BUS. J. (Nov. 2011), <http://www.thembj.org/2011/11/sound-recording-in-2013-a-legal-brief/>.

7. 17 U.S.C. § 203.

works that are “made for hire” do not.⁸ The Act provides that “[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all the rights comprised in the copyright.”⁹ When a work is made for hire, the assignee actually *becomes* the author; it is as if the original artist never even existed. The termination right does not apply to works made for hire because “there was no transfer [of copyright] in the first place, and therefore no transfer [of copyright] to terminate.”¹⁰ While an artist is the author in fact, the assignee is the author in law.

A “work made for hire” is defined in the Act as either (1) a work created by an employee within the scope of that employment, or (2) a work “specially ordered or commissioned” for use in one of nine enumerated categories, and the creator of the work has explicitly agreed in a written instrument signed by both parties that the work shall be considered a work made for hire.¹¹ In simple terms, a work made for hire can arise through one of two mutually exclusive means: one for formal employees and one for certain independent contractors.

When a recording artist signs a record deal, the artist agrees to transfer all ownership of her resulting sound recordings to the label.¹² If held to apply to sound recordings, the copyright termination provision will allow recording artists to terminate that transfer of ownership after thirty-five years. But if sound recordings meet the statutory definition of a “work made for hire,” they will be excluded from this right.

Because the section 203 copyright termination provision only applies to transfers of copyright taking place on or after January 1, 1978,¹³ the year 2013 marks the first time that this section’s thirty-five-year trigger will be met. Courts have never fully addressed the issue of whether sound recordings will be eligible for the copyright termination right, or whether they will instead fall into the work-made-for-hire

8. *Id.*

9. 17 U.S.C. § 201(b).

10. DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 320 (8th ed. 2012); *see also* Siegel v. Warner Bros. Entm’t Inc., 658 F. Supp. 2d 1036, 1056 (C.D. Cal. 2009) (“Under the 1976 Act, an author’s (or his or her heirs’) ability to terminate a prior grant in the copyright to his or her creation does not apply to a ‘work made for hire’ because the copyright in such a creation never belonged to the artist in the first instance to grant; instead, it belonged at the outset to the party that commissioned the work.”).

11. 17 U.S.C. § 101.

12. *See* Luiz Augusto Buff, *A Primer on Termination Rights*, *MUSIC BUS. J.* (Apr. 2011), <http://www.thembj.org/2011/04/a-primer-on-termination-rights/>.

13. 17 U.S.C. § 203.

exception. This lack of precedent has caused much uncertainty regarding the future of the music industry.

The Recording Industry Association of America (RIAA), the organization that legally represents the major record labels in the United States, has publicly announced its position that the termination right does not apply to sound recordings because they fall into the work-made-for-hire exception.¹⁴ Therefore, the question of whether albums are considered works made for hire will provide “a fertile ground for litigation” beginning in the year 2013.¹⁵

This Comment analyzes whether sound recordings meet the definition of a “work made for hire.” In doing so, it thoroughly examines the two ways in which a work can be designated for-hire status, and discusses the unique relationship between recording artists and record labels. Through its examination, this Comment concludes that sound recordings created by recording artists under contract with major record labels should fall within the statutory definition of works made for hire, thereby preventing recording artists from exercising the copyright termination right.

In Part II, this Comment argues that sound recordings are not works made for hire under subsection (1) of the definition because recording artists are not formal employees of record labels. Part III argues, however, that sound recordings should be considered works made for hire under subsection (2) of the definition because sound recordings are specially ordered or commissioned by record labels for use as contributions to a collective work. Part IV presents a brief note on the procedural requirements artists must fulfill in order to exercise the termination right. Part V discusses the negative implications that copyright termination would have on the music industry. Finally, Part VI presents concluding remarks.

II. SUBSECTION (1) OF THE WORK-MADE-FOR-HIRE EXCEPTION: RECORDING ARTISTS AS FORMAL EMPLOYEES

The first way that a work can be considered a work made for hire is if the work in question was created by a formal employee within the scope of her employment.¹⁶ This Comment concludes that recording artists should not be considered formal employees of their record labels due to the unique relationship created by the terms of record contracts.

There is no statutory definition of an “employee” whose work con-

14. Masnick, *supra* note 2.

15. Buff, *supra* note 12.

16. 17 U.S.C. § 101 (defining “work made for hire”).

stitutes a work made for hire under subsection (1).¹⁷ Therefore, whether a person is considered a formal employee under the work-made-for-hire doctrine (the “Doctrine”) is determined by a multi-factored common law analysis. The seminal case that sets forth the appropriate analysis in determining whether a work was created by a formal employee pursuant to subsection (1) is *Community for Creative Non-Violence v. Reid*.¹⁸

In *Reid*, a nonprofit organization to benefit the homeless contacted artist Reid to create a sculpture of a modern Nativity scene in which, in the place of the Holy Family, there would be contemporary homeless people huddled around a streetside steam grate.¹⁹ In determining whether the artist was a formal employee of the organization, the Court relied on the common law of agency.²⁰ It set forth twelve factors: (1) the skill level required of the artist, (2) the source of equipment and tools, (3) the location of the work, (4) the duration of the relationship between the parties, (5) the hiring party’s right to control the manner and means by which the product is accomplished, (6) the extent of the hired party’s discretion over when and how long to work, (7) the method of payment, (8) the hired party’s role in the hiring and paying of assistants, (9) whether the work is part of the regular business of the hiring party, (10) whether the hiring party has the right to assign additional projects to the hired party, (11) the provision of employee benefits, and (12) the tax treatment of the hired party.²¹

The Court held that Reid was not a formal employee because he had to use a great deal of skill in creating the sculpture, he supplied his own tools, he worked on days and times of his own choosing, and he paid his own assistants.²² Further, Reid was paid a lump sum dependent on the completion of the specific job, which did not include any employee benefits or tax withdrawals.²³ The Court explained that these factors showed that Reid was not treated as a formal employee by the organization and that his work product would therefore not be considered a work made for hire under subsection (1).

Courts have since consistently applied the *Reid* analysis to determine whether a work is to be treated as a work made for hire under subsection (1) of the Doctrine.²⁴ This Comment accordingly applies the

17. See *id.*; see also 18 C.J.S. *Copyrights* § 23 (2012).

18. 490 U.S. 730 (1989).

19. *Id.* at 733.

20. *Id.* at 750–51.

21. *Id.* at 751–52.

22. *Id.* at 752.

23. *Id.* at 753.

24. See, e.g., *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549 (2d Cir. 1995) (holding that a photographer was not a formal employee because he used his own equipment, set his own work schedule, and was not provided with employee benefits); *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir.

key factors of the *Reid* analysis to the unique relationship between a recording artist and a record label to show that recording artists are not formal employees pursuant to subsection (1).

A. *Hiring Party's Right to Control the Creative Process and Work Hours*

In the 1960s, record companies exercised a great deal of control over the creation of music.²⁵ In recent years, however, this aspect of the industry has changed dramatically.²⁶ It is now very rare for an artist to be closely supervised or controlled during the creative process. To the contrary, they are typically given quite a bit of creative latitude in the production of their work.²⁷ Moreover, a recording artist does not have standard work hours like formal employees do.²⁸ Rather, the artist's schedule is determined at the artist's discretion.²⁹ Because the record company has little control over the manner and means of a sound recording's creation, these factors weigh against a formal employee relationship.

B. *Method of Payment*

The payment arrangement in the music industry is unlike any other industry. Instead of ordinary salaries, artists are paid through royalty agreements, meaning that they receive payment based on a percentage of their music sales.³⁰ This method of payment weighs against a formal

1992) (holding that a computer programmer was not a formal employee because his work required great skill, and the hiring party did not extend employee benefits or withhold taxes); see also U.S. Auto Parts Network, Inc. v. Parts Geek, LLC, 692 F.3d 1009, 1015 (9th Cir. 2012) ("We join our sister circuits in adopting [the *Reid*] approach.").

25. *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. 26 (2000) [hereinafter *Oversight Hearing*] (statement of Hon. Marybeth Peters, Register of Copyright); Diane Rapaport, *How Record Companies Make Money*, MUSIC BUS.: PRODUCERS, <http://www.music-business-producer.com/record-companies-money.html> (last visited Jan. 9, 2010).

26. *Oversight Hearing*, supra note 25 (statement of Hon. Marybeth Peters, Register of Copyright); Rapaport, supra note 25.

27. PASSMAN, supra note 10, at 316; Adam Halston Dunst, Comment, "It's Mine! No, It's Mine! No, It's Mine!" *Works-Made-For-Hire, Section 203 of the Copyright Act, and Sound Recordings*, 7 VAND. J. ENT. L. & PRAC. 381, 382 (2005).

28. Ryan Ashley Rafter, 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, 1036 (2000).

29. *Id.*

30. See, e.g., COREY FIELD & BARRY I. SLOTNICK, ENTERTAINMENT LAW: FORMS & ANALYSIS § 4.02 (2011); Gary Stiffleman & Bonnie Greenberg, *Exclusive Recording Agreements Between an Artist and a Record Company*, in 8 ENTERTAINMENT INDUSTRY CONTRACTS P159.03 (Donald C. Farber ed., LexisNexis 2008).

employee relationship because it does not resemble a fixed wage like that paid by an employer to its employees on the payroll.

C. *Employee Benefits and Tax Treatment*

Record companies do not pay employee benefits, provide workers' compensation, or provide unemployment insurance.³¹ Nor do they withhold taxes or social security for the artist.³² The label issues 1099 forms, not W-2s.³³ While explicitly ruled to not be a *per se* rule, almost every case since *Reid* has found against a formal employee-employer relationship where the hiring party did not extend benefits.³⁴ Therefore, failure to treat hired parties as employees for payroll purposes is a "virtual admission" that the hired party is not a formal employee.³⁵

D. *Source of Tools, Equipment, and Assistants*

The arrangement dictating the source of equipment, tools, and assistants is also unique to the music industry. The record label provides all of these necessities for the artist while the artist creates the sound recordings, paying the expenses for studio time, sound systems, and producers.³⁶ However, all of this money used to finance the creation of the sound recordings is ultimately withheld from the artist's royalties.³⁷ The artist merely receives an "advance" at the beginning of the recording process, which is recoupable against the artist's future earnings.³⁸ If the artist does not make enough money in sales to cover the cost of the equipment, tools, and assistants, she will not receive any royalty money from the record label.³⁹ Because the company's financing of the equipment, tools, and assistants is thus essentially no more than a loan, the artist is effectively responsible for providing those necessities for herself, causing this factor to weigh against a formal employer-employee relationship.

31. Rafoth, *supra* note 28, at 1037.

32. *Id.*

33. William Henslee & Elizabeth Henslee, *You Don't Own Me: Why Work For Hire Should Not Be Applied to Sound Recordings*, 10 J. MARSHALL REV. INTELL. PROP. L. 695, 712 (2011).

34. See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.03(b)(1)(a)(iv) (1992) [hereinafter NIMMER ON COPYRIGHT].

35. *Aymes v. Bonelli*, 980 F.2d 857, 862 (2d Cir. 1992).

36. See JEFFREY BRABEC & TODD BRABEC, MUSIC MONEY AND SUCCESS: THE INSIDER'S GUIDE TO MAKING MONEY IN THE MUSIC BUSINESS 140 (7th ed. 2011); PASSMAN, *supra* note 10, at 81.

37. Henslee & Henslee, *supra* note 33, at 712.

38. *Id.*

39. See *id.*; Stiffleman & Greenberg, *supra* note 30.

E. *Duration of Relationship and Additional Projects*

Typical record deals state that the company's professional relationship with the artist exists until the artist fulfills her obligation to the record company.⁴⁰ Whereas formal employees are hired for an unidentified term, a recording artist is hired only until she submits the agreed-upon number of recordings.⁴¹ Once the artist completes her specific job, the relationship with the company is severed.⁴² This duration of employment thus weighs against finding that a recording artist is a formal employee. Naturally, the structure of this arrangement means that the label does not have the ability to assign additional projects to the artist during the original contract term.

An analysis of the most relevant *Reid* factors shows that recording artists are not formal employees of record labels. Therefore, sound recordings should not be considered works made for hire under subsection (1) of the definition.

III. SUBSECTION (2) OF THE WORK-MADE-FOR-HIRE EXCEPTION: RECORDING ARTISTS AS INDEPENDENT CONTRACTORS

Even if a work does not constitute a work made for hire under subsection (1) of the definition because it was not created by a formal employee, the work can still be considered a work made for hire under subsection (2) if it was created by an independent contractor. It is this subsection that will be the main focus of future litigation concerning whether sound recordings are works made for hire.

For an independent contractor's work to constitute a work made for hire under subsection (2), the work must have been "specially ordered or commissioned" for use in one of nine enumerated categories, and the creator of the work must have explicitly agreed in a written instrument signed by both parties that the work shall be considered a work made for hire.⁴³ Therefore, there are four questions to consider in determining whether a work constitutes a work made for hire under this subsection: (1) whether the work falls within one of the qualifying categories enumerated in the statute, (2) whether the work was created "for use" in that

40. See, e.g., PASSMAN, *supra* note 10, at 109 (noting that the contract terminates six to nine months after delivery of the completed album); Stiffleman & Greenberg, *supra* note 30, at 2 ("[T]he term of the agreement . . . is tied to the recording of a specified number of records by the artist . . .").

41. However, if the artist has not delivered an album within a certain amount of time, generally within twelve to eighteen months, the record label can terminate the contract. See PASSMAN, *supra* note 10, at 109.

42. Unless the record label reserves an option to extend the recording agreement for additional periods and additional albums. See BRABEC & BRABEC, *supra* note 36, at 120.

43. 17 U.S.C. § 101 (2006).

category, (3) whether the work was “specially ordered or commissioned” by the hiring party, and (4) whether the parties expressly agreed in a written instrument signed by them that the work shall be a work made for hire.

A. *Whether Sound Recordings Fall Within One of the Nine Enumerated Categories*

The specific categories of works that are eligible for work-for-hire status are expressly enumerated in the Act: a contribution to a collective work, a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, and an atlas.⁴⁴

This Comment does not dispute that individual sound recordings, standing alone, do not constitute works made for hire.⁴⁵ Rather, this Comment argues that sound recordings constitute works made for hire when they are assembled into an album, because they are then contributions to a collective work—an enumerated category. No court has addressed this argument.⁴⁶

1. ALBUMS AS “COLLECTIVE WORKS”

For sound recordings to be contributions to a collective work, an album must meet the definition of a collective work. A “collective work” is defined in the Act as “a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.”⁴⁷ A classic example of works contributed for use in a collective work are articles and photographs created for publication in a magazine, because they are complete works on their own accord but become just one aspect of an overall piece when they are published in the periodical.⁴⁸ As indicated in the statute, anthologies and encyclopedias are also standard collective works.⁴⁹

A collective work must meet two requirements in order to be considered as such: The individual contributions making it up must be sepa-

44. *Id.*

45. *See* *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999) (holding that sound recordings, standing alone, do not constitute works made for hire); *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999) (same).

46. This argument has been debated at the Congressional level, but no conclusion was ever reached. *See Oversight Hearing*, *supra* note 25.

47. 17 U.S.C. § 101.

48. *See id.*

49. *Id.*

rate and independent works in themselves,⁵⁰ and the overall collection must contain the “minimal degree of creativity” necessary to support a collective work copyright.⁵¹

An album meets the first requirement, because each track on an artist’s album is a separate and independent work in and of itself. One song on an album can be listened to on its own and can stand as a complete work of art. Similar to how a reader need not read an entire magazine to appreciate one photograph within it, listeners do not need to hear an entire album to appreciate one song’s artistic value. In fact, sound recordings are often deliberately released apart from the album as “singles.”⁵² Just as individual articles are assembled for publication in an encyclopedia, individual sound recordings are assembled together for publication on an album.

An album meets the second requirement because the selection and arrangement of sound recordings on an album meet the minimal degree of creativity in order to warrant copyright protection for the overall collection. The manner in which individual contributions are selected and arranged must incorporate some amount of subjective decision-making in order to meet the creativity bar.⁵³ The process of selecting the sound recordings that are to be included on an artist’s album meets this bar because it requires a determination of which recordings best showcase the artist’s talents.⁵⁴ Moreover, the sound recordings are arranged in such a sequence so as to further the artist’s creative vision and keep the listener engaged. Sheryl Crow, for example, explains that albums have “a beginning, a middle, and an ending,” and that she strives for the album’s arrangement to “take the listener on a journey.”⁵⁵ Therefore, an album meets the minimal degree of creativity in order to be considered a collective work deserving of copyright protection.

Some argue that a typical album should not be considered a collective work and that only the combination of several artists’ works such as a Christmas album should fall under this category.⁵⁶ This argument relies on a plausible policy reason for creating the work-made-for-hire exception to the termination provision: avoiding holdout problems.

Such supporters for artist eligibility for copyright termination argue

50. *Id.* (defining “collective work”).

51. *See* *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

52. *See* BILLBOARD.COM, <http://www.billboard.com/new-releases#/new-releases/songs#new-releases-section> (last visited Feb. 5, 2012).

53. *See Feist*, 499 U.S. at 345.

54. *See Oversight Hearing*, *supra* note 25 (statement of singer-songwriter, Sheryl Crow) (explaining the process by which tracks are selected for inclusion on an album).

55. *Id.* (statement of singer-songwriter, Sheryl Crow).

56. *See id.* (statement of Marci Hamilton, the Thomas H. Lee Chair in Public Law, Cardozo School of Law).

that Congress' motivation for creating an exception that excludes contributions to a collective work from the copyright termination right was to avoid slicing up a work among several authors, since dividing up ownership could create a holdout problem. Distributing ownership of a work that is meant to be unified could create a holdout problem because it would allow each contributor to have a say in the collective work's use and promotion, causing decisions about its exploitation as a single work to become extremely difficult or impossible. Individual owners could hold out on agreeing to certain uses until they are paid large sums of money or given other incentives if they know that the person desiring to use the work cannot do so unless he has every owner's permission.

Supporters argue that this holdout problem does not exist when every song on an album is recorded by the same artist. If the album is created by only one recording artist, they argue, ownership would be reclaimed by only one person. Reversion of ownership to only one person would thus give authority to only that person to control its use, eliminating the threat of a holdout.

This argument, however, fails to recognize that the featured recording artist is not the sole author of a sound recording. There are several other parties who make substantial contributions to the sound recording, including backup musicians, sound engineers, and producers.⁵⁷ These contributors all have claims as authors of the sound recording under the joint authorship doctrine of copyright.⁵⁸ Therefore, the holdout problem *does* still exist even when all of the tracks on an album are performed by the same featured recording artist.

Moreover, the determination of ownership status would require courts to conduct a fact-intensive inquiry on a case-by-case basis. In many cases, it would be nearly impossible to determine who is eligible to terminate the grant and whether the requisite majority of joint authors has agreed to do so.⁵⁹ Courts should decline to open the door to a flood of litigation to determine who the eligible authors are. Furthermore, courts are arguably unfit to even attempt to make such determinations. According to the doctrine of aesthetic nondiscrimination, courts should avoid making judgments as to the creative value of a contributor's

57. See, e.g., NIMMER ON COPYRIGHT, *supra* note 34, § 5.03(b)(2)(a)(ii); Dunst, *supra* note 27, at 384; Epperson, *supra* note 2; Henslee & Henslee, *supra* note 33, at 713.

58. See *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991) (holding that a party who contributes creatively and shares a mutual intent to merge such contributions to a unitary whole is a joint author).

59. See 17 U.S.C. § 203(a)(1) (2006) (“[I]n the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it.”).

work.⁶⁰ Finally, the uncertainty as to which contributors are eligible to terminate the copyright grant of the sound recording runs contrary to the Act's overall goal of certainty and predictability of copyright ownership.⁶¹

2. ADOPTING A BROAD OR NARROW INTERPRETATION OF THE ENUMERATED CATEGORIES

Even if sound recordings can be construed to fall under the "contributions to a collective work" category, the question of Congress' intent still remains: Is the statute intended to be broadly read as including art media that are not explicitly enumerated? Supporters of allowing recording artists to terminate copyright grants of their sound recordings point to the Copyright Act's legislative history, arguing that it shows that the enumerated categories should be interpreted strictly.⁶² This Comment argues, however, that such a strict reading is unsound because it would render one of the enumerated categories irrelevant.

In a 1963 preliminary draft bill, the Copyright Office defined a "work made for hire" as "a work prepared by an employee within the scope of the duties of his employment, but *not* including a work made on special order or commission."⁶³ Therefore, works made by independent contractors could explicitly *not* be considered works made for hire in the original draft of the law. In 1965, a revision bill added four specific categories of works on special order or commission that can qualify.⁶⁴ Finally, the current version of the Act enumerates nine carefully worded categories.⁶⁵

This history reveals that the work-made-for-hire doctrine began with an explicit blanket exclusion of all independent contractor works, providing that works not created during a formal employee-employer relationship were absolutely eligible for copyright termination. The nine specific enumerated categories, supporters argue, were then presumably written in to *overcome* this blanket exclusion. The history of exclusion

60. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251–52 (1903).

61. See NIMMER ON COPYRIGHT, *supra* note 34, § 5.03(b)(1)(a)(iii) (stating that one of the primary goals of Congress in revising the Copyright Act in 1976 was to "enhance predictability and certainty of copyright ownership").

62. See Rafoth, *supra* note 28, at 1048.

63. STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 68–69 (Comm. Print 1965) [hereinafter 1965 REVISION BILL] (emphasis added); see also Spencer, *supra* note 6.

64. 1965 REVISION BILL, *supra* note 63; see also Spencer, *supra* note 6.

65. 17 U.S.C. § 101 (2006) (listing the nine categories: contributions to collective works, parts of motion pictures or other audiovisual works, translations, supplementary works, compilations, instructional texts, tests, answer material for tests, and atlases).

illustrates Congress' intent to limit what is to constitute a work made for hire to only very specific instances, and that the categories are to be construed as narrow accommodations to a general rule of exclusion. Therefore, the exceptions should be strictly applied only to works that are explicitly enumerated.⁶⁶ This is why supporters maintain that sound recordings may not be considered works made for hire even if they constitute contributions to a collective work, because the "sound recordings" art medium is not explicitly enumerated in the statutory list.

This strict reading, however, would render the "contribution to a collective work" category irrelevant. Arguing that the specific medium of work (painting, literary work, sound recording, etc.) must be listed in order for it to be considered a work made for hire runs contrary to Congress' decision to include "contributions to a collective work" in the enumerated list. This category clearly states that contributions to a collective work—without *any* mention of the work's medium—are eligible to be considered works made for hire.⁶⁷ This category's focus is therefore on the makeup or structure of the work, not the art medium.

B. *Whether Sound Recordings Are Created "For Use" in a Collective Work*

Even if a particular work falls into one of the nine enumerated categories, the definition explicitly states that a work must be created *for use* in that category.⁶⁸ This language suggests that the record label must have created each individual sound recording with the express intent of including it on an album.

Standard recording contracts state that a recording artist is under contract to create enough songs to constitute one long-playing album, typically of approximately thirty-five minutes in duration.⁶⁹ Others contract the artist for a minimum number of recordings, plus any additional recordings deemed necessary for completion of an album.⁷⁰ The manner in which these contracts explicitly lay out the artist's obligation in terms of a full album implicitly means that each sound recording's purpose is to contribute to that album.

It is necessary to note, however, that in cases where an artist is contracted for the completion of a "single," this intent to use the recording in a collective work is not present, destroying the argument. Even if

66. See Dunst, *supra* note 27, at 383 ("One viewpoint . . . is that the legislative history indicates that the nine categories reflect a thoroughly considered, careful balance of rights, and thus the omission [of sound recordings] was intentional."); Rafoth, *supra* note 28, at 1048.

67. See 17 U.S.C. § 101.

68. *Id.*

69. See, e.g., BRABEC & BRABEC, *supra* note 36, at 140; FIELD & SLOTNICK, *supra* note 30.

70. See, e.g., BRABEC & BRABEC, *supra* note 36, at 140; FIELD & SLOTNICK, *supra* note 30.

the single were to end up in an album later in time, the fact that it was not initially recorded with that purpose in mind causes it to fall outside of the statutory definition of “a work specially ordered or commissioned for use in one of nine enumerated categories.”⁷¹

C. *Whether Sound Recordings Are “Specially Ordered or Commissioned” by Record Companies*

In order for a work to be considered a work made for hire under subsection (2), the work must have been “specially ordered or commissioned” by the hiring party.⁷² To determine whether a work is “specially ordered or commissioned,” courts must address the question of at whose instance and expense the work was created.⁷³ This Comment argues that sound recordings are specially ordered or commissioned by record labels because sound recordings are created at both the expense and the instance of the label.

1. AT WHOSE EXPENSE SOUND RECORDINGS ARE CREATED

In evaluating at whose expense a work is created, courts look to the method of payment and to the provider of the work’s funds. In *Playboy Enterprises, Inc. v. Dumas*, the simple fact that an artist was paid a fixed sum for each of his works created for publication in a magazine was sufficient to meet the requirement that the works be made at the hiring party’s expense.⁷⁴ The unique relationship between recording artists and record labels, however, makes the analysis more complex when applied to sound recordings.

Recording artists, as discussed earlier, receive payment in the form of royalties.⁷⁵ The record company tenders to the artist an “advance”—a sum of money that is provided upfront to cover the costs of creating the sound recordings but is recoupable from the artist’s royalties.⁷⁶ Therefore, the artist is ultimately responsible for the expense of creating the work. Nevertheless, even though the artist is obligated to pay the money back, the record label is the entity financing the artist’s work. Without the record label fronting the necessary funds, the sound recordings would not be created. Thus, for purposes of the “instance and expense” test, the creation of sound recordings is at the record labels’ expense.

71. 17 U.S.C. § 101 (emphasis added).

72. *Id.*

73. See *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 562 (2d Cir. 1995) (holding that the phrase “specially ordered or commissioned” has essentially the same meaning as “instance and expense”).

74. *Id.* at 555.

75. See, e.g., FIELD & SLOTNICK, *supra* note 30; Stiffleman & Greenberg, *supra* note 30.

76. See BRABEC & BRABEC, *supra* note 36, at 139.

2. AT WHOSE INSTANCE SOUND RECORDINGS ARE CREATED

To determine whether a work was made at the instance of a hiring party, courts utilize the “motivating factor” test: “The key factor would appear to be whether the motivating factor in producing the work was the person requesting preparation of the work who induced its creation.”⁷⁷ This Comment argues that sound recordings are produced at the record label’s instance.

The key consideration in the “motivating factor” test is whether there exists an obligation to submit work. In *Playboy*, the court found that the magazine publisher was the motivating factor in the creation of an artist’s work because there was a mutual understanding that the artist would submit one painting each month.⁷⁸ There need not be a formal contract, so long as the course of conduct between the parties shows an implicit understanding.⁷⁹

It is clear that record labels are the motivating factor in the creation of an artist’s sound recordings because there exists a formal contract stating that the artist is obligated to submit work.⁸⁰ Moreover, like the magazine in *Playboy*, record labels usually have a say in the style of the recordings. They have the power to accept or reject the artist’s work if it does not meet their standards.⁸¹ Recording contracts typically state that the work must be “commercially satisfactory”⁸² and sometimes designate what style and genre of music the artist can record.⁸³ This control over the style of the final product suggests that the record label is the motivating factor in the work’s preparation.

Artists may argue that the motivating factor in the creation of their music is the realization of a creative vision, not acceptance by the record company.⁸⁴ This argument focuses on the artist’s subjective intent and

77. *Playboy*, 53 F.3d at 562; see also *Playboy v. Dumas*, 960 F. Supp. 710, 714 (S.D.N.Y. 1997) (on remand) (determining “whether works were created at Playboy’s instance, *i.e.*, whether Playboy was the “motivating factor” in their creation”), *aff’d*, 159 F.3d 1347 (2d Cir. 1998).

78. See *Playboy*, 960 F. Supp. at 719 (“The evidence demonstrates that Nagel felt a responsibility to submit one painting to Playboy each month, done in a particular style that was motivated by Playboy, and that one of his works appeared in each issue of Playboy for almost a decade. These facts show that the parties felt a responsibility toward one another despite the lack of a formal commitment.”).

79. See *id.*

80. See BRABEC & BRABEC, *supra* note 36, at 140 (“For example, a contract may state that during each period of the term the artist shall record . . . a minimum number of . . . recordings”); FIELD & SLOTNICK, *supra* note 30.

81. See FIELD & SLOTNICK, *supra* note 30.

82. PASSMAN, *supra* note 10, at 110.

83. BRABEC & BRABEC, *supra* note 36, at 141.

84. See *Oversight Hearing*, *supra* note 25 (statement of singer-songwriter, Sheryl Crow) (“I choose the musicians, the engineers, the studio all based on what it is I am striving to express artistically.”).

inspiration when creating her work. The relevant analysis, however, is to be based on the objective course of conduct between the parties.⁸⁵ Regardless of the subjective inspiration driving an artist to create a certain recording, the bottom line is that the artist has agreed to fulfill certain obligations by signing a record deal. Therefore, courts should find that the artist's motivating factor in creating sound recordings is to fulfill her legal obligation to the record company under the terms of her contract.

D. *Whether the Parties Agreed in a Written Instrument to a Work-Made-For-Hire Designation*

Finally, even if all of the previous requirements of subsection (2) are met, a work that is specially ordered or commissioned for use in one of the Act's nine enumerated categories cannot be treated as a work made for hire unless there is a written instrument signed by both parties that states that the work shall be considered as such.⁸⁶ This requirement is not an obstacle to the classification of sound recordings as works made for hire because record labels have long been inserting boilerplate language into every record deal, stating that a recording artist's recordings will be considered works made for hire.⁸⁷ Therefore, it is undisputed that this requirement is always met in standard record deals.

IV. PROCEDURAL REQUISITES OF ACTIVATION OF THE COPYRIGHT TERMINATION RIGHT

The ability to terminate a copyright transfer is not automatic. For it to be activated, the burden is on the artist (or her heirs) to strictly follow procedural steps: She must serve formal notice to the grantee of her intent to terminate the grant of copyright and register a copy of the notice in the Copyright Office prior to the date on which her termination is to take effect.⁸⁸ The formal notice must be served to the record label no more than ten years and no less than two years prior to the effective date of termination.⁸⁹ It must be in writing, must be signed, and must state the effective date of termination.⁹⁰ The stated effective date must

85. See *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 563 (2d Cir. 1995) ("The question is whether *under this course of conduct* Playboy was the motivating factor behind the creation of the paintings." (emphasis added)).

86. 17 U.S.C. § 101 (2006).

87. See, e.g., NIMMER ON COPYRIGHT, *supra* note 34, § 5.03(b)(1)(a)(ii); Choquette, *supra* note 3, at 1; Dunst, *supra* note 27; Henslee & Henslee, *supra* note 33, at 697; Raftery, *supra* note 28, at 1050.

88. 17 U.S.C. § 203.

89. *Id.*

90. *Id.*

be within a five-year window beginning thirty-five years after the transfer was made.⁹¹ The right to terminate a copyright transfer will be lost if the artist does not follow the statute's procedural guidelines.

V. IMPLICATIONS OF THE COPYRIGHT TERMINATION RIGHT FOR THE MUSIC INDUSTRY

Recording artists need not lament the work-for-hire status of their sound recordings. Excluding sound recordings from the copyright termination right would be for the best. Mass termination of copyright grants in sound recordings would destroy the music industry, to the detriment of artists and labels alike. This Comment argues that because major record labels rely in large part on revenue from older sound recordings, losing that income stream would likely put them out of business. Furthermore, recording artists who rely in large part on the funds, promotion, and marketing expertise of the record labels would in turn suffer.

Mass termination of copyright grants in sound recordings by recording artists would deliver a fatal blow to record labels across America.⁹² Each year, labels would lose the rights to albums acquired thirty-five years prior, which means losing valuable revenue from those albums. This could be disastrous for record companies, since they rely in large part on their back-catalogue for income.⁹³ For example, the Beatles broke multiple chart records with the re-release of their catalogue, selling over thirteen million albums.⁹⁴ Since Michael Jackson's death, his albums have generated over two million dollars through sales of reissues alone.⁹⁵ Additionally, licensing old recordings for use in new movie and television soundtracks produces significant revenue for labels.⁹⁶

Over the next six years, the major labels could lose the rights to several extremely important works: *Back in Black* by AC/DC (owned by Warner Music Group), *Brothers in Arms* by Dire Straits (Warner Music Group), *The Gambler* by Kenny Rogers (Universal), *Purple Rain* by Prince (Warner Music Group), *Darkness on the Edge of Town* by Bruce Springsteen (Sony), and *Thriller* by Michael Jackson (Sony).⁹⁷

The loss of works such as these could cause major record labels to collapse—Charlie Stanford, senior marketing director at Sony Music,

91. *Id.*

92. See Choquette, *supra* note 3.

93. See Bird, *supra* note 1; Henslee & Henslee, *supra* note 33, at 713; *Imagine No New Artists, Just Endless Re-Releases*, INDEPENDENT (July 30, 2010), <http://www.independent.co.uk/arts-entertainment/music/features/imagine-no-new-artists-just-endless-rereleases-2038814.html>.

94. *Imagine No New Artists*, *supra* note 93.

95. *Id.*

96. Rafoth, *supra* note 28, at 1051–52.

97. Bird, *supra* note 1.

has said that revenues from these types of classic songs is the "life-blood" of the industry.⁹⁸ Without the proceeds generated by them, the major labels may not be able to survive.

A collapse of the major record labels would work to the detriment of artists. Record labels provide valuable services for artists who desire to achieve wide dissemination and a large fan base. Record labels offer expertise in marketing and promotion.⁹⁹ They supply the funds needed to create and manufacture the music.¹⁰⁰ They provide experience and bargaining power when negotiating movie and television licenses. As explained by Hilary Rosen, the president and CEO of the RIAA: "Their sphere of expertise is really in the marketplace. It is marketing, promotion and creating the demand. Find the fans, sell the music."¹⁰¹ If the termination provision is held to apply to sound recordings, record labels will be reluctant to invest money to promote new talent since they know they will be required to give up the rights to the resulting works thirty-five years later.

This is not to say, however, that artists will not receive any benefit whatsoever from the existence of section 203's copyright termination provision. The threat of termination has spurred enough debate on the subject to draw attention to the fact that recording artists have been pressured into accepting oppressive contract terms for years. Even Congressional Representatives have begun appreciating that recording artists are "one group of creators who get ripped off more than anybody else in any other industry."¹⁰²

The reason why recording artists typically get ripped off is because of the relatively little bargaining power they usually have in comparison to record labels. Because "getting signed" by a record label is perceived by many artists as a near necessity to success, and because individual artists usually lack the funds and tools needed to create albums on their own, they are eager to sign a record deal if offered one. Therefore, labels have the upper hand in negotiations and can demand that certain clauses are non-negotiable. Moreover, it is impossible to know the value of a new recording artist's work before it is released on the market. Not until after a song has been released and exploited does it become apparent that it is a hit; therefore, artists are forced to accept their royalty agreement before they know how successful their work will be.¹⁰³

98. *Imagine No New Artists*, *supra* note 93.

99. *See Oversight Hearing*, *supra* note 25 (statement of Hilary Rosen).

100. *See* PASSMAN, *supra* note 10, at 94 (stating that albums can easily cost \$150,000 or more to create, a sum that is rarely accessible to an artist on her own).

101. *Oversight Hearing*, *supra* note 25 (statement of Hilary Rosen).

102. *Id.* (statement of John Conyers).

103. *See* James A. Trigg & Sabina A. Vayner, *Stayin' Alive: An Overview of Copyright*

This Comment argues that enough attention has been drawn to this unfair position of recording artists to put a good amount of pressure on record labels to renegotiate the contracts of high profile veterans. A demonstration of loyalty and fairness to retired artists would probably make the label appear attractive to up-and-coming stars. Also, record labels will want to avoid a bad reputation in the public eye as greedy corporate bodies who take advantage of artists' creative genius for their own financial benefit. Moreover, labels will likely be willing to agree to generous settlements to avoid putting the question to a jury, whose members could easily be swayed by the sympathetic artist's plight. For all of these reasons, artists can expect an opportunity to negotiate more favorable contract terms with their record labels thanks to the threat of copyright termination.

VI. CONCLUSION

Taking all factors into consideration, sound recordings that are created for use on an album should be considered works made for hire under subsection (2) of the Doctrine's definition, thereby preventing recording artists from terminating their transfers of copyright to record labels in the year 2013.

Subsection (2) defines a work made for hire as: "a work specially ordered or commissioned for use as a contribution to a collective work, . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."¹⁰⁴ Sound recordings, standing alone, do not meet these requirements, but they do when they are recorded for publication on an album. This is so because albums meet the definition of a collective work.

Because the obligations of recording artists are currently structured in terms of supplying enough sound recordings to create one long-playing album,¹⁰⁵ it is quite clear that each sound recording's purpose is to contribute to an album, thereby meeting the "for use" requirement. With the advent of the internet and other means of digital distribution of sound recordings, however, this contract model may change. Selling C.D.'s may cease to be the main focus of record labels, as consumers prefer more and more to download individual songs from the internet. This trend may have serious implications for the work-for-hire status of sound recordings.¹⁰⁶

Termination, L. TECH. NEWS ONLINE (May 28, 2010), <http://www.law.com/jsp/lawtechnology/news/PubArticleLTN.jsp?id=1202458889363&slreturn=1>.

104. 17 U.S.C. § 101 (2006).

105. BRABEC & BRABEC, *supra* note 36, at 140; FIELD & SLOTNICK, *supra* note 30.

106. See *Oversight Hearing*, *supra* note 25 (statement of Hon. Marybeth Peters).

Finally, sound recordings are “specially ordered or commissioned” by record companies according to the “instance and expense” test.¹⁰⁷ Even though the artists ultimately pay for their studio time and other expenses out of their royalty payments, the record labels are the entities initially funding the work’s creation. Furthermore, recording artists have a contractual obligation to submit sound recordings that meet the standards of the record label. Therefore, the record labels are the motivating factor of the sound recording’s creation.

Excluding sound recordings from the copyright termination right is in the best interests of both the recording artists and the record labels. Even though it is possible for artists to record, distribute, and promote their own music on the internet, it is generally preferable to have the funds and expertise of a label. Artists unquestionably provide the creative genius in the industry, but the record labels help the artists reach their audience. Therefore, a collapse of the current industry’s structure would work to the detriment of artists. Just the mere threat of copyright termination has placed enough pressure on the record labels to negotiate better deals with their artists.

The year 2013 marks an exciting landmark for copyright law and the music industry. Some have called for legislative intervention to clarify the law’s meaning. Indeed, Congress has not shut the door on that option.¹⁰⁸ But if Congress remains silent, courts will be faced with the task of applying several complicated legal doctrines to a unique industry.

107. See *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 562 (2d Cir. 1995).

108. See *Oversight Hearing*, *supra* note 25 (statement of Representative Berman) (“[A] future Congress, after more extensive deliberation and careful consideration, could decide whether this legal debate should be resolved through legislation.”).