

---

## It's the End of the World as Musicians Know It, or Is It?: Artists Battle the Record Industry and Congress to Restore Their Termination Rights in Sound Recordings

Kathryn Starshak

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

---

### Recommended Citation

Kathryn Starshak, *It's the End of the World as Musicians Know It, or Is It?: Artists Battle the Record Industry and Congress to Restore Their Termination Rights in Sound Recordings*, 51 DePaul L. Rev. 71 (2001)

Available at: <https://via.library.depaul.edu/law-review/vol51/iss1/4>

This Notes & Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

# IT'S THE END OF THE WORLD AS MUSICIANS KNOW IT, OR IS IT? ARTISTS BATTLE THE RECORD INDUSTRY AND CONGRESS TO RESTORE THEIR TERMINATION RIGHTS IN SOUND RECORDINGS

## INTRODUCTION

*"If a song means a lot to you, imagine what it means to us."*

Artists Against Piracy<sup>1</sup>

Imagine a musical artist just starting out in the business. They spend hours practicing, trying to create a sound that will make them stars. Night after night, they perform in bars, clubs, and cafés with the hope that they will be noticed. Then one night it happens, a record company representative offers the artist a chance to record an album. As an artist, that first recording contract could be the most important agreement she makes in her career.<sup>2</sup> The artist, desperate for the recording agreement, will typically sign a deal for a lower royalty rate, sometimes even as low as seven percent.<sup>3</sup> Then the artist's dream comes true, she has a number one song, but due to the low royalty rate, she does not profit from it.<sup>4</sup> Section 203 of the 1976 Copyright Act<sup>5</sup> was created to remedy this situation. The creators of the Copy-

---

1. Artists Against Piracy, at [www.artistsagainstpiracy.com/news/index.html](http://www.artistsagainstpiracy.com/news/index.html) (last visited Feb. 28, 2001). Artists Against Piracy was a group aimed at expressing recording artists' views on online music distribution. They used this quote in an ad campaign that was aimed at educating the public on the impact free online music sites, such as Napster, have on recording artists. Sherman Fridman, *Music Artists Advertise for Online Rights*, NEWSBYTES, July 11, 2000, available at 2000 WL 21179794.

2. MARK HALLORAN, *THE MUSICIAN'S BUSINESS & LEGAL GUIDE* 326 (2d ed. 1996).

3. M. WILLIAM KRASILOVSKY & SIDNEY SHEL, *THIS BUSINESS OF MUSIC* 19 (8th ed. 2000). Royalty rates for new artists can start from between seven to twelve percent of the retail price of the album; however, the record companies generally reduce that amount significantly to cover other costs. *Id.* For a more complete discussion of artists' royalty rates, see *infra* note 233 and accompanying text.

4. In 1996, the members of the group TLC declared bankruptcy a year after their second album, "Crazysexycool," sold ten million copies worldwide. Chuck Philips, *Group Tops Charts But Claims Bankruptcy*, L.A. TIMES, May 28, 1996, at A1. The group signed a recording contract in 1991 that paid them royalties equaling approximately seven percent on the retail price of each album. *Id.* at 19. After the record company took its contractual reductions, the group was left with sixty cents per album to divide three ways. *Id.*

5. 17 U.S.C. § 203(a) (1994). Section 203 provides for the termination of any exclusive or nonexclusive grant of a transfer or license of a copyright that was executed on or after January 1, 1978. *Id.* This termination may take place any time during a period of five years beginning at the end of thirty-five years from the date of execution. 17 U.S.C. § 203(a)(3) (1994).

right Act wanted to provide an author with a fair opportunity to appreciate the real value of her work.<sup>6</sup> For particular artists, the future right to terminate a record contract and regain the rights to their recordings may finally allow them the chance to profit from their creations.

Last fall, sound recording artists had this right taken away from them. In November 1999, Congress passed an amendment to the Copyright Act that added sound recordings to the list of commissioned or specially ordered works eligible for "work made for hire" status.<sup>7</sup> At first glance, this amendment would seem trivial because most record companies claim that they own their artists' sound recordings.<sup>8</sup> However, if the recordings were in fact works made for hire, then the artists would not be able to exercise the termination rights under section 203.<sup>9</sup>

Prior to the 1999 amendment, it was questionable whether sound recordings could qualify as works made for hire. The recording industry claimed that sound recordings were works made for hire; but recording artists continually argued that when making a contract, they were merely licensing their works to record companies.<sup>10</sup> Just before Congress passed the amendment, two federal district courts decided that sound recordings were not eligible for work made for hire status absent an employer-employee relationship.<sup>11</sup>

Because there were no public hearings on the matter, artists were not given an opportunity to express their views to Congress about the 1999 amendment.<sup>12</sup> However, after numerous articles in *Billboard*

---

6. H.R. REP. NO. 94-1476, at 124 (1976).

7. The Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113 Appendix I, § 1011(d), 113 Stat. 1501, (*codified at* 17 U.S.C. § 101 (1994 & Supp. V 1999)), *repealed by* Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379 (2000).

8. HALLORAN, *supra* note 2, at 335. Most recording contracts include a provision making the sound recordings works made for hire. *Id.*

9. Section 203 of the Act allows artists to regain the rights to the copyright in their works by terminating any transfers or assignments of those rights. 17 U.S.C. § 203(a) (1994). This termination may only be done for a period of five years beginning thirty-five years after the license has been granted. *Id.* Under section 203 of the Act, works made for hire are not eligible for the termination rights. *Id.* For a discussion on termination rights, see *infra* notes 95-132 and accompanying text.

10. W. John Moore, *Bye-Bye, American Pie*, NAT'L J., May 6, 2000, at 1464.

11. See *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999); *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999) (claiming in dicta that sound recordings are not works-for-hire under the statute because they do not fit within any of the categories of specially ordered or commissioned works).

12. Bill Holland, *New Work-For-Hire Law To Be Examined: Subcommittee To Hear Witnesses*, BILLBOARD, May 20, 2000, at 113. The amendment was passed as a "technical change," meaning Congress did not have to hold hearings on the issue. *Id.*

Magazine discussed the impact of the amendment, artists began to join together to fight for their termination rights.<sup>13</sup> Eventually Congress listened to the artists and repealed the amendment.<sup>14</sup> Now that the 1999 amendment has been successfully repealed, artists and the recording industry are back in the same positions they were in two years ago.<sup>15</sup> Furthermore, there is still no final answer to the question of whether sound recordings qualify as works made for hire.

This Comment will examine both the 1999 amendment to the Copyright Act and the Works Made for Hire and Copyright Corrections Act of 2000, as well as their effects on the future of the music industry. Part II will outline the history of the work-for-hire and termination rights provisions of the 1976 Copyright Act and discuss various courts' interpretations of these two provisions.<sup>16</sup> Part III will examine the legislative histories of both the 1999 amendment to the works-for-hire provision of the Copyright Act and the Works Made for Hire and Copyright Corrections Act of 2000.<sup>17</sup> This section will explore the 1999 amendment and the various battles between the recording industry, recording artists, and Congress that led to the creation of the Works Made for Hire and Copyright Corrections Act of 2000, which effectively repealed the 1999 amendment.<sup>18</sup> Part IV will analyze the 1999 amendment to demonstrate that the amendment was in fact a substantive change in Copyright law. This section will examine the status of sound recordings as works made for hire before the amendment.<sup>19</sup> This section will also compare the 1999 amendment to other technical amendments recently passed by Congress.<sup>20</sup> Part V will analyze the neutrality of the language of the Works Made for Hire and Copyright Corrections Act of 2000 and examine whether it will stop the courts from considering either amendment when determining whether sound recordings are eligible for work-for-hire status.<sup>21</sup> Ad-

---

13. Bill Holland, *Artists Claim Progress With Hearing*, BILLBOARD, June 10, 2000, at 96. Musical artists Sheryl Crow and Don Henley formed the Artists' Recording Coalition, a group of musical artists and managers dedicated to protecting the rights of musical artists. *Id.*

14. On September 19, 2000, the House of Representatives passed the Work Made for Hire and Copyright Corrections Act of 2000 that effectively repealed the 1999 amendment. 146 CONG. REC. H7771 (Sept. 19, 2000). On October 12, 2000, the Senate also passed the Work Made for Hire and Copyright Corrections Act of 2000. 146 CONG. REC. S. 10498 (Oct. 12, 2000). On October 27, 2000, the bill was officially signed into law. Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379 (2000).

15. 146 CONG. REC. H7771, 7772 (Sept. 19, 2000).

16. *See infra* notes 24-132 and accompanying text.

17. *See infra* notes 133-192 and accompanying text.

18. *See infra* notes 135-189 and accompanying text.

19. *See infra* notes 193-334 and accompanying text.

20. *See infra* notes 334-354 and accompanying text.

21. *See infra* notes 355-377 and accompanying text.

ditionally, this section will discuss the need for a definitive answer to the question of whether sound recordings are eligible to be works made for hire before 2003 and examine one of the proposed solutions to the problem.<sup>22</sup> Finally, Part VI will conclude that it is important to the future of the music industry for Congress to create a definitive answer to the question of whether sound recordings can qualify as works made for hire under the Copyright Act.<sup>23</sup>

## II. BACKGROUND: THE HISTORY OF WORKS-FOR-HIRE AND TERMINATION RIGHTS IN THE 1976 COPYRIGHT ACT

In order to gain a clear understanding of the potential impact that the 1999 sound recording amendment could have had on artists, the work-for-hire provision of the 1976 Copyright Act (Act) and the termination rights provision in the Act must be fully examined. A history of the works made for hire provision of the Act, specifically the United States Supreme Court's definition of an employee under the Act, should first be considered. Second, an understanding of when a work created by an independent contractor may be considered a work made for hire is necessary. Finally, the rights provided to copyright owners by the termination rights provision in section 203 of the Act and the effect of a work being labeled a work made for hire on those rights must be discussed.

### A. Works Made for Hire

The Copyright Clause in the United States Constitution grants Congress the power "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."<sup>24</sup> Through the Copyright Clause, Congress created the Act,<sup>25</sup> which gives authors an incentive to create by providing them special protection for their works.<sup>26</sup> Works-for-hire are given special protection under the Copyright Act.<sup>27</sup> The Act, in a work-for-hire situation, defines the hiring party or person for whom the work was created to be the author and,

---

22. See *infra* notes 377-396 and accompanying text.

23. See *infra* notes 391-395 and accompanying text.

24. U.S. CONST. ART. I, § 8, cl. 8.

25. 17 U.S.C. § 101 et seq. (1994).

26. 17 U.S.C. § 302(a) (1994). For example, the author of a copyrighted work has exclusive rights to that work for his lifetime plus an additional seventy years. *Id.*

27. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.03A, at 5-11 (2001).

thus, the owner of the copyright of the work.<sup>28</sup> This is “an exception to the rule that copyright ownership vests initially in the work’s creator.”<sup>29</sup> In fact, the United States may be the only country that permits a creator’s employer to “obtain authorship status of the work.”<sup>30</sup> The notion that ownership rights should vest with the employer in a work-for-hire situation is well established in Copyright law.<sup>31</sup> Labeling a creation as a work made for hire carries great implications for the artist and her employer.<sup>32</sup> Work-for-hire status affects the term of the copyright, the owner’s renewal rights, and the owner’s termination rights.<sup>33</sup> In addition, only a copyright owner can sue for infringement; therefore, in a work-for-hire situation, the employer is the only party allowed to sue an infringing party.<sup>34</sup> Under the Act, a work made for hire consists of either a creation prepared by an employee in the scope of his employment, or a creation that fits within the identified categories of commissioned works.<sup>35</sup>

### 1. *The Employer-Employee Prong of the Works Made for Hire Definition*

While the Act states that a work made for hire is a work made by an employee during the scope of his employment, neither the statute nor its legislative history sets out guidelines to determine who qualifies as an employee.<sup>36</sup> For many years, it had been the general consensus that Congress’ use of the term “employee” was meant to indicate a

---

28. 17 U.S.C. § 201(b) (1994). Section 201 of the Act states, “In 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 [the Act].” *Id.*

29. ROCHELLE COOPER DREYFUSS & ROBERTA ROSENTHAL K WALL, *INTELLECTUAL PROPERTY* 318 (1996).

30. *Id.*

31. H.R. REP. NO. 94-1476, at 121 (1976).

32. Chau Vo, *Finding a Workable Exception to the Work Made for Hire Presumption of Ownership*, 32 *LOY. L.A. L. REV.* 611, 615 (1999).

33. *Id.* For example, the copyright duration for a work-for-hire is either ninety-five years from publication or 120 years from creation, whichever expires first. 17 U.S.C. § 302(c) (1994).

34. Vo, *supra* note 32, at 615.

35. Prior to the 1999 Sound Recording Amendment, section 101 of the Act defined a work made for hire as:

A work prepared by an employee within the scope of his or her employment; or a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101 (1994).

36. 1 NIMMER, *supra* note 27, § 5.03[B][1], at 5-14; *Community for Creative Non-Violence et al. v. Reid*, 490 U.S. 730, 742 (1989).

“salaried worker in a long term position.”<sup>37</sup> However, in 1989, the Supreme Court of the United States set a standard for determining when a hired party can be considered an employee in *Community for Creative Non-Violence v. Reid*.<sup>38</sup>

a. *Community for Creative Non-Violence v. Reid*<sup>39</sup>

In *Reid*, the Court applied principles of agency to determine whether the hired party was an employee under the meaning of the statute.<sup>40</sup> The Court relied on a federal common law rule of agency as opposed to state agency laws because of the Act’s “express objective of creating national, uniform copyright law.”<sup>41</sup>

*Reid* involved a dispute over a sculpture created for the plaintiff by the defendant, a non-profit organization that benefited the homeless.<sup>42</sup> A dispute over the copyright ownership ensued when the plaintiff, the Community for Creative Non-Violence (CCNV), wanted to take the sculpture on tour.<sup>43</sup> Reid, the artist, objected to the tour and claimed that the sculpture would not be able to withstand extensive traveling.<sup>44</sup> CCNV and Snyder, one of CCNV’s trustees, eventually filed suit against Reid, seeking reacquisition of the sculpture and a ruling on who owned the copyright.<sup>45</sup> The Court listed a number of factors (*Reid* factors) taken from the Restatement of Agency<sup>46</sup> to determine whether Reid was an employee of CCNV.<sup>47</sup> The Court stated:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties;

---

37. Jessica D. Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857, 890 (1987).

38. 490 U.S. 730 (1989).

39. 490 U.S. 730 (1989).

40. *Reid*, 490 U.S. at 740. The Court stated that in the past they had “concluded that Congress intended terms such as ‘employee’ and ‘employer’” to be examined under agency law. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 735.

44. *Id.* Reid then went on to file for a copyright registration for the sculpture and, in turn, CCNV filed a competing registration. *Reid*, 490 U.S. at 735.

45. *Id.* It is important to note that the ownership of the sculpture itself was never an issue in this case, as it was the property of CCNV. *Id.* The ownership of the work and of the copyright are separate and distinct from one another. *Id.*

46. RESTATEMENT (SECOND) OF AGENCY § 220.

47. *Reid*, 490 U.S. at 751-52.

whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role of hiring and paying assistants; whether the work was part of the normal business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.<sup>48</sup>

After considering these factors, the Court determined that Reid was an independent contractor, not an employee of CCNV.<sup>49</sup> The first factor that the Court considered was CCNV's right to control the work.<sup>50</sup> The Court focused on the right to control the production process, not the product itself.<sup>51</sup> Both parties agreed that the sculpture was to be made of Cast 62, a synthetic substance that would allow the project to fit within CCNV's budget.<sup>52</sup> Snyder and other CCNV members visited Reid to check on the progress of the work and Snyder made suggestions to Reid on the model of the sculpture.<sup>53</sup>

Although CCNV did control some aspects of the sculpture, the amount of control a party exercises over the project is not dispositive.<sup>54</sup> In fact, the other factors used by the Court to determine the ownership of the sculpture weighed in Reid's favor.<sup>55</sup> Reid was a sculptor, which the Court considered to be a "highly skilled profession."<sup>56</sup> In addition, he provided his own materials and worked out of his own studio.<sup>57</sup> These facts demonstrated that Reid controlled the process used to create the work. The sculpture was not part of CCNV's regular business, and CCNV did not pay Reid any benefits nor did it withhold any taxes.<sup>58</sup> These facts demonstrated that a typical employer-employee relationship did not exist.<sup>59</sup> After an analysis of the factors, the Court concluded that Reid was in fact an independent

---

48. *Id.* at 751.

49. *Id.*

50. *Id.*

51. Corey L. Wishner, *Whose Work is it Anyway?: Revisiting Community for Creative Non-Violence v. Reid in Defining the Employer-Employee Relationship Under the "Work Made for Hire" Doctrine*, 12 HOFSTRA LAB. AND EMP. L.J. 393, 403 (1995) (citing 1 NIMMER, *supra* note 27, § 5.03 [B][1][a] at 5-22).

52. *Reid*, 490 U.S. at 734.

53. *Id.*

54. Wishner, *supra* note 51, at 403; *see also* 1 NIMMER, *supra* note 27, § 5.03 [B][1][a], at 5-22.

55. *Reid*, 490 U.S. at 751.

56. *Id.* at 752.

57. *Id.*

58. *Id.* at 753. In addition, the Court considered the fact that CCNV had no right to assign any other projects to Reid and that they paid Reid a \$15,000 lump sum "dependant on completion of a specific job." *Id.*

59. *Id.*



contractor of CCNV.<sup>60</sup> Therefore, the sculpture could not be considered a work made for hire, and CCNV could not be an author of the work.<sup>61</sup>

In *Reid*, the Court intended to clarify Congress' main purpose in revising the Act, which was "enhancing predictability and certainty of copyright ownership."<sup>62</sup> However, by using this list of factors, the Court established a test that was highly fact specific. The Court indicated that no one factor was dispositive, but it gave no direction on how to weigh all of the factors.<sup>63</sup> Therefore, the Court failed in its attempt to establish predictability within the Act.<sup>64</sup>

b. *Aymes v. Bonelli*<sup>65</sup>

In 1992, the United States Court of Appeals of the Second Circuit elaborated on the application of the Reid factors in *Aymes v. Bonelli*. In *Aymes*, the plaintiff appealed a district court ruling that the computer program he designed while working for the defendant was a work made for hire.<sup>66</sup> The district court dismissed Aymes' claim for copyright infringement against the defendant, Island Recreational.<sup>67</sup>

The Second Circuit stated that even though no *Reid* factor was dispositive, not all factors were equally important.<sup>68</sup> "The factors should not merely be tallied but should be weighed according to their significance in [that specific] case."<sup>69</sup> The Second Circuit stated that while some factors would generally be insignificant, others would be important in a majority of cases.<sup>70</sup> These important factors included: "(1) the hiring party's right to control the manner and means of the crea-

---

60. *Reid*, 490 U.S. at 753.

61. *Id.* While the Court held that CCNV was not an author of the work by virtue of the work-for-hire provision, it did uphold the decision of the United States Court of Appeals to remand the case to the district court to determine whether CCNV was a joint author of the work. *Id.* The district court had to decide whether CCNV and Reid created the work "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." *Id.* (citing 17 U.S.C. § 101). If that were the case, then Reid and CCNV would share ownership of the copyright. *Id.*

62. *Id.* at 750.

63. *Reid*, 490 U.S. at 752; *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992).

64. 1 NIMMER, *supra* note 27, § 5.03 [B][1][a], at 5-27.

65. 980 F.2d 857 (2d Cir. 1992).

66. *Aymes*, 980 F.2d at 858. According to the facts set out by the United States Court of Appeals for the Second Circuit, the work in question was a series of computer programs called "CSALIB" that Aymes designed under the direction of Bonelli during his two years of work for Island. *Id.* at 859.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Aymes*, 980 F.2d at 861.

tion; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign other projects to the hired party.”<sup>71</sup> The Second Circuit put more weight on these five factors because they would most likely be determinative of the “nature of the employment relationship” in question.<sup>72</sup> As a result, the Second Circuit created a somewhat structured approach to determining how to weigh the *Reid* factors in a given case.<sup>73</sup> After applying this balancing test, the Second Circuit overruled the district court’s determination that Aymes’ computer program was a work made for hire.<sup>74</sup>

### c. Scope of Employment

Once a court establishes that the hired party is an employee, it must determine whether the work in question was prepared within the scope of that person’s employment. Courts have looked to the Restatement of Agency for guidelines in determining whether an employee’s work was created within the scope of his employment.<sup>75</sup> The work falls under the scope of the employee’s employment when: “(1) [i]t is of the kind of work he is employed to perform; (2) [i]t occurs substantially within authorized work hours and office; (3) [i]t is actuated at least in part by a purpose to serve the employer.”<sup>76</sup> A person

---

71. *Id.*

72. *Id.*

73. *Id.* at 862. The court should address the five factors enumerated in the case, as they will most likely be relevant in every case. *Id.* The court should then address the remaining factors in the order of their relevance. *Id.*; Wishner, *supra* note 47, at 401.

74. *Aymes*, 980 F.2d at 862. The court put extra weight on the fact that Island did not pay payroll taxes or benefits for Aymes. *Id.* The court stated that type of behavior was a “virtual admission” that the hired party was an independent contractor and not an employee. *Id.* The Second Circuit in *Aymes* listed the following cases as examples of cases that had used balancing tests in applying the *Reid* factors: *Marco v. Accent Publishing Co.*, 969 F.2d 1547 (3d Cir. 1992) (establishing that photographer was independent contractor using only some of the *Reid* factors and ignoring others because they were “indeterminate”); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486 (11th Cir. 1990) (holding that a drafting service was an independent contractor using only a few of the *Reid* factors); *MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769 (3d Cir. 1991) (finding that a computer programmer could be an independent contractor). *Aymes*, 980 F.2d at 862. *But see* 1 NIMMER, *supra* note 27, § 5.03[B][1][a], at 5-27 (criticizing the approach taken by the Second Circuit in *Aymes*). Professor Nimmer states that there is some merit to the Second Circuit’s reasoning that the *Reid* factors are not all equal; however, he feels that it is unlikely that the same five factors listed in *Aymes* would always be accorded the most significance in every case. *Id.* at 5-29. He further argues that the Second Circuit’s approach directly conflicts with the Supreme Court’s decision in *Reid* because the Supreme Court stressed the importance of considering every factor as it related to the facts of the case. *Id.*

75. 1 NIMMER, *supra* note 27, § 5.03[B][1][b], at 5-33.

76. 1 NIMMER, *supra* note 27, § 5.03 [B][1][b], at 5-33; *see also* *City of Newark v. Beasley*, 883 F. Supp. 3, 7 (D.N.J. 1995).

is working within the scope of her employment when she is "acting under the direction and supervision of the hiring author, at the hiring author's instance and expense."<sup>77</sup> It is irrelevant if the creator has a typical employee relationship with the hiring party.<sup>78</sup> Therefore, even if a hired party is an employee, his creation does not necessarily have to be considered a work made for hire.

## 2. *The Commissioned Works Prong of the Works-for-hire Definition*

A work created by an independent contractor can also be a work made for hire if it fits within one of the specially enumerated categories provided in the statutory definition.<sup>79</sup> Before the Supreme Court decision in *Reid*, courts had varying interpretations of the commissioned works paragraph in the works made for hire definition.<sup>80</sup> While some courts followed the reasoning that paragraph two of the works made for hire definition was "the exclusive provision governing commissioned works,"<sup>81</sup> the Second Circuit took a different approach.<sup>82</sup> In *Reid*, the Supreme Court invalidated the Second Circuit's approach by deciding that Congress intended the two sections of the works-for-hire definition to be "mutually exclusive ways for works to acquire work-for-hire status."<sup>83</sup> The first section applied to employees, while the second section applied to independent contractors.<sup>84</sup>

77. Marci A. Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1299 (1987).

78. *Id.* In *City of Newark v. Beasley*, the district court stated that all three of the factors must be found in order to label a work as a work-for-hire. *City of Newark*, 883 F. Supp. at 7; see also 1 NIMMER, *supra* note 27, § 5.03 [B][1][b], at 5-33.

79. 17 U.S.C. § 101 (1994).

80. 1 NIMMER, *supra* note 27, § 5.03[B][1][a], at 5-22.

81. Hamilton, *supra* note 77, at 1296-97. See also *Meltzer v. Zoller*, 520 F. Supp. 847, 857 (D.N.J. 1981) (holding that architectural drawings done by an independent contractor did not qualify for work-for-hire status because architectural drawings were not included within one of the enumerated categories set out in the work-for-hire definition in section 101 of the Act); *Mister B. Textiles, Inc. v. Woodcrest Fabrics, Inc.* 523 F. Supp. 21 (S.D.N.Y. 1981) (holding that fabric design did not fit within one of the enumerated categories in the work-for-hire definition), as cited in Hamilton, *supra* note 77, at 1296-1297.

82. In *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548 (2d Cir. 1984), *cert denied*, 469 U.S. 982 (1984), the Second Circuit held that both sections of the work made for hire definition applied to independent contractors. The United States Court of Appeals for the Second Circuit stated that section two of the works-for-hire definition only applied when the hiring party contributed little to the creative process, but section one applied when the hiring party did supervise the work of the hired party. *Id.* at 552. See also Hamilton, *supra* note 77, at 1300.

83. *Community for Creative Non-Violence et al. v. Reid*, 490 U.S. 730, 748 (1989).

84. *Id.*

The Act's legislative history shows that the status of commissioned works as works made for hire was highly debated throughout the creation of the Act.<sup>85</sup> The categories of commissioned works arose from a compromise between authors' representatives and publishers within the motion picture industry.<sup>86</sup> These categories, prior to the 1999 sound recording amendment, included: a contribution to a collective work; a part of a motion picture or other audio visual work; a translation; a supplementary work; a compilation; an instructional text; a test; answer material for a test; and an atlas.<sup>87</sup> If the work in question does not fit within one of the specific categories mentioned in the statute, then it cannot be a work made for hire even if it had been specially commissioned.<sup>88</sup>

Additionally, commissioned works that fit within one of these enumerated categories will only be considered a work-for-hire if there is a signed agreement between the parties designating the work as such.<sup>89</sup> This writing requirement is only in effect for specially ordered or commissioned works; works created by an employee within the scope of his employment do not require a written agreement.<sup>90</sup> "The purpose of the writing requirement is not only to protect people against false claims of oral agreements, but also to make the ownership of property rights in intellectual property clear and definite, so that such property will be readily marketable."<sup>91</sup> The written agreement must be signed by both parties in order to be valid<sup>92</sup> and must sufficiently designate

---

85. H.R. REP. NO. 94-1476, at 121 (1976). At one point, screenwriters and composers for movies proposed a provision that would allow the commissioning party to acquire the right to use the commissioned work to the extent necessary in their regular course of business, but allow the hired party to keep the other rights in the work. *Id.* This provision, which in theory would have increased the bargaining power of artists, was rejected by the legislators because they felt that, in practice, the possibility of any real benefit to the artists was minimal. *Id.*

86. Litman, *supra* note 37, at 890-91. The authors' representatives were concerned that freelance authors lacked the amount of bargaining power necessary to turn down contract provisions that labeled the works as works made for hire. *Id.* However, publishers and movie studios were concerned about the implication of the termination provisions on works that were created by independent contractors, but had a history of being labeled works made for hire. *Id.* "These groups compromised by limiting commissioned works-for-hire status to the specific classes of works typically created by multiple authors." *Id.*

87. 17 U.S.C. § 101 (1994).

88. 1 NIMMER, *supra* note 27, § 5.03[B][2][a], at 5-38.

89. 17 U.S.C. § 101 (1994); Wishner, *supra* note 51, at 411.

90. 1 NIMMER, *supra* note 27, § 5.03[B][2][b], at 5-40; Wishner, *supra* note 51, at 411.

91. *Oversight Hearing on the United States Copyright Office and the Issue of Sound Recordings as Works Made for Hire: Hearings Before the Subcomm. on Courts and Intellectual Property of the Judiciary*, 106th Cong. 14 (2000) [hereinafter *Hearings*] (statement of Professor Paul Goldstein), *citing* Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 411 (7th Cir. 1992) (holding that photographs that were specially ordered were not works made for hire because the agreement designating them as such was not signed by both parties).

92. 1 NIMMER, *supra* note 27, § 5.03[B][2][b], at 5-39; *see also* Schiller, 969 F.2d at 411.

the works in question as works made for hire.<sup>93</sup> If a work falls within one of the enumerated categories of commissioned works eligible for work-for-hire status and there is a signed writing, then the work created by an independent contractor will be a work made for hire under the Act.<sup>94</sup>

### B. Termination Rights

Whether a copyright owner can utilize the termination rights provided by the Act depends upon whether her work qualifies as a work made for hire. Section 203 of the Act provides authors with the opportunity to terminate any exclusive or nonexclusive transfer of their work executed after January 1, 1978.<sup>95</sup> This termination may take place any time during a period of five years, beginning at the end of a thirty-five year period from the date of the execution of the grant.<sup>96</sup> An author must serve notice of the termination, and this notice must be served no less than two and no more than ten years before the termination date.<sup>97</sup> Once the termination takes effect, all rights that were covered by the original transfer will revert back to the author.<sup>98</sup> Despite the fact that section 203 has been in effect for more than twenty years, there is very little case law on the subject because termination under this provision cannot be executed until 2013, thirty-five years after the 1978 grants.<sup>99</sup> There is, however, a conflict between

---

93. 1 NIMMER, *supra* note 27, § 5.03[B][2][b], at 5-40. See *Playboy Enterprises, Inc. v. Dumas*, 53 F.3d 549, 560 (2d Cir. 1995), *cert. denied*, 516 U.S. 1010 (1995). The Second Circuit held that a check endorsement that only mentioned an "assignment" of the work did not satisfy the written agreement requirement of the commissioned works provision of the statute. *Id.* The Second Circuit also found a legend that confirmed the works were works made for hire would satisfy the writing requirement as long as it was signed by both parties. *Id.* The court also remanded the case to determine whether an agreement signed by an agent could make a work a work made for hire. *Id.* at 561. On remand, the district court concluded that there was no evidence to support the argument that the artist's managers believed that they were authorized to bind the artist to a work-for-hire agreement. *Playboy Enterprises, Inc. v. Dumas*, 960 F. Supp. 710, 721 (S.D.N.Y. 1997).

94. 1 NIMMER, *supra* note 27, § 5.03[B][2][b], at 5-41.

95. Section 203 provides:

In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination if it meets certain conditions.

17 U.S.C. § 203 (1994).

96. 17 U.S.C. § 203 (1994); see generally Kathleen M. Bragg, *The Termination of Transfers Provision of the 1976 Copyright Act: Is It Time to Alienate it or Amend it?*, 27 PEP. L. REV. 769 (2000).

97. 17 U.S.C. § 203 (1994).

98. *Id.*

99. *Id.* However, there have been some terminations under section 304, which is the termination provision for works created before 1976. Section 304 provides authors of a work that was in

the circuit courts on whether section 203 should be interpreted to mean that transfers could only be terminated after thirty-five years.<sup>100</sup> Both the Seventh and Ninth Circuits initially dealt with this matter.

### 1. *Rano v. Sipa*<sup>101</sup>

In *Rano v. Sipa*, the United States Court of Appeals for the Ninth Circuit held that section 203 of the Act preempted California state contract law. As a result, transfers of copyrights may only be terminated during the five-year period beginning thirty-five years from the date of the transfer.<sup>102</sup> In *Rano*, the plaintiff, a professional photographer, entered into an oral copyright license agreement with the defendant for an unspecified length of time to reproduce, sell, and distribute his photographs.<sup>103</sup> After *Rano* terminated the license agreement, the defendant refused to relinquish control of the photos. Subsequently, *Rano* sued the defendant for copyright infringement.<sup>104</sup> The Ninth Circuit interpreted section 203 of the Act to mean that no licensing agreements are terminable at will before the end of the statutory thirty-five year period, unless the licensing agreement contained an express provision specifying an earlier termination date.<sup>105</sup>

### 2. *Walthal v. Rusk*<sup>106</sup>

In contrast, the United States Court of Appeals for the Seventh Circuit in *Walthal v. Rusk* held that terminations were allowed under Illi-

---

its first or renewal term on January 1, 1978, with the right to terminate an exclusive or nonexclusive grant of a transfer or license of the renewal copyright. 17 U.S.C. § 304(c) (1994). This section allows authors to initiate this termination at any time during a period of five years beginning at the end of fifty-six years from the date the copyright was originally obtained, or beginning January 1, 1978, whichever was later. 17 U.S.C. § 304(c)(3) (1994). Using this provision, Joseph Simon, the creator of the comic book character Captain America, filed an official termination notice with the Copyright Office in 1999 to terminate the license he granted to Marvel Entertainment Group to the character. Wendelyn P. Killian & Leon Liu, *Termination Looms in 2013*, 23 NAT'L L.J., Oct. 16, 2000, at C1. This notice provided Marvel the two years notice that is required for termination under the Act. *Id.* Thus, Mr. Simon should regain his rights to Captain America in December 2001. *Id.*

100. 3 NIMMER, *supra* note 27, § 11.01[B], at 11-4.

101. 987 F.2d 580 (9th Cir. 1993).

102. *Rano*, 987 F.2d at 585.

103. *Id.* at 583.

104. *Id.*

105. *Id.* at 585. Professor Nimmer has been especially critical of this decision. 3 NIMMER, *supra* note 27, § 11.01[B], at 11-4. He stated that the ruling "convert[ed] casual oral permission into a thirty-five year straitjacket." *Id.* at 11-7. Professor Nimmer also believed the decision "convert[ed] an outside deadline designed as the maximum time before which an author must be allowed to terminate prior grants into a minimum duration of those grants." *Id.*

106. 172 F.3d 481 (7th Cir. 1999).

nois law and section 203 does not preempt that termination right.<sup>107</sup> In *Walthal*, the plaintiffs, all of whom were members of the musical group Butthole Surfers, wanted to terminate their recording agreement with their record company.<sup>108</sup> The agreement between the parties consisted only of an oral licensing agreement, so it did not contain any provisions governing termination rights.<sup>109</sup> The plaintiffs attempted to terminate the agreement when the defendant record company refused to amend the terms of the agreement from a fifty-fifty division of the royalties to an arrangement in which the band would receive eighty percent of the royalties.<sup>110</sup> After Butthole Surfers sent the record company a letter terminating the agreement, the company continued to make and distribute the group's recordings, so the group filed a suit for copyright infringement.<sup>111</sup> The record company argued that the group's termination of the agreement was ineffective because it could not terminate for thirty-five years under section 203 of the Act.<sup>112</sup>

The Seventh Circuit found that the letter terminating the agreement was valid under Illinois law and that section 203 did not prevent the group from terminating their deal before the end of the thirty-five year period.<sup>113</sup> The court emphasized that the purpose of the termination rights provision is to protect authors from any unfair transfer of rights that are due to the unequal bargaining position of the authors.<sup>114</sup> If the court had interpreted section 203 as requiring transfers to last thirty-five years and forced Butthole Surfers to remain in their contract with the record company, the very purpose of the termination rights provision would have been undermined.<sup>115</sup>

### 3. *Korman v. HBC Florida, Inc.*<sup>116</sup>

Recently, the United States Court of Appeals for the Eleventh Circuit followed the reasoning in *Walthal* and held that section 203 did

---

107. *Walthal*, 172 F.3d at 485.

108. *Id.* at 482.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 483.

113. *Walthal*, 172 F.3d at 485.

114. *Id.* at 484.

115. *Id.* The United States Court of Appeals for the Seventh Circuit criticized the opinion of the United States Court of Appeals for the Ninth Circuit's *Rano* stating that the Ninth Circuit's holding created a situation where "a contract for a specific term of less than 35 years does not conflict with the 35 year period but a contract which is terminable at will by operation of the law does." *Id.* at 485.

116. 182 F.3d 1291 (11th Cir. 1999).

not require a thirty-five year minimum term for licenses that were created for an unspecified duration.<sup>117</sup> In *Korman v. HBC Florida, Inc.*, the defendant radio station continued to use jingles that the plaintiff wrote after she attempted to terminate her license with the station.<sup>118</sup> After examining the holdings in both *Walthal* and *Rano*, the Eleventh Circuit followed the Seventh Circuit's approach and held that Korman could terminate her license with HBC before the end of the thirty-five year statutory period.<sup>119</sup> The Eleventh Circuit concluded, "Section 203 does not say that copyright licenses of indefinite duration cannot be terminated for thirty-five years."<sup>120</sup> In addition, the Eleventh Circuit stated that "if state law provides that licenses of indefinite duration may be terminated in less than 35 years, it is state law and not section 203 that governs the question of termination . . ."<sup>121</sup>

The Seventh and Eleventh Circuits' interpretation of section 203 is consistent with the purpose of the provision to provide authors with a second chance to reap the benefits of their work.<sup>122</sup> The legislative history shows that the reasoning behind this provision was the unequal bargaining power of authors, which is a direct result of the immense difficulty found in determining the value of a creation before it has been exploited.<sup>123</sup> An interpretation of the termination rights provision that creates a minimum term for indefinite licenses would accomplish the exact opposite of that goal.<sup>124</sup> The House Report states that the provision was not intended to lengthen the duration of any transfer made for a term of less than thirty five years,<sup>125</sup> reconfirming that parties were always allowed to create a license for a definite duration.<sup>126</sup> The view that state laws should govern indefinite agreements before the end of the thirty-five year statutory period is more consistent with the legislative purpose of the termination provision.

It is important to determine whether a particular work is a work made for hire because the termination rights provided in section 203

117. *Id.* at 1294.

118. *Id.* at 1292.

119. *Id.* at 1294.

120. *Id.* at 1295.

121. *Id.* at 1297.

122. H.R. REP. NO. 94-1476, at 124 (1976).

123. *Id.*; see also 3 NIMMER, *supra* note 27, § 11.01[A], at 11-3 (asserting section 203 is designed to protect authors and to give them a second chance to profit from their works).

124. *Walthal v. Rusk*, 172 F.3d 481, 485 (7th Cir. 1999).

125. H.R. REP. NO. 94-1476, at 128 (1976).

126. *Korman*, 182 F.3d at 1295.



are inapplicable to works made for hire.<sup>127</sup> The explicit terms of the statute exclude works made for hire from section 203.<sup>128</sup> Moreover, parties may not agree that a work is a work made for hire simply to avoid the termination rights if the parties do not actually have a “for hire” relationship.<sup>129</sup> If an employer-employee relationship does not exist between the parties, then the work must fall within one of the enumerated categories of commissioned works in order for an agreement to have the effect of making the work a work made for hire.<sup>130</sup> “It is the relationship that in fact exists between the parties, and not their description of that relationship, that is determinative.”<sup>131</sup> Similarly, parties may not use an agreement to place a work made for hire under the termination provisions; however, parties may put some of their own termination provisions in their employment contract.<sup>132</sup> Whether a work is considered a work made for hire has a real impact on the artist’s ability to reclaim his rights in the future.

### III. THE 1999 AND 2000 AMENDMENTS TO THE COPYRIGHT ACT

A thorough understanding of the work-for-hire and termination rights provisions in the 1976 Copyright Act (Act) is necessary to comprehend the potential impact that the 1999 sound recording amendment could have had on recording artists. In order to further appreciate the artist community’s reaction to this amendment and the battles that ensued between the record industry and artists over the change in the law, it is necessary to examine the legislative history and reasoning behind the first works made for hire amendment in 1999, which added sound recordings to the list of works eligible for work-for-hire status. These battles led to the compromises made between artists and the recording industry that led to the 2000 Work Made for Hire and Copyright Corrections Act, which effectively repealed the 1999 amendment.

---

127. H.R. REP. NO. 94-1476, at 125 (1976). The fact that the termination rights do not apply to works made for hire was one of the main reasons the definition of works made for hire was so important during the creation of the Act. *Id.*

128. Section 203 begins, “In the case of any work other than a work made for hire . . . .” 17 U.S.C. § 203 (1994).

129. 3 NIMMER, *supra* note 27, § 11.02[A][2], at 11-11.

130. *Id.*

131. *Id.* at 11-11 to 11-12.

132. *Id.* at 11-12.

A. *The 1999 Work Made for Hire Amendment*

There have always been questions surrounding the protection of sound recordings<sup>133</sup> under copyright law.<sup>134</sup> The Act did not provide any protection for sound recordings until 1971, long after artists such as the Beatles and Elvis had become popular.<sup>135</sup> The Act's legislative history defends the protection of sound recordings as a class, stating that they are "writings of an author capable of protection under the Constitution."<sup>136</sup> On November 29, 1999, President Clinton signed into law the Satellite Home Viewer Improvement Act,<sup>137</sup> which was attached to the federal omnibus spending bill.<sup>138</sup> In total, the omnibus bill contained 1,174 pages,<sup>139</sup> and hidden among the pages was a four-line "technical amendment" to the Act that may have changed the recording industry forever.<sup>140</sup> The wording of the amendment was simple: "Work Made for Hire - § 101 of title 17, United States Code, is amended in the definition relating to work-for-hire in paragraph (2) by inserting 'as a sound recording,' after 'audiovisual work.'"<sup>141</sup> This amendment, in theory, added sound recordings to the list of commissioned or specially ordered works that could be considered works made for hire. The legislative history available on this provision de-

---

133. Sound recordings, as defined in section 101 of the Act, are "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C. § 101 (1994).

134. H.R. REP. NO. 94-1476 at 56 (1976). It must be noted that the copyright for a sound recording is separate and distinct from the copyright in the musical composition. 1 NIMMER, *supra* note 27, § 2.10. Similarly, ownership of the copyright of a sound recording does not translate into the ownership of the actual master containing the recording. *Id.*

135. *See generally* H.R. REP. NO. 92-487, 2d Cong., 1st Sess., at 5 (1971).

136. H.R. REP. NO. 94-1476 at 56 (1976). The legislative history of the 1976 Act states that "the copyright protection that would prevent the reproduction and distribution of unauthorized phonorecords of sound recordings is clearly justified," and "too long delayed." *Id.* However, sound recording owners do not receive as much protection under the Act as other copyright owners because they do not have the benefit of public performance rights. 17 U.S.C. § 114(a) (1994). Sound recording owners also get a lower degree of protection because they have to show actual reproduction of a recording in order to succeed in an infringement action. 17 U.S.C. § 114(b) (1994).

137. The Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113 Appendix I, § 1011(d), 13 Stat. 1501, (codified at 17 U.S.C. § 101 (1994 & Supp. V 1999)), *repealed by* Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379 (2000).

138. Bill Holland, *Acts' Repeals Decry Copyright Clause*, BILLBOARD, Jan. 15, 2000, at 75.

139. *Id.*

140. *Id.*

141. The Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113 Appendix I, § 1011(d), 113 Stat. 1501, (codified at 17 U.S.C. § 101 (1994 & Supp. V 1999)), *repealed by* Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379 (2000).

scribes the amendment as a “technical and clarifying change”<sup>142</sup> because sound recordings had been registered in the Copyright Office as works made for hire since they were eligible for protection.<sup>143</sup> Additionally, Senator Trent Lott claimed that the amendment would not imply that sound recordings could not qualify as works made for hire before the amendment took effect.<sup>144</sup>

Noting the limited legislative history on the provision, it is no surprise that the artist community had no knowledge of the amendment until it was too late. The amendment was discovered by lobbyists from the American Federation of Television and Radio Artists after it was too late to contest it.<sup>145</sup> The lobbyists did not discover the amendment until it was placed in the conference report, which cannot be amended.<sup>146</sup> The reason it took the lobbyists so long to find the amendment was that no Congressional hearings on the matter occurred because a congressional staffer had labeled the amendment as a technical correction.<sup>147</sup> By labeling the change as a technical amendment, Congress did not allow the artists to express their concerns over the issue.<sup>148</sup> Had Congress held public hearings on the matter, the artist community would have argued that the amendment was a substantive change in the law.<sup>149</sup> The artist community feared that the amendment would destroy any of the termination rights they owned under section 203 of the Act.<sup>150</sup> Many recording artists looked forward to 2013 as the year they would be able to begin to reclaim the

---

142. 145 CONG. REC. S14696, 14712 (Nov. 17, 1999); *Copyright Act is Amended to Make Sound Recordings Eligible for Classification as Works Made for Hire*, 21 NO. 9 ENT. L. REP., Feb., 2000, at 8.

143. 145 CONG. REC. S14696, 14712 (Nov. 17, 1999); Geoffrey Hull, *Copyright Act Amendment Seen as Blow to Artists' Sound Recording Rights*, 15 ENT. L. FIN. 1 (2000).

144. 145 CONG. REC. S14712 (Nov. 17, 1999).

145. Holland, *supra* note 138, at 75.

146. *Id.*

147. Bill Holland, *Work-For-Hire Provision Sparks Artist Furor, Demand For Change*, BILLBOARD, Jan. 22, 2000, at 122.

148. Holland, *supra* note 12, at 112. In general, a proposed law that causes a substantive change to the rights of others would be subject to debate or hearings in both chambers of Congress. *Id.* The reason the sound recording amendment avoided such debate was that it was introduced as a technical amendment. *Id.* As a general rule, technical amendments are used to make corrections to the wording of a law or to correct minor problems. *Id.* An amendment must be noncontroversial in nature in order to meet the definition of a technical amendment. *Id.*

149. Holland, *supra* note 138, at 75.

150. As stated previously, works made for hire do not qualify for the termination rights in section 203 of the Act. See *supra* notes 127-132 and accompanying text. Artists claimed that by adding sound recordings to the list of works that qualify as works made for hire, this amendment effectively stripped them of the future ability to reclaim ownership of their copyrighted recordings. Holland, *supra* note 138, at 75; Holland, *supra* note 147, at 122.

rights in their recordings.<sup>151</sup> On the other hand, the recording industry would have argued that the amendment had no substantive effect on the law because sound recordings had always been considered works made for hire.<sup>152</sup> Even though the artists did not have an opportunity to voice their concerns over the amendment before it was passed, they immediately came together to oppose it once the amendment was discovered.

Adding to the artist community's frustration over the issue was the revelation that the sound recording amendment was not requested by a member of Congress.<sup>153</sup> Instead, it was apparently entered by a congressional staffer into the final conference report of the Satellite Home Viewer Improvement Act at the request of the Recording Industry Association of America (RIAA).<sup>154</sup> Coincidentally, that staffer has since taken a position as a lobbyist for the RIAA.<sup>155</sup>

Both the staffer and the RIAA stated that the amendment was necessary as a clarifying amendment to ensure that recording artists were protected under the Cyber-Piracy Prevention Act.<sup>156</sup> In fact, the staffer who entered the amendment into the conference report worked on the Cyber-Piracy Prevention Act, which prohibited the practice of cybersquatting.<sup>157</sup> Musician Don Henley, who helped cre-

---

151. Holland, *supra* note 12, at 112.

152. See Hull, *supra* note 143, at 1. The Record Industry claimed that this was just a technical amendment because sound recordings had been registered as works made for hire already. *Id.* While the fact that the Copyright Office had been registering sound recordings as works-for-hire does create prima facie evidence that the recordings are works-for-hire, it is a rebuttable presumption due to the factual nature of the question. *Id.*

153. Holland, *supra* note 138, at 75.

154. Holland, *supra* note 13, at 96. This charge has been disputed by Representative Howard Coble, who stated that two staffers discussed the issue with the committee a few days before the end of the conference and it was discussed by the entire conference staff. *Hearings, supra* note 91, at 14. However, Representative Rick Boucher, a member of the House subcommittee, has been quoted as claiming that he knew nothing about the amendment. Holland, *supra* note 13, at 96. He stated that a staff member could have mistakenly inserted the provision without consulting any of the conference members. *Id.*

155. Holland, *supra* note 13, at 96.

156. Holland, *supra* note 12, at 111. The Cyber-Piracy Prevention Act was passed within the same Satellite Home Viewer Improvement Act as the Sound Recording Amendment. 145 CONG. REC. S14696, 14714 (Nov. 19, 1999). The bill was created to end cybersquatting, the practice of registering domain names of people or companies with the intent to sell the domain names back to that person or company for a profit. *Id.* The legislation provides a limited exception for domain names that includes the names of copyrighted works, such as audiovisual works, sound recordings, and books. *Id.* In addition, the Act states that a person who in good faith registers a domain name consisting of the name of another living person shall not be liable if that name is affiliated with or related to a work of authorship protected under the Act. *Id.* Such protected works include a work made for hire if the person registering the name is the copyright owner or licensee of the work. 145 CONG. REC. H11769, 11779 (Nov. 19, 1999).

157. Holland, *supra* note 13, at 96.

ate the Cyber-Piracy Prevention Act, stated that he had never heard that a change to the Act was necessary to ensure that artists and sound recordings were protected from cybersquatting.<sup>158</sup>

In addition, there is some evidence that the RIAA, despite their statements to the contrary, had been lobbying for an amendment of this kind for years.<sup>159</sup> In 1990, the Register of Copyright, while discussing a pending bill that proposed to make computer software programs eligible for work-for-hire status, suggested that sound recordings also be added to the list of commissioned works that could be eligible as work-for-hire.<sup>160</sup> The former senior vice-president and general counsel for the RIAA wrote to the Register of Copyright regarding the record industry's view on the bill.<sup>161</sup> The RIAA believed that because sound recordings were already considered works-for-hire, a "clarifying amendment" would be the best way to remedy the problem.<sup>162</sup> Before the 1999 amendment, the RIAA had never succeeded in pushing their proposed amendment through Congress.<sup>163</sup> It should be noted that Hilary Rosen, the president and CEO of the RIAA, denied that the RIAA made prior requests for a work-for-hire amendment.<sup>164</sup> Ms. Rosen was adamant in her claim that the 1999 amendment was only a result of the exceptions created for works made for hire in the Cyber-Piracy Prevention Act.<sup>165</sup>

---

158. Holland, *supra* note 147, at 122.

159. Bill Holland, *Work-For-Hire Repeal Near?: RIAA's Involvement Goes Back 10 Years*, BILLBOARD, July 29, 2000, at 103.

160. Randy S. Frisch & Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 COLUM.-VLA J.L. & ARTS 211, 234 (1993). It is important to note that this article was the first article to examine the record industry's problems with termination rights.

161. *Id.* at 234. Mr. Leibowitz, the RIAA representative, realized that if an amendment adding sound recordings to the list of commissioned works eligible for work-for-hire status were passed, it would only restrict the artists' termination rights for recordings made after the amendment was passed. *Id.* It would not limit termination rights for recordings made prior to the amendment. *Id.*; *see also* Holland, *supra* note 159, at 103 (discussing the RIAA's past requests for the amendment).

162. Holland, *supra* note 159, at 103. RIAA felt that the clarifying amendment would demonstrate that sound recordings were in fact always works-for-hire, so no artist would be able to terminate their assignments of rights. *Id.*

163. *See* Frisch, *supra* note 160, at 234.

164. Hilary Rosen, *The Letter that Billboard Refused to Print*, at [http://www.riaa.com/News\\_Story.cfm?id=274](http://www.riaa.com/News_Story.cfm?id=274) (Jan. 12, 2000). Hilary Rosen stated, in a letter to Billboard, which the magazine refused to print, that the RIAA had not attempted to sneak the amendment in to the bill, nor had they ever sought to change the work-for-hire definition before. *Id.*

165. *Id.* It is interesting to note that this is not the first time the RIAA has been accused of successfully lobbying to add a last-minute amendment to a bill that adversely effects recording artists. Justin Pritchard, *Striking a Chord with Congress*, L.A. TIMES, Aug. 19, 1998, at 8D. Included in the Consumer Bankruptcy Reform Act of 1994 was a provision specifically aimed at preventing artists from filing for bankruptcy in order to be excused from their contracts. H.R.

Regardless of the potentially honorable reasons of the RIAA in requesting the amendment, artists felt that they had a right to voice their opinions on the possible effects that the amendment would have on their future termination rights. After months of battling with Congress and the recording industry, artists were finally given their chance. Representative Howard Coble, the Chairman of the House Courts and Intellectual Property Subcommittee, set up an oversight hearing to examine the claims of the artists.<sup>166</sup> The decision to have the oversight hearing was a victory for the recording artists, as it marked the first time that they had successfully banded together to fight for their rights on Capitol Hill.<sup>167</sup> It is a common misconception that the RIAA represents the interests of the artists; instead, the RIAA's main concerns lie with the record companies.<sup>168</sup> Many record

---

CONF. REP. NO. 105-794 at 102 (1998); David C. Norrell, *The Strong Getting Stronger: Record Labels Benefit from Proposed Changes to the Bankruptcy Code*, 19 LOY L.A. ENT. L.J. 445, 446 (1999). Section 365 of the Federal Bankruptcy Code allows debtors to become free from contracts that impair their ability to relieve themselves of debt. 11 U.S.C. § 365 (1994). A few artists, including Toni Braxton and TLC, had successfully used this provision to threaten to leave their record contracts in order to negotiate a better deal. Anita M. Samuels & Diana B. Henriques, *Going Broke and Cutting Loose; Bankruptcy Has New Appeal for Music Groups Chafing at Their Contracts*, N.Y. TIMES, Feb. 5, 1996, at D1. In response to this growing trend, the RIAA attempted to have the amendment passed. Justin Pritchard, *Striking a Chord with Congress*, L.A. TIMES, Aug. 19, 1998, at 8D. Although Congress never passed the amendment, artist representatives were concerned with the RIAA's ability to lobby for an amendment inserted without any Congressional hearings on the matter. *Id.* In this instance, it was a Congressman who entered the provision into the bill, instead of a staffer, but that Congressman had received a \$3,000 contribution from the RIAA's political action committee. *Id.*

166. Holland, *supra* note 12, at 112. The battle among the RIAA, Congress, and the artists at times became very animated. Representative Coble first included the following derogatory statement towards Mr. Henley in the written version of his opening statement for the hearing:

I would like to close by delivering a Valentine to Mr. Don Henley, one of the more conspicuous critics of this Subcommittee's work. Instead of attending the hearing today, he has chosen to promote his new album. . . . Mr. Henley, if you are within the sound of my voice, I hope you get Carpal tunnel syndrome from counting all the money you make, compliments of the Copyright Act and the Congress who wrote it.

*Hearings, supra* note 90, at 14 (statement of Representative Howard Coble, Chairman).

Although Mr. Coble never orally made the statement, it was printed in various reports covering the hearing. *Hearings, supra* note 90, at 14 (statement of Representative Coble, Chairman); *see also* Holland, *supra* note 13, at 101 (discussing the animosity between the parties). The battle continued when Mr. Henley responded to the statement by stating that Coble had "aided and abetted the film studios and the record companies in perpetuating the plantation mentality that has forever plagued our industry." Holland, *supra* note 13, at 101. Eventually, the war of words began to cool down, and Mr. Henley offered Mr. Coble an "olive branch," which Coble said he would accept as long as Mr. Henley did not "shove it in his ear." *Id.*

167. *Id.*

168. *Artists' Write-In Requests To Repeal Amendment*, BILLBOARD, June 10, 2000, at 96. Popular recording artist Billy Joel has stated, "RIAA does not represent me, nor does it represent any other recording artists that I know. The RIAA is nothing more and nothing less than the representative of the major record companies." *Id.*

industry representatives had lobbyists to fight for them on the Hill,<sup>169</sup> therefore, it was important for the artists to create a group that would look out for their best interests. In an attempt to level the playing field, musical artists Don Henley and Sheryl Crow co-founded the Recording Artists' Coalition (Coalition), a lobbying group made up of musical artists and managers.<sup>170</sup> As of July 29, 2000, the Coalition had already enlisted forty-four musical performers as members.<sup>171</sup>

The Coalition was not the only group represented at the May 25, 2000 oversight hearing. Other people who gave testimony included: Hilary Rosen, the CEO of RIAA; Marybeth Peters, the Register of Copyrights; and Michael Greene, President of the National Academy for Recording Arts and Sciences.<sup>172</sup> In addition, law professors testified as to the impact of the amendment on artists' rights.<sup>173</sup> The subcommittee also received a letter signed by twenty-seven copyright law professors from universities such as Harvard, NYU, and Berkeley, stating that sound recordings were not considered works-for-hire before the new law.<sup>174</sup> The hearing proved to be successful for the artists, as many members of the committee immediately began to promote a repeal of the 1999 amendment.<sup>175</sup> Just two months later, representatives of the RIAA and the recording artist community began to create a bill that would be an agreeable compromise between the two groups.<sup>176</sup>

---

169. Holland, *supra* note 159, at 103. The RIAA has their own lobby group in Washington, D.C., as well as Seagram's Universal Music Group (UMG), Warner Music, and Sony Music. *Id.* In fact, the RIAA "spent just over \$1 million on lobbying in 1999, with \$500,000 of that going to law and lobbying firms." Shawn Zeller, *Lobbying*, 32 NAT'L J. 3668 (Nov. 18, 2000). In the first half of 2000, the group spent an additional \$300,000 on outside lobbying groups. *Id.*

170. Holland, *supra* note 13, at 96.

171. Holland, *supra* note 159, at 103. Besides Sheryl Crow and Don Henley, other high-profile artists that have joined the Coalition include: R.E.M., Billy Joel, Jimmy Buffet, Bruce Springsteen and Dave Matthews. *Id.*

172. Holland, *supra* note 13, at 96; *see also Hearings, supra* note 91, at 53-59 (statement of Hilary Rosen, CEO of RIAA); *Id.* at 74-81 (statement of Michael Greene, President of the National Academy of Recording Arts and Sciences); *Id.* at 18-42 (statement of Marybeth Peters, Register of Copyrights).

173. Those professors included Professor Marci Hamilton from Benjamin N. Cordozo School of Law and Professor Paul Goldstein from Stanford University. *Hearings, supra* note 91, at 65-69 (statement of Professor Marci A. Hamilton); *Id.* at 59-65 (statement of Professor Paul Goldstein).

174. Peter Jaszi, *Letter of Law Professors Opposing Addition of Sound Recordings to Commissioned Works Made for Hire Provisions*, at <http://www.recordingartistscoalition.com/letter.html> (last visited Feb. 28, 2001); *see* Holland, *supra* note 13, at 96.

175. Bill Holland, *Democrats To Call For Work-For Hire Repeal*, BILLBOARD, June 24, 2000, at 1.

176. Bill Holland, *Work-For-Hire Repeal Near?: Steps Taken toward Reversal of New Law*, BILLBOARD, July 29, 2000, at 102.

At the meeting, the artists' representative not only worked on behalf of the Coalition, but for groups such as the National Academy of Recording Arts and Sciences, American Society of Composers Authors and Publishers, Broadcast Music Incorporated, American Federation of Television and Radio Artists, and American Federation of Musicians.<sup>177</sup> The negotiations between the industry and the artists did not always run smoothly. A couple of weeks after the first meeting, the representatives of the RIAA proposed changes that substantially differed from the language agreed upon at the first meeting.<sup>178</sup> The RIAA wanted the new bill to mention that sound recordings could be eligible for work-for-hire status, but the artists' representative adamantly disapproved.<sup>179</sup> Finally, after months of negotiations, the RIAA and representatives of the recording artists agreed on a neutral bill that would affectively repeal the 1999 amendment.<sup>180</sup> Both groups believed that the agreed upon proposal put them back in the position they were in before the 1999 amendment.<sup>181</sup>

#### *B. The Work Made for Hire and Copyright Corrections Act of 2000*

On September 6, 2000, House Representative Howard Coble introduced the new bill as number 5107.<sup>182</sup> In his introduction, Mr. Coble described it as a compromise between the artists and the recording industry.<sup>183</sup> The new bill, entitled the Work Made for Hire and Copyright Corrections Act of 2000, stated: "The definition of 'work made for hire' contained in section 101 of title 17, United States Code, is amended – (1) in paragraph (2), by striking 'as a sound recording.'" <sup>184</sup> Part two of that section added a paragraph to the Act to ensure that neither amendment "would be considered or given any legal significance."<sup>185</sup> The purpose of the bill was to repeal the 1999 amendment without prejudice, meaning that each party would be in the same legal

---

177. *Id.*

178. Bill Holland, *Work-For-Hire Talks Stalled*, BILLBOARD, Aug. 5, 2000, at 100.

179. *Id.*

180. Bill Holland, *RIAA, Artists Agree On C'Right Language*, BILLBOARD, Aug. 19, 2000, at 3.

181. *Id.*

182. 146 CONG. REC. H7244 (Sept. 19, 2000).

183. *Id.* Mr. Coble also stated that he still believed that the 1999 amendment was merely technical, but there was ample evidence to support the artists' point of view as well. *Id.*

184. 146 CONG. REC. H7771 (Sept. 19, 2000).

185. That paragraph stated:

In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, nor the deletion of the words added by that amendment—

(A) shall be considered or otherwise given any legal significance, or



position they occupied prior to the passage of the 1999 amendment.<sup>186</sup> Both the RIAA and the artist community expressed their support for the new Work Made for Hire Amendment and agreed that it was important for them to work together on the issue.<sup>187</sup>

Because of its bipartisan support, the Work Made for Hire and Copyright Corrections Act of 2000 quickly passed in the house.<sup>188</sup> On September 19, 2000, the bill was approved by the House and sent to the Senate.<sup>189</sup> The Senate passed the bill on October 12, 2000.<sup>190</sup> President Clinton then signed the legislation into law on October 27, 2000.<sup>191</sup> With the passage of the amendment, the artists and record industry are back in the same positions they occupied before the 1999 amendment.<sup>192</sup> However, the question of whether sound recordings constitute works made for hire remains unanswered.

#### IV. ANALYSIS: SOUND RECORDINGS AS WORKS MADE FOR HIRE

If Congress initially had conducted a public hearing on the 1999 sound recording amendment, much of the controversy surrounding the passage of the amendment would have been avoided. Artists merely wanted the opportunity to voice their opinions on the effects that the change in the law would have made on their careers.<sup>193</sup> This

(B) shall be interpreted to indicate congressional disapproval of, or acquiescence in, any judicial determination,

by the courts or the Copyright Office. Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made for Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.

146 CONG. REC. H7771 (Sept. 19, 2000).

186. 146 CONG. REC. H7771, 7772 (Sept. 19, 2000). In fact, the bill lists November 29, 1999 as its effective date in order to eliminate any claim that works created in the period between the two amendments would be works made for hire. *Id.*

187. Hilary Rosen, the president and CEO of RIAA, stated, "We said from the beginning we did not intend to change the law and have worked diligently to assure that the issue of work-for-hire is resolved without prejudice to anyone's position." *Statement of Hilary Rosen on the Work Made for Hire Legislation*, at [http://www.riaa.com/News\\_Story.cfm?id=333](http://www.riaa.com/News_Story.cfm?id=333) (last visited Feb. 28, 2001). Sheryl Crow stated, "It shows that at the end of the day the system does work if people will just stay diligent." Bill Holland, *Work-For-Hire Rollback Proceeds*, BILLBOARD, Sept. 16, 2000, at 89.

188. Holland, *supra* note 187, at 89. The legislation was co-sponsored by Republicans Howard Coble and Henry Hyde and Democrats Howard Berman and John Conyers. *Id.*

189. 146 CONG. REC. H7771, 7772 (Sept. 19, 2000).

190. 146 CONG. REC. S10498 (Oct. 12, 2000).

191. Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379 (2000).

192. Bill Holland, *Work-For-Hire Rollback Legislation Ready*, BILLBOARD, Sept. 2, 2000, at 101.

193. 146 CONG. REC. H7244, 10499 (Sept. 6, 2000)

section will focus on the artists' claim that sound recordings did not qualify as works made for hire before the 1999 amendment. A comparison of the 1999 amendment to other technical amendments will show that the 1999 amendment was incorrectly labeled as a technical amendment because it constituted a substantive change in copyright law.

*A. The 1999 Amendment: A Substantive Change in Copyright Law*

It was believed at the time the 1999 amendment was passed, that the addition of sound recordings to the list of commissioned works eligible for work-for-hire status codified the record companies' existing practice of registering their ownership of sound recordings as works made for hire.<sup>194</sup> However, in order for that to have been the case, sound recordings would have needed to qualify for work-for-hire status under either prong of the work-for-hire test. An examination of the relationship created between record companies and artists as a result of recording contracts demonstrates that their contractual relationship does not create an employer-employee relationship. In addition, sound recordings did not fit under any of the specified "specially ordered or commissioned works" before Congress added them as a category in the 1999 amendment. An examination of other technical amendments passed by Congress proves that the 1999 amendment was a substantive change in the law.

*1. Employer/Employee Relationships*

Due to the repeal of the 1999 amendment, it is unclear as to whether sound recordings created under a typical sound recording contract qualify as works made for hire.<sup>195</sup> Courts confronted with the issue of whether a specific sound recording fits within the works made for hire definition would first have to consider whether there was evidence of an employer-employee relationship between the artist and the record company.<sup>196</sup> One major problem is that "there is little direct authority on how the [*Reid*] test should . . . be applied to recording artists."<sup>197</sup> Therefore, it is doubtful that the test would be applied uniformly by the courts, which could lead to a situation where some

---

194. *Id.*

195. *Hearings, supra* note 91, at 90 (statement of Marybeth Peters, Register of Copyrights). While most recording contracts contain provisions specifying that the sound recordings are works made for hire, these statements are not necessarily definitive. *Id.*

196. *Id.*

197. Peter Jaszi, *Letter of Law Professors Opposing Addition of Sound Recordings to Commissioned Works Made for Hire Provisions*, at <http://www.recordingartistscoalition.com/letter.html> (last visited Jan. 23, 2001).

artists are considered employees and others are considered independent contractors.<sup>198</sup> However, the factors set out by the Supreme Court in *Reid* will show that most recording contracts do not make artists employees of their record companies.<sup>199</sup>

a. The Right to Control

The first factor that a court would use to determine whether an employer-employee relationship was established is the record company's right to control the process of the creation of the sound recording.<sup>200</sup> The effect of this factor depends on the artist's stature in the music business.<sup>201</sup> There are many contractual provisions that can be negotiated in order to give an artist more creative control if the artist is already established in the industry.<sup>202</sup>

The first provision of a record contract that demonstrates the record company's right to control the artist is the clause regarding the quality of the artists' master recording.<sup>203</sup> Recording contracts will often contain a provision that requires each master to be "commercially satisfactory"<sup>204</sup> to the record company.<sup>205</sup> This provision establishes more control for the record companies because they can order an artist to re-record a song that they feel is not acceptable for commercial release at the artist's own expense.<sup>206</sup> This standard gives the record company more power over the artists' work because it sets out a purely subjective standard to determine whether the work is commer-

---

198. *Id.*

199. For a list of the *Reid* factors, see *supra* note 48 and accompanying text.

200. *Community for Creative Non-Violence et al. v. Reid*, 490 U.S. 730 (1989); see also Ryan Ashley Raforth, *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, 1033 (2000).

201. DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 107 (4th ed. 2000). A "new artist" is "someone who has never before had a record deal, or someone who has been signed [to a deal], but [has] never sold over 250,000 or so albums per release." *Id.* This term refers to an artist who was once popular, but has since lost her record deal due to a lack of success. *Id.* A "midlevel artist" is someone whose last album sold between 750,000 and 1,500,000 copies. *Id.* The term "superstar" generally refers to an artist who has sold more than 2.5 million albums. *Id.* The more established the artist, the more artistic control she will likely retain over her recordings. See HALLORAN, *supra* note 2, at 332. On the other hand, a new artist may have to defer more to the preferences of the record company. *Id.*; see also Raforth, *supra* note 200, at 1033.

202. See HALLORAN, *supra* note 2, at 326.

203. See Raforth, *supra* note 200, at 1034.

204. If a record contract requires the artist to deliver commercially satisfactory recordings, it means that the company only has to accept recordings that it believes it will sell. PASSMAN, *supra* note 201, at 124. See generally, Raforth, *supra* note 200, at 1034.

205. PASSMAN, *supra* note 201, at 124.

206. *Id.*

cially acceptable.<sup>207</sup> However, most established artists try to negotiate that the recording must only be “technically satisfactory,” meaning that it merely needs to be recorded in a professional manner.<sup>208</sup> This second provision gives the record companies less control over the work because they would have to accept the master as long as it was recorded without technical difficulties.<sup>209</sup>

Second, a record company may attempt to claim a right of approval over the songs that will be recorded for an album of a new artist.<sup>210</sup> Historically, record companies have deferred to artists’ creative decisions, but industry-wide economic problems ended that practice in the 1970s.<sup>211</sup> Although it is unlikely that a new artist would be given the right to select which songs to record without the record company having a right of approval, it is generally not disputed which songs should be recorded.<sup>212</sup> In contrast, a more established artist would be more likely to negotiate for more artistic control over the album.<sup>213</sup>

A final issue of control between artists and record companies is the right to name a producer.<sup>214</sup> The record producer is generally one of the most important individuals involved in creating a sound recording.<sup>215</sup> It is common for most recording contracts to state that the producer must be chosen by both the artist and the record company.<sup>216</sup> In many recording contracts, the right to approve the producer is the most significant creative control that the record company is granted.<sup>217</sup> Like many other provisions in recording contracts, this

207. HALLORAN, *supra* note 2, at 332.

208. PASSMAN, *supra* note 201, at 124. If the artist’s contract requires only a technically satisfactory recording, then the record company must accept anything the artist delivers as long as it is made without any technical deficiencies, such as hissing or skips. *Id.* While newer artists will most likely have to accept a “commercially satisfactory” clause in their contracts, more established artists can generally negotiate for the “technically satisfactory” clause. *Id.* Superstars can negotiate for a clause that is even more favorable with the contract stating that “the recordings must only be of a ‘style’ . . . similar to [their] previous recordings.” *Id.*

209. *Id.*

210. HALLORAN, *supra* note 2, at 332; Raforth, *supra* note 200, at 1033.

211. KRASILOVSKY, *supra* note 3, at 19.

212. HALLORAN, *supra* note 2, at 332.

213. *Id.*

214. HALLORAN, *supra* note 2, at 332.

215. Producers are often instrumental in the artistic creation of the recording. The producer is responsible for overseeing the creative process of the recording, which means “selecting songs, deciding on arrangements,” and choosing the right sound for the album. PASSMAN, *supra* note 201, at 133. Producers also have to “take care of all the administration, such as booking studios,” hiring and paying musicians, and maintaining the recording budget. *Id.*

216. HALLORAN, *supra* note 2, at 342.

217. *Id.*

provision can be negotiated by the artist if the artist has enough bargaining power.<sup>218</sup>

If the record company is granted a right of approval over portions of the creative process, that does not necessarily make the artist an employee.<sup>219</sup> Although the record company may retain a right of control over the finished products, courts tend to look more at control over the details of the product's creation than control over the finished product.<sup>220</sup> The level of control that a record company has over recordings would be determined on a contract-by-contract basis, depending mostly on the prior success of the artist. Therefore, it is difficult to state whether this first *Reid* factor weighs heavily in favor of either the record industry or the artists. If the right to control factor favors the record companies' position, the inquiry still would not be finished.

#### b. The Skill Required for the Work

In *Reid*, the Court stated that control was not the sole determining factor in the employer-employee analysis and that all of the factors should be weighed together.<sup>221</sup> Using the Second Circuit's analysis from *Aymes*, the next factor that must be examined is the skill required for the work.<sup>222</sup> In general, recording artists have a high level of musical skill, which indicates an independent contractor relationship between the artist and the record company.<sup>223</sup> Musicians are part of a highly skilled profession in which individual artists are signed to recording contracts based on the record companies' perception of their talent and potential profitability.<sup>224</sup> Musicians utilize skills that result from years of training and practice, which were developed

---

218. HALLORAN, *supra* note 2, at 388. An artist's attorney should try to create a contract provision that gives the artist the exclusive right to select the producer; however, only an established artist will be successful in obtaining that right. *Id.*

219. *See Lulirama Ltd., Inc. v. Axxess Broad. Serv., Inc.*, 128 F.3d 872, 877 (5th Cir. 1997) (holding that the hired party was an independent contractor even though the hiring party had a right to approve the jingles); *see also Raforth, supra* note 200, at 1034.

220. In *High-Tech Video Prods., Inc. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093, 1097 (6th Cir. 1995), the court found that a video producer's control over details of a video project indicated an employer-employee relationship between the producer and the artists making the video. *Id.* However, the weight given to that factor was diminished due to the producer's reliance on the artistic decisions made by the artists. *Id.* *See also Forward v. Thorogood*, 985 F.2d 604 (1st Cir. 1993) (paying for masters and possessing the tapes does not establish work-for-hire relationship); *see also Raforth, supra* note 200, at 1033.

221. *Community for Creative Non-Violence et al. v. Reid*, 490 U.S. 730, 751 (1989).

222. *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992).

223. *Reid*, 490 U.S. at 751. In *Reid*, the Court found that Reid's high level of skill as a sculptor indicated that he was hired by CCNV as an independent contractor. *Id.*

224. *See HALLORAN, supra* note 2, at 319.

before the signing of the record agreement.<sup>225</sup> For example, singer Sheryl Crow received a bachelor's degree in piano performance from the University of Missouri before she became a successful recording artist.<sup>226</sup> Similarly, the Court in *Reid* found the fact that Reid was a sculptor, which it considered a skilled occupation, was evidence that Reid was hired as an independent contractor.<sup>227</sup> The standard set out in *Aymes* was that a court should examine the "skill necessary to perform the work."<sup>228</sup> It is undeniable that it requires a high level of skill to be a successful professional musician; therefore, this factor would weigh against a finding that recording artists are employees of the record companies.

### c. Payment Structure and Payment of Benefits

The next *Reid* factor to be considered when using the *Aymes* formulation would be the payment structure and the payment of benefits.<sup>229</sup> The royalty payment arrangement used in most recording contracts generally indicates an independent contractor relationship.<sup>230</sup> Record companies do not pay artists wages or fixed salaries based on the number of hours that they work, but they do pay other employees in that way.<sup>231</sup> When an artist signs a recording contract, she is generally given a fund that is used as a budget for recording her album.<sup>232</sup> Most artist agreements contain a royalty payment arrangement in which the

---

225. See *Hilton Int'l v. NLRB*, 690 F.2d 318, 322 (2d Cir. 1982) (stating that band musicians are members of a "highly skilled members of a clearly distinctive occupation").

226. *Hearings*, *supra* note 91, at 164 (statement of Sheryl Crow).

227. 490 U.S. at 752.

228. *Aymes v. Bonelli*, 980 F.2d 857, 862 (2d Cir. 1992). See *Marco v. Accent Publ'g Co.*, 969 F.2d 1547 (3d Cir. 1992). The United States Court of Appeals for the Third Circuit rejected the argument that the position of a staff photographer did not require "more than a minimal knowledge of photography." *Id.* at 1551. The court went on to say that although technology lowered the amount of expertise once needed to be successful in the photography profession, "something beyond owning a camera is necessary to make photographs suitable for a trade journal." *Id.*; see generally *Raforth*, *supra* note 200, at 1038-39.

229. *Aymes*, 980 F.2d at 862.

230. *Frisch*, *supra* note 160, at 219.

231. *Id.* at 218-219.

232. *PASSMAN*, *supra* note 201, at 110. A recording fund encompasses recording costs in addition to any amount that the artist might receive as an advance. *Id.* The amount that an artist might receive for a recording fund varies greatly with the stature of the artist. *Id.* at 111. A new artist could receive anywhere from \$5,000 to \$300,000 depending on the type of label with whom she signs. *Id.* A midrange artist can generally receive \$300,000-\$600,000 as an advance. *Id.* Meanwhile, a superstar can successfully demand an advance over \$1.5 million. *Id.* For example, when R.E.M. signed a record deal with Warner Brothers in 1996, they were reportedly guaranteed a \$10 million advance per album. *Top of the Chart, R.E.M. Signs Record Contract*, *St. LOUIS POST*, Aug. 26, 1996, at 1.

artist will receive a certain percentage of each album sold.<sup>233</sup> Before the artist receives royalty payments, money that the record company has provided the artist is considered an advance and is recouped by the record company.<sup>234</sup>

---

233. PASSMAN, *supra* note 201, at 108. Royalty percentages generally range from nine to thirteen percent for a new artist. *Id.* An artist, who has been successful in the past, can expect to receive royalties between fifteen and twenty percent. *Id.* These percentages are based on the suggested retail list price of the album absent the taxes. KRASILOVSKY, *supra* note 3, at 19.

While a twelve percent royalty might sound reasonable, the amount of money the artist actually receives from that twelve percent is significantly lower due to a number of deductions taken by the record company. *Id.* First, the producer's royalties for an album, which are approximately three percent, are deducted from the artist's percentage. KRASILOVSKY, *supra* note 3, at 21. Second, a deduction for the cost of packaging reduces the artist's base royalty by twenty-five percent. *Id.* at 20. The rationale for this is that the artist should receive a royalty based on the music alone, not on the artwork or designs added by the record company. *Id.* Third, artists' royalties are reduced by another fifteen percent to compensate the record companies for records given away to distributors for promotional purposes. *Id.* at 21. Fourth, record companies withhold a percentage of the artist's royalties, around thirty-five percent, as a reserve when stores return unsold albums to the distributor. *Id.* Finally, record companies reduce the artist's royalty rate for compact discs by fifteen to twenty percent, in order "to be reimbursed for their research and development costs as well as for higher costs of manufacture." *Id.*

For example, a typical royalty calculation on a compact disc with a retail price of \$14.98, where the artist's base royalty is twelve percent would look something like this:

"12 percent – 3 percent (producer's royalty)	= 9 percent
9 percent × .75 (25 percent reduction for packaging)	= 6.75 percent
6.75 percent × .85 (15 percent for "free goods")	= 5.74 percent
5.74 percent × .80 (20 percent reduction for compact discs)	= 4.59 percent
4.59 percent × .65 (35 percent reduction for reserves)	= 2.98 percent
2.98 percent of \$14.98	= \$0.447."

KRASILOVSKY, *supra* note 3, at 21-22.

Therefore, the artist actually receives significantly less than the twelve percent royalty payment provision in the contract.

Some contracts provide that the royalty rate for the album will increase once it has sold a certain number of copies. PASSMAN, *supra* note 201, at 109. Generally, an artist's royalty percentage will increase approximately one percent once her record sales reach between 500,000 and 1,000,000 copies. *Id.* The royalty rates also depend on the type of sale that has occurred; some sales, such as those through mail order distributors get an even smaller royalty percentage. See HALLORAN, *supra* note 2, at 342-344.

234. KRASILOVSKY, *supra* note 3, at 23. Recording costs can vary depending on a variety of factors, such as the size of the project, the price of the producer, and "the complexity of the recordings." *Id.* In addition to recouping recording costs from the artist, most record companies now also charge the artist for at least half of the promotional costs. See Tonya Pendleton, *For Hip-Hop and R&B Artists, the Price of Fame can be Bankruptcy*, PHILADELPHIA DAILY NEWS, Apr. 1, 1998, at 1. These promotional costs encompass costs for travel, makeup, wardrobe, promotional parties, merchandise, and videos. *Id.* For example, the cost of a video could run as high as \$250,000. *Id.* Another problem for artists is that the record company will recover its expenditures for all of the artist's recordings before the artist receives any royalties. KRASILOVSKY, *supra* note 3, at 23. Therefore, if an artist finally has a successful album in her third attempt and the recording costs for that album are recouped by the company, she still will not receive any royalty payments until the recording costs for her first two albums have been recouped. *Id.*

In this situation, the record company is analogous to a mortgage bank that provides a person with a loan to purchase a new home.<sup>235</sup> Just as a homeowner must continuously reimburse a mortgage bank for its loan until it is completely repaid, the artist must allow the record company to deduct the advance from royalty payments until it has recouped the entire advance.<sup>236</sup> The major difference between these two arrangements is that, unlike a homeowner who takes ownership of his house after the mortgage is completely paid off, the recording artist pays off the advance while the record company continues to own the rights to the recording.<sup>237</sup>

It is common for a new artist to receive a large advance at the beginning of the contract that she cannot pay off with the royalties of the song.<sup>238</sup> The artist, therefore, is not guaranteed to ever profit from the recording because the royalties are based on the commercial success of the album.<sup>239</sup> This type of royalty payment arrangement differs greatly from a typical employment relationship where the employee would be paid either in hourly wages or by salary. Thus, the royalty payment structure strongly suggests that artists are independent contractors of record companies, not employees.<sup>240</sup>

In some cases, a record company pays an artist annual compensation. For example, in California, a record company is required to pay the artist a guaranteed nine thousand dollar annual salary, which enables the company to get an injunction against the artist in the case of a breach of contract.<sup>241</sup> This requirement applies to all members of a group; therefore, record companies must choose whether the option

---

235. *American Federation of Television and Radio Artists Position on "Works Made for Hire" and Section 101 of the Copyright Act*, at <http://www.recordingartistscoalition.com/aftra.html> (last visited Feb. 28, 2001).

236. *Id.*

237. *Id.*

238. HALLORAN, *supra* note 2, at 338.

239. David Segal, *Aspiring Rock Stars Find Major-Label Deals - - and Debts*, WASHINGTON POST, May 13, 1995, at A1. Generally, a band would have to sell at least 400,000 albums to ever see any royalties. *Id.* However, that type of success is extremely rare considering less than fifteen percent of the sound recordings released by major record companies recoup their costs. *Hearings, supra* note 91, at 125 (statement of Hilary Rosen, President of RIAA). Out of the 37,857 albums released in 1998, only 233 sold over 250,000 units and only 437 sold over 100,000 units. *Id.*

240. Frisch, *supra* note 160, at 219.

241. LAWRENCE J. BLAKE, *THE MUSICIAN'S BUSINESS & LEGAL GUIDE*, 367 (2d ed. 1996). California Civil Code § 3423 used to require that an artist receive a six thousand dollar guaranteed minimum payment per year if the company wanted to receive an injunction against the artist for breach of contract. *Id.* In 1993, the statute was amended to require a minimum payment of \$50,000 per year. *Id.* When the record companies discovered this amendment, they lobbied for a revision to the law. *Id.* Eventually in 1994, the amount was amended back down to \$9000 per year. *Id.*



of injunctive relief is worth the cost of paying the artists an annual salary.<sup>242</sup> In some cases, the record company could choose only to pay this annual compensation to the key members of the group.<sup>243</sup> If the company were to pay an annual compensation to only select members of a group, it would be extremely difficult to determine whether the group as a whole is an employee of the company. As a result, situations may arise where certain members of a group would be considered employees, and others independent contractors. If the company does make these annual payments, the relationship between the company and the artist resembles more of an employer-employee relationship, rather than parties involved in a typical royalty based recording agreement.

In addition, the fact that record companies generally do not pay employment benefits for their artists indicates an independent contractor arrangement.<sup>244</sup> In *Aymes*, the Second Circuit found that the company's failure to pay the computer programmer employment benefits to be a primary factor in finding an independent contractor arrangement between the two parties.<sup>245</sup> Similarly, recording artists typically do not receive health insurance or any other benefits from their record company, even though other record company employees receive these benefits.<sup>246</sup> This fact clearly indicates that recording artists are independent contractors for the record companies.

#### d. Tax Treatment of the Hired Party

The fourth essential *Reid* factor to be considered under *Aymes* is the tax treatment of the hired party.<sup>247</sup> Many times, a strong indication of a worker's employment status can be obtained by examining how the employer treats the worker for tax purposes.<sup>248</sup> Record com-

---

242. The need for injunctive relief usually comes into play when the artist decides to record for another label. *Id.*

243. HALLORAN, *supra* note 2, at 367. The record company would not be without relief if they decided not to pay these annual payments because they could still to recover damages from the group. *Id.*

244. *Community for Creative Non-Violence et al. v. Reid*, 490 U.S. 730, 752 (1989); *see generally* Raforth, *supra* note 200, at 1037.

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

246. Frisch, *supra* note 160, at 219.

247. *Aymes*, 980 F.2d at 861.

248. *Hi-Tech Video Productions, Inc. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093, 1097 (6th Cir. 1995) (holding that the defendant's copyright of plaintiff's video as work made for hire was not valid). *See also* Natkin v. Winfrey, 111 F. Supp. 2d 1003, 1009-10 (N.D. Ill. 2000) (holding that photographers for Oprah Winfrey show were not employees of the production company because the company's IRS reports described its payments to the photographers as non-employee compensation).

panies do not withhold federal or state income taxes for artists.<sup>249</sup> Artists also do not have any social security taxes taken out of their royalty payments.<sup>250</sup> In addition, artists do not receive any unemployment benefits.<sup>251</sup> Although, record companies make their required contributions to the musician's unions;<sup>252</sup> the fact that record companies typically do not pay taxes for their artists demonstrates that the companies and artists have an independent contractor relationship.<sup>253</sup>

e. Right to Assign Additional Projects to Hired Party

The final *Reid* factor under *Aymes* is the right of the hiring party to assign additional projects to the hired party.<sup>254</sup> A typical recording agreement contains a minimum recording commitment, as well as a number of option periods.<sup>255</sup> Generally, an artist is required to record one album within the initial period of the agreement.<sup>256</sup> The record company then retains the exclusive right to exercise an option to keep the artist for another recording.<sup>257</sup> The typical contract for a new artist permits a "one-sided renewal" by the record companies for seven additional albums.<sup>258</sup> Generally, these options do not cover specific periods of time, but they run until the artist completes the requested album.<sup>259</sup> In addition, most recording contracts contain exclusivity provisions so the artist can record only for that company.<sup>260</sup> This means that only the contracting company has the right to request recordings from the artist throughout the term of the contract.<sup>261</sup> There

249. Frisch, *supra* note 160, at 219.

250. *Id.*

251. *Id.*

252. HALLORAN, *supra* note 2, at 350. Generally, record companies are required to make payments to the union's health and retirement funds. *Id.* These payments generally amount to approximately one percent of the retail price of the album. *Id.*; see also Frisch, *supra* note 160, at 219.

253. The Second Circuit in *Aymes* found the tax treatment of the hired party to be one of the most important factors in the test. 980 F.2d at 862-63. The failure to pay taxes for the hired party demonstrates that the record company considers the artist to be an independent contractor. *Id.*

254. *Id.* at 861.

255. HALLORAN, *supra* note 2, at 329. "All major label . . . recording contracts . . . must be approved by the American Federation of Musicians," which generally favors agreements that do not last for more than five years. KRASILOVSKY, *supra* note 3, at 15.

256. HALLORAN, *supra* note 2, at 329.

257. *Id.*

258. *Id.*

259. MCA Records, Inc. v. Newton-John, 90 Cal. App. 3d 18 (1979). Record companies in California were forced to change contract terms so they would expire based at the completion of a recording rather than the end of a specific period of time. *Id.* See also HALLORAN, *supra* note 2, at 350.

260. *Id.* at 333.

261. *Id.*

are various exceptions to these exclusivity provisions, including exceptions that allow the artist to appear as a backup musician for other artists.<sup>262</sup> Nonetheless, this factor does not weigh significantly in favor of either party, because while the record company is the sole party that can exercise the options on a recording contract, it generally cannot add recording requirements to the provisions of the contract.<sup>263</sup>

f. The Effect of the Remaining *Reid* Factors

Several of the other *Reid* factors weigh in favor of finding an independent contractor relationship between the record companies and recording artists. The unstructured format of a recording artist's relationship with the record company indicates that the recording artist is not an employee of the company. Another *Reid* factor is the extent of the hiring party's discretion over when and how long to work.<sup>264</sup> This factor favors the artists because they generally set their own work schedules and only face deadlines for completion of the project.<sup>265</sup> In addition, most artists choose their own backup musicians and production staff.<sup>266</sup>

The location of the work factor favors the artist because she generally has the ability to choose the location of the recording studio.<sup>267</sup> In addition, recording artists are usually responsible for providing their own song material, as well as instruments for the recording sessions.<sup>268</sup>

The fact that the recordings are part of the regular business of the record companies may weigh in favor of the record companies.<sup>269</sup> This is different from the situation in *Reid* because CCNV did not regularly commission sculptures as part of their business.<sup>270</sup> Although this factor favors the record company, it does not outweigh the other factors that favor the artist. Thus, a typical recording contract does not create an employer-employee relationship between the artist and the record company. "If inevitable, routine participation sufficed to transform the hiring party into a work-for-hire author, *Reid* would be

---

262. *Id.* at 334-35. These "sideman" exceptions allow the artist to appear with other artists on their albums, as long as it is in a backup role. *Id.*

263. Frisch, *supra* note 160, at 219.

264. *Community for Creative Non-Violence et al. v. Reid*, 490 U.S. 730, 751-53 (1989).

265. Frisch, *supra* note 160, at 219. Similarly, in *Reid*, the artist chose his own work hours. 490 U.S. at 753. In addition, the Court found an independent contractor relationship even though *Reid* faced a deadline, which he missed by twelve days, for the creation of the sculpture. *Id.*

266. HALLORAN, *supra* note 2, at 340.

267. *Id.*

268. Frisch, *supra* note 160, at 220.

269. KRASILOVSKY, *supra* note 3, at 203; *see also* Raforth, *supra* note 200, at 1038-39.

270. *Reid*, 490 U.S. at 753.

eviscerated and the law would retrogress to the ‘actual supervision and control rule’ . . . .”<sup>271</sup> Therefore, based on a balancing test of the factors set out in *Reid*, a recording artist would not be considered an employee of the record company.

## 2. *Sound Recordings as Commissioned Works*

It is at best questionable whether the employment relationship created by a record agreement would have qualified sound recordings as works made for hire; therefore, the only way that the 1999 amendment could have been considered a technical amendment was if sound recordings clearly fit under the second prong of the work-for-hire definition.<sup>272</sup> For sound recordings to have fit this definition, they must have qualified as one of the enumerated types of commissioned works that are eligible for work-for-hire status.<sup>273</sup> The RIAA’s main argument in response to artists’ criticism of the amendment was that sound recordings did in fact fit within the categories of commissioned works eligible for work-for-hire status, even before the 1999 amendment.<sup>274</sup> This argument centered around only a few of the listed categories. Some categories, such as a translation, an instructional text, a test, answer material for a test, or an atlas, can be eliminated immediately. This leaves the categories of audiovisual works, contributions to collective works, compilations, and supplemental works as the remaining possibilities.<sup>275</sup> An examination of these remaining categories clearly demonstrates that sound recordings had not obtained work-for-hire status as commissioned works before the 1999 amendment.

### a. *Audiovisual Works*

Sound recordings cannot fit under the “audiovisual works” provision in the works-for-hire definition. Under the 1976 Copyright Act (Act), audiovisual works are defined as:

works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accom-

---

271. *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 314 (S.D.N.Y. 2000) (finding that a photographer for a catalog was not an employee of the company).

272. For a list of the defined categories, see *supra* note 35.

273. See *Easter Seal Soc’y for Crippled Children & Adults v. Playboy Enters.*, 815 F.2d 323, 328 (5th Cir. 1987).

274. Hilary Rosen, *The Letter that Billboard Refused to Print*, at [http://www.riaa.com/News\\_Story.cfm?id=274](http://www.riaa.com/News_Story.cfm?id=274) (Jan. 12, 2000). In her letter to Billboard, Hilary Rosen, the CEO of RIAA, argued that sound recordings already had work-for-hire status because they have always been considered either compilations or contributions to collective works. *Id.*

275. Raforth, *supra* note 200, at 1041.

panying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.<sup>276</sup>

From this definition, it seems that the focus of audiovisual works is on the images that are shown, with the sounds only being an accompaniment to those images.<sup>277</sup> Nevertheless, it has been argued that purely audio works can fit within that definition even if they do not contain any images.<sup>278</sup> In *Lulirama Ltd. Inc. v. Axxess Broadcasting Services*,<sup>279</sup> the United States Court of Appeals of the Fifth Circuit held that the category "audiovisual works" did not encompass works that merely contain audio components because the Act's definition of sound recordings<sup>280</sup> encompasses any purely audio work.<sup>281</sup> If the Fifth Circuit had decided that sound recordings qualified as audiovisual works, Congress' decision to list audiovisual works and sound recordings separately in the definition section of the 1976 Act would have been redundant.<sup>282</sup> Following the reasoning in this decision, it is evident that sound recordings were not works made for hire as commissioned audiovisual works before the 1999 amendment.

However, the recent popularity of multimedia compact discs may qualify some sound recordings as audiovisual works and, therefore, works made for hire. Many artists have recently begun to release their recordings on compact discs that, when played from a computer, are accompanied by images.<sup>283</sup> If the contracts for these works contain clauses that the recordings were being used as part of an audiovisual work, then these recordings would qualify for work-for-hire status, as long as the contract also contained a work-for-hire provision.

#### b. Supplemental Works

Another commissioned works category that sound recordings could arguably fall under is the supplemental works category. However, the only way a sound recording could qualify as a supplementary work is

---

276. 17 U.S.C. §101 (1994).

277. *Lulirama Ltd. Inc. v. Axxess Broad. Servs.*, 128 F.3d 872, 877-78 (5th Cir. 1997).

278. *Lulirama*, 128 F.3d at 877 (holding jingles written by independent contractor for advertising agency did not qualify for works made for hire under the specially ordered or commissioned works prong of the definition).

279. 128 F.3d 872, 877 (5th Cir. 1997).

280. For a definition of sound recordings, see *supra* note 133.

281. *Lulirama*, 128 F.3d at 878; Raforth, *supra* note 200, at 1041-42.

282. *Lulirama*, 128 F.3d at 878.

283. For example, Sarah McLachlan's "Surfacing" and Jewel's "Joy: A Holiday Collection" are both "enhanced" or "hyper" compact discs that produce images when played through a computer. SARAH McLACHLAN, *SURFACING* (Arista Records 1997); JEWEL, *JOY: A HOLIDAY COLLECTION* (Atlantic Records 1999).

if the recording was created as a “secondary adjunct” to a prior work.<sup>284</sup> Most sound recordings do not fit within the statutory description of supplemental works. A majority of sound recordings are comprised of original material and not based on a pre-existing work.<sup>285</sup> In addition, it is difficult for an artist to sample<sup>286</sup> another artist’s preexisting recording because of the high cost of licensing.<sup>287</sup> While this category may allow written musical arrangements to qualify for work-for-hire status, it does not apply to sound recordings.<sup>288</sup> Even if the artist’s work was based on a preexisting underlying work, the recording would have to fulfill one of the statutory purposes of a supplemental work.<sup>289</sup> Because it is unlikely that most sound recordings are created to fulfill one of these statutory purposes, the argument that sound recordings qualify as works made for hire as supplemental works would fail.

### c. Compilations

The third possible commissioned works category that could encompass sound recordings is the compilation category; however, most sound recordings do not qualify for works-for-hire status as compilations.<sup>290</sup> The Act defines a compilation as “a work formed by the collection and assembling of preexisting materials that are selected, coordinated or arranged in such a way that the resulting work as a

---

284. A supplemental work, for purposes of the works-for-hire definition, is a work “prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work.” 17 U.S.C. § 101 (1994). This statute gives the examples of maps, charts, forewords, editorial notes, musical arrangements, bibliographies, and indexes as works that would be considered supplemental works. *Id.*; see also Raforth, *supra* note 200, at 1044.

285. HALLORAN, *supra* note 2, at 331. Record contracts typically contain a provision that requires an artist to produce original works of music for the album. *Id.*

286. “The term *digital sampling*, or *sampling* refers to the recording of a sound, or a portion of a previously existing sound recording, with the aid of a device that can store the recording in binary form in the memory of a computer.” AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 1287 (2d ed. 1996).

287. *Id.* at 1417. An artist must sign a warranty in a record contract that none of the material on his album violates or infringes upon any rights of a third party. BLAKE, *supra* note 242, at 360. In order to use another artist’s material without infringing his rights, the artist using the material must obtain a license to use the preexisting work. KOHN, *supra* note 286, at 1299. These licenses range in price, depending on the popularity and bargaining power of the original song and artist, because there is no set fee for a sampling license. *Id.* at 1300. A typical sampling license could cost from \$1,500-\$5,000 for a buy out or it could cost the artist a half-cent to three cents of royalties. *Id.* at 1417.

288. KRASILOVSKY, *supra* note 3, at 204.

289. For a list of the statutory purposes of a supplemental work, see *supra* note 284. See also Raforth, *supra* note 200, at 1044 n.119.

290. Raforth, *supra* note 200, at 1043.

whole constitutes an original work of authorship.”<sup>291</sup> The key is that most sound recordings do not consist of pre-existing material, but rather of newly recorded material.<sup>292</sup> “A song is a fully integrated work rather than an assembled collection of separately preexisting materials; the parts of a song — such as voice and instrumental number — are assembled to form a ‘unitary’ whole.”<sup>293</sup>

If the song itself does not qualify as a compilation, then it must be argued that the album as a whole is a compilation, with the songs equaling the pre-existing work and the album being the arrangements of those works.<sup>294</sup> However, this argument fails for two reasons. First, an album lacks the necessary creativity to be considered an “original work of authorship.”<sup>295</sup> Second, an album can be considered a unified work, which has an underlying theme and design.<sup>296</sup> In order for an album to be considered a compilation, there must be originality in the selection and arrangement of the songs on the album.<sup>297</sup> Under the compilation provision, sound recordings would not have qualified as works made for hire before the 1999 amendment because the majority of record albums created under record contracts do not meet the originality requirements necessary to be a copyrightable compilation.

However, it can be argued that there are some record albums that would qualify as compilations. For example, live albums could qualify as compilations, presuming that the album does not include an entire performance but rather a selection of certain highlights of a live per-

---

291. 17 U.S.C. § 101 (1994).

292. Recording contracts generally have a provision that the material for an album must consist of the artist’s “newly recorded studio performances.” HALLORAN, *supra* note 2, at 331.

293. Raforth, *supra* note 200, at 1043. *See also Hearings, supra* note 91, at 143 (statement of Professor Paul Goldstein) (stating that the argument that the recording of an individual song constitutes a compilation is weak because most, if not all, copyrightable works can be dissected in a similar way).

294. Raforth, *supra* note 200, at 1042.

295. *Feist Publications, Inc., v. Rural Tel. Serv.*, 499 U.S. 340 (1991). The Supreme Court set out the originality requirements that a compilation must meet to satisfy the “minimal amount of creativity” standard. *Id.* The Court required that there be a “discretionary selection and assembly of works” from among a larger collection of pre-existing works. *Id.* Most record albums would not meet this standard because they usually contain all of an artist’s newly recorded material, so no selection is necessary. Raforth, *supra* note 200, at 1043.

296. Sheryl Crow stated that a sound recording is “the final result of the creative vision, expression, and execution of one person- the featured artist.” *Hearings, supra* note 91, at 166. (statement of Sheryl Crow). She compared her albums to movies, a story with a beginning, a middle, and an ending. *Id.* at 165. When creating an album, she tries to “create a feel that will take the listener on a journey.” *Id.* This is a perfect description of an album as a unitary whole, and as such, it cannot be considered a compilation. *See also Raforth, supra* note 200, at 1043.

297. KRASILOVSKY, *supra* note 3, at 204.

formance or multiple performances.<sup>298</sup> Live albums are not very prevalent in the recording industry as they do not generally fulfill the requirements of a recording contract.<sup>299</sup> Although live albums may qualify as compilations, this exception does not warrant the claim that all sound recordings were works made for hire before the 1999 amendment.

#### d. Collective Works

The final commissioned works category that may include sound recordings is the contributions to collective works section.<sup>300</sup> The Act defines a collective work 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.”<sup>301</sup> A collective work is basically a compilation that includes independently copyrightable works.<sup>302</sup> In order for a sound recording to be considered a contribution to a collective work, the album for which it was created must then be a collective work.<sup>303</sup> For example, a Christmas album that contains recordings by different artists could be considered a collective work.<sup>304</sup> However, it is unlikely that a record album would be considered a collective work for the same reasons that it would not qualify as a compilation.<sup>305</sup> As stated above, most artists produce masters only for songs that are going to be included on the album; the record company does not need to use any

---

298. *Feist*, 499 U.S. at 340. An album that merely contains a recording of an entire live performance would not meet the minimal creativity standard set out in *Feist*. *Id.* However, some artists release albums that contain recordings of performances from different concerts and the selection of these different recordings may meet the minimal creativity requirement.

299. See HALLORAN, *supra* note 2, at 332. If an artist has been successful enough to create a demand for a live album, a record company will release a live album even though it generally will not count toward that artist’s contractual recording requirements. *Id.*

300. Raforth, *supra* note 200, at 1043; Frisch, *supra* note 160, at 222.

301. 17 U.S.C. § 101 (1994).

302. Raforth, *supra* note 200, at 1043.

303. *Id.*

304. *Hearings*, *supra* note 91, at 152 (statement of Professor Marci Hamilton). Additionally, Professor Jaszi has stated, “It would strain ordinary principles of statutory construction (to say nothing of common sense) to extend this rubric to the individual musical selections making up an album of songs created as an artistic unit by a single recording artist.” Peter Jaszi, *Letter of Law Professors Opposing Addition of Sound Recordings to Commissioned Works Made for Hire Provisions*, at <http://www.recordingartistscoalition.com/letter.html> (last visited Feb. 28, 2001).

305. Raforth, *supra* note 200, at 1043. Collective works require the same minimal amount of creativity required for compilations. *Id.* The selection of materials for an album does not satisfy that requirement. *Id.* But see *Hearings*, *supra* note 91, at 143 (statement of Professor Paul Goldstein) (claiming that the contribution of a recording “as one of several selections on a CD . . . will typically constitute a contribution to a collective work.”).



amount of creativity in selecting them for the album.<sup>306</sup> In addition, the artists could argue that the recordings were not commissioned to be a part of a collective work because the recordings can also be sold individually as singles.<sup>307</sup> The record companies would counter that argument by stating that the singles are only sold as promotional tools for the album.<sup>308</sup>

Courts, when confronted with the issue of whether an album is a collective work, would need to decide on a case-by-case basis whether the selection of songs for the album contained a minimal amount of creativity. It is possible that an artist could produce more recordings than necessary for the album, so the selection of songs chosen for the album could contain the minimal amount of creativity necessary to be a copyrightable work.<sup>309</sup> If this is the case, and the record company does meet the creativity requirement, then the album would be a collective work.<sup>310</sup> The record companies could also argue that albums are separate and distinct from the recordings themselves and, therefore, are similar to encyclopedias and periodicals.<sup>311</sup> If courts were to decide that some individual sound recordings were already works made for hire before the 1999 amendment, it would most likely be under the conclusion that the recordings qualified as collective works.<sup>312</sup> The mere fact that sound recordings do qualify as contributions to collective works does not imply that all sound recordings qualified as works made for hire before the 1999 amendment.<sup>313</sup> This determination would have to be decided on an individual basis, and even if some recordings were collective works, there is no basis for the

---

306. Similarly, Congress noted that a set of three one-act plays would not satisfy the minimal amount of creativity required for collective works. See H.R. REP. NO. 94-1476; see also Raforth, *supra* note 200, at 1043. But see *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 387-88 (5th Cir. 1984) (finding that a television program that combined songs and dances by various artists constituted a collective work); *Roy Export Establishment of Vaduz v. Columbia Broad. Sys.*, 672 F.2d 1095, 1102-03 (2d Cir. 1982) (holding that a film containing clips of Charlie Chaplin movies constituted a collective work), as cited in, *Hearings*, *supra* note 91, at 143 (statement of Professor Paul Goldstein).

307. KRASILOVSKY, *supra* note 3, at 204; Frisch, *supra* note 160, at 223.

308. KRASILOVSKY, *supra* note 3, at 204.

309. Peter Jaszi, *Letter of Law Professors Opposing Addition of Sound Recordings to Commissioned Works Made for Hire Provisions*, at <http://www.recordingartistscoalition.com/letter.html> (last visited Feb. 28, 2001).

310. Frisch, *supra* note 160, at 222.

311. *Id.* at 223.

312. *Id.*

313. Peter Jaszi, *Letter of Law Professors Opposing Addition of Sound Recordings to Commissioned Works Made for Hire Provisions*, at <http://www.recordingartistscoalition.com/letter.html> (last visited Feb. 28, 2001).

record industry's claim that all sound recordings were works made for hire prior to the amendment.

e. The Effect of Work-for-hire Provisions in Record Contracts

Although most record contracts contain provisions that label the artist's recordings as works made for hire, those provisions do not, in and of themselves, make the recordings works-for-hire. Frequently, record companies will attempt to ensure that the artist's recordings are the property of the company by including provisions in the contract that the recordings are being created on a work-for-hire basis.<sup>314</sup> The work-for-hire provisions in recording contracts do not alone qualify the recordings for work-for-hire status unless the recordings fall within one of the enumerated categories of commissioned works.<sup>315</sup> If sound recordings qualified as one of the enumerated commissioned works,<sup>316</sup> the only effect of these contractual work-for-hire provisions is that they would satisfy the written agreement requirement for the commissioned works prong of the work-for-hire definition. If a record contract designates an artist's contribution as a work made for hire, but the contribution is not a work made for hire as defined by the statute, then that clause is merely "an ordinary assignment transferring the artist's share of the sound recording copyright" to the company.<sup>317</sup> The 1999 amendment included sound recordings as a separate category of specially ordered or commissioned works that could qualify for work-for-hire status. If that provision had remained in effect, the work-for-hire provisions in recording contracts would

---

314. HALLORAN, *supra* note 2, at 335-6. A typical recording provision would read as follows:

All masters recorded by Artist during the Term from the inception of the recording thereof and all reproductions derived therefrom, together with the performances embodied thereon, shall be the property of Company for the Territory free from any claims whatsoever by Artist or any person deriving any rights or interests from Artist. Each such master shall be considered a work made for hire for Company; if any such master is determined not to be a work made for hire it will be deemed transferred to Company by this agreement, together with all rights in it.

*Id.*

The companies include the transfer provision because they are aware that it is not certain that sound recordings can qualify for work-for-hire status. *Id.*

315. 1 NIMMER, *supra* note 27, § 5.03[B][2][b], at 5-40.

316. 17 U.S.C. § 101. In order for specially ordered or commissioned works to qualify as works made for hire, there must be a written agreement signed by both parties designating them as such. *Id.*; see also *Playboy Enter. Inc. v. Dumas*, 53 F.3d 549, 560 (2d Cir. 1995) (stating that a legend that confirmed the works were works made for hire would satisfy the writing requirement as long as it was signed by both parties).

317. Peter Jaszi, *Letter of Law Professors Opposing Addition of Sound Recordings to Commissioned Works Made for Hire Provisions*, at <http://www.recordingartistscoalition.com/letter.html> (last visited Feb. 28, 2001).

have successfully fulfilled the written agreement requirement needed to qualify a sound recording as a work-for-hire.

f. The Legislative History of the 1976 Copyright Act

Although a few individual sound recordings may have qualified as works made for hire as contributions to collective works before the 1999 amendment, most would have fallen outside of the definition. In fact, before the 1999 amendment was passed, two district courts ruled that sound recordings did not qualify for work-for-hire status because they were not specifically listed in the commissioned works prong of the work-for-hire definition.<sup>318</sup> The legislative history of the commissioned works prong of the works-for-hire definition also supports the conclusion that sound recordings did not qualify as works made for hire. In deciding the categories of commissioned works to include as works-for-hire, Congress was concerned about the complications that may arise in the creation of works by a significant number of people, such as movies or encyclopedias.<sup>319</sup> The concern was the potential for great unfairness to the commissioning parties of these works, if each author had been able to retain his termination rights.<sup>320</sup> The list of commissioned works was then created as a compromise between authors, motion picture companies, and the publishing industry.<sup>321</sup> While it is true that numerous people can potentially be involved in the creation of a sound recording, these projects do not compare to the large collaborative effort it takes to create a movie.<sup>322</sup> Therefore, a party that commissions a sound recording would not require the same amount of protection as a motion picture studio.<sup>323</sup>

In fact, the creation of a sound recording is analogous to the creation of a book, as opposed to a motion picture.<sup>324</sup> Like a recording artist, the author of a book forms a concept for the book before she

---

318. *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999); *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999)(claiming, in dicta, that sound recordings are not works-for-hire under the statute because they do not fit within any of the categories of specially ordered or commissioned works).

319. Raforth, *supra* note 200, at 1048-49.

320. *Id.*

321. *Community for Creative Non-Violence et al. v. Reid*, 490 U.S. 730, 746 (1989). Even though Congress was considering adding sound recordings as copyrightable material around the same time the works made for hire provision was being created, sound recordings were never mentioned as a potential category of commissioned works. *Hearings, supra* note 91, at 87 (statement of Marybeth Peters, Register of Copyrights).

322. Raforth, *supra* note 200, at 1049.

323. *Id.*

324. *American Federation of Television and Radio Artists Position on "Works Made for Hire" and Section 101 of the Copyright Act*, at <http://www.recordingartistscoalition.com/aftra.html> (last visited Feb. 28, 2001).

receives input from her publisher.<sup>325</sup> A book publisher generally offers an advance, provides an editor, designs artwork for the cover, and publishes the book for the author.<sup>326</sup> Similarly, the record company offers an advance, provides a producer, designs the cover for the compact disc, and distributes the recording.<sup>327</sup> Although, the functions of a book publisher and record company are similar, it is rarely argued that a book could be a commissioned work made for hire under the Act.<sup>328</sup> In fact, five of the commissioned works categories are related to book publishing;<sup>329</sup> yet, Congress did not want to impair the authors' abilities to remain creators and owners of their works.<sup>330</sup> Therefore, it is logical that sound recording artists, like authors of books, should be able to remain authors of their works. The decision of the legislature not to include sound recordings as commissioned works, when the Act was first drafted, clearly indicates that sound recordings did not qualify as works made for hire before the 1999 sound recording amendment.

The portion of the Act's legislative history that describes the protection for sound recordings also supports the conclusion that sound recordings are not works made for hire.<sup>331</sup> It stated that "the copyrightable elements in a sound recording will usually, though not always, involve 'authorship' both on the part of the performers whose performance is captured and on the part of the record producer responsible for . . . capturing and electronically processing the sounds."<sup>332</sup> However, the House Report goes on to state that, in some instances, a producer might not contribute enough to a recording to warrant a claim of authorship.<sup>333</sup> Even though it mentions the parties who could claim to be the author of a sound recording, the House Report never mentions the contributions of the record companies.

### 3. *The 1999 Amendment as a "Technical Amendment"*

Congress was excused from holding public hearings on the 1999 amendment only because it was classified as a technical amendment.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. The five categories related to book publishing are: a translation, an instructional text, a test, answer material for a test, and an atlas. 17 U.S.C. §101 (1994).

330. *American Federation of Television and Radio Artists Position on "Works Made for Hire" and Section 101 of the Copyright Act*, at <http://www.recordingartistscoalition.com/aftra.html> (last visited Feb. 28, 2001).

331. H.R. REP. NO. 94-1476 at 56 (1976).

332. *Id.*

333. *Id.*

It was unusual for Congress to label an amendment to a twenty-four year-old statute as a “technical and clarifying change.”<sup>334</sup> Technical amendments are generally used to correct poor grammar, misspellings, and other errors that are insignificant to the actual rights granted in the statute.<sup>335</sup> There are clear examples of typical technical amendments included in the Work Made for Hire and Copyright Corrections Act of 2000.<sup>336</sup> For example, section 3(a)(2) of the Work Made for Hire and Copyright Corrections Act of 2000 changes the wording of 17 U.S.C. § 705 to: “The Register of Copyrights shall ensure that records of deposits, registrations, recordations, and other actions taken under this title are maintained, and that indexes of such records are prepared.”<sup>337</sup> Previously, section 705 had read: “The Register of Copyrights shall provide and keep in the Copyright Office records of all deposits, registrations, recordations, and other actions taken under this title, and shall prepare indexes of all such records.”<sup>338</sup> The reordering of the Register of Copyrights’ duties, listed in this provision, does not have any effect on the substance of the provision itself. There were many similar amendments included in the Works Made for Hire and Copyright Corrections Act of 2000 that were classified as noncontroversial corrections to the Copyright Act because they were merely needed to “remove expired sections and clarify miscellaneous provisions.”<sup>339</sup>

Other examples of true technical amendments were included in the Act entitled Technical Corrections to Title 17, United States Code, signed into law in August 1999.<sup>340</sup> Section 1(e) of this bill states: “Section 1202(e)(2)(B) of Title 17, United States Code, is amended by striking ‘category or works’ and inserting ‘category of works.’”<sup>341</sup> This amendment illustrates the exact purpose of a technical amendment because the amendment merely corrects a typographical error in the statute. Similarly, an amendment included in the same bill is used to correct a misspelling of the word “acknowledgment” in section 1320(c) of the Act.<sup>342</sup>

---

334. See Hull, *supra* note 143, at 1.

335. See 1 NIMMER, *supra* note 27, § 5.03[B][2][a][ii], at 5-38.1 n121.7. “Technical amendments are generally used to make the Copyright Act read well.” *Id.*

336. 146 CONG. REC. H7244 (Sept. 6, 2000).

337. *Id.*

338. 17 U.S.C. § 705 (1994); 146 CONG. REC. H7244 (Sept. 6, 2000).

339. 146 CONG. REC. H7244 (Sept. 6, 2000).

340. Technical Corrections to Title 17 United States Code, Pub. L. No. 106-44, 113 Stat. 221 (1999).

341. *Id.*

342. *Id.*

The language of the 1999 amendment illustrates that Congress' decision to classify the amendment as technical was, in fact, hasty.<sup>343</sup> The amendment added the phrase "as a sound recording," after the term "audiovisual work" within the work-for-hire definition.<sup>344</sup> As a result, the statute then stated "as a part of a motion picture or other audiovisual work [sic] as a sound recording,, [sic] as a translation . . . ."<sup>345</sup> Ironically, it would have required a true technical amendment to correct the punctuation errors caused by the 1999 amendment if it had not been repealed.<sup>346</sup>

In contrast to the examples of true technical amendments discussed above, the 1999 sound recording amendment changed the substantive rights of copyright owners by automatically qualifying sound recordings as eligible for work-for-hire status. This type of change differs dramatically from a spelling correction or a grammatical adjustment. In order for the 1999 amendment to have qualified as a technical amendment, it would have to have been clear that sound recordings were eligible as works made for hire before the amendment was passed. As demonstrated in the above analysis, that is simply not true. By adding sound recordings to the list of works that can be labeled as specially commissioned works, Congress effectively eliminated the termination rights of artists.<sup>347</sup> By no stretch of the imagination can this be considered a technical change. On November 28, 1999, the day before the amendment was passed, artists believed that they would have the ability to reclaim their recordings at some point in the future.<sup>348</sup> The next day that ability was eliminated without so much as a public hearing. At a minimum, the artists were entitled to inform Congress of their concerns over losing their future termination rights. Because the 1999 amendment had such a dramatic effect on the rights of the artists, it could not be considered a technical amendment.

The record industry has argued that the 1999 amendment was merely technical because it had always registered recordings as works-

---

343. See 1 NIMMER, *supra* note 27, § 5.03[B][2][a][iii], at 5-38.1 n121.7.

344. The Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, § 1011(d), 113 Stat. 1501, (codified at 17 U.S.C. § 101 (1994 & Supp. V 1999)), *repealed by* Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379 (2000).

345. 17 U.S.C. § 101 (1994 & Supp. V 1999); 1 NIMMER, *supra* note 27, § 5.03[B][2][a][ii], at 5-38.1 n121.7.

346. 1 NIMMER, *supra* note 27, § 5.03[B][2][a][ii], at 5-38.1 n121.7.

347. See *supra* notes 127-132 and accompanying text.

348. One artist described the termination rights as "[the] light at the end of the tunnel" after years of performing under a contract that heavily favored the record company. *Hearings, supra* note 91, at 177 (statement of Michael Greene, president of NARAS).

for-hire with the Copyright Office.<sup>349</sup> However, the mere practice of registering the recordings as works-for-hire does not actually make them works-for-hire.<sup>350</sup> The Copyright Office does not investigate whether a sound recording, registered as a work-for-hire, actually meets the statutory requirements for that classification.<sup>351</sup> “The fact that the recent amendment . . . corresponds to record industry practice does not make it a technical amendment if that industry practice did not correspond to the legal requirements for works made for hire.”<sup>352</sup>

Additionally, the 1999 Act did not apply the provision retroactively.<sup>353</sup> As a result, a sound recording produced in 2000 would have qualified as a specially commissioned work, but any recording created before the amendment would not have been a work-for-hire, even if there was a signed written agreement labeling it as a work-for-hire.<sup>354</sup> Therefore, even the language contained within the Act made the amendment a substantive change in the law. Thus, Congress should not have passed the amendment without any legislative hearings on the matter.

## V. IMPACT

The passage of the 1999 sound recording amendment did have one positive feature: it opened the door for communication between the recording industry and recording artists on the entire matter. Now that the issue has been brought to the forefront, there is reason to hope that the two groups will be able to create a compromise before artists begin to file termination notices in 2003. The Work Made for Hire and Copyright Corrections Act of 2000 left artists and record companies without a definitive solution on this matter. Both groups would greatly benefit by creating a compromise before the issue is decided by the courts.

---

349. *Hearings, supra* note 91, at 131 (statement of Hilary Rosen, president of RIAA). Ms. Rosen asserted that many artists who own the rights to their own recordings, such as R.E.M. and Dave Matthews, register themselves as authors of the works using the works made for hire doctrine. *Id.* at 131.

350. *Hearings, supra* note 91, at 90 (statement of Marybeth Peters, Register of Copyrights).

351. *Id.*

352. *Id.*

353. The Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, § 1011(d), 113 Stat. 1501, (codified at 17 U.S.C. § 101 (1994 & Supp. V 1999)), *repealed by* Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379 (2000); *see* 1 NIMMER, *supra* note 27, § 5.03[B][2][a][ii], 5-38.2 n. 121.11.

354. 1 NIMMER, *supra* note 27, § 5.03[B][2][a][ii], at 5-38.2.

A. *The Effects of the 2000 Amendment; Courts Will Consider the Change in the Law*

When the representatives for the recording industry and recording artists were working on the compromise that resulted in the Work Made for Hire and Copyright Corrections Act of 2000, their goal was to create a neutral repeal of the 1999 sound recording amendment.<sup>355</sup> In order to achieve this goal, representatives of both parties and members of Congress agreed to include a provision in the 2000 Act that attempts to remove any possible effect of the 1999 amendment on future litigation.<sup>356</sup> This provision was necessary to avoid having courts interpret the amendment's repeal as demonstrating Congress' support for the artists' argument that sound recordings did not qualify as works made for hire. However, it is not clear whether this provision will be effective.

While introducing the Work Made for Hire and Copyright Corrections Act of 2000, Representative Howard Berman stated that Congress was aware of the potential danger that the repeal may be interpreted as a statement by Congress that sound recordings are not eligible for work-for-hire status.<sup>357</sup> Representative Berman cited to *American Automobile Ass'n v. United States*,<sup>358</sup> a case in which the Supreme Court interpreted a retroactive repeal of two sections in the Internal Revenue Code, one year after they were enacted.<sup>359</sup> The Tax Code provisions that Congress enacted in 1954 were the first to specifically permit use of an income accounting system that had been used by industries in the past.<sup>360</sup> One year later, Congress repealed the provisions because the Treasury believed that the authorization of the accounting system would have an adverse effect on the Government's revenue.<sup>361</sup> In the legislative history of the repeal, Congress expressed that it did not intend to "disturb prior law as it affected accrual accounting provisions."<sup>362</sup> Nevertheless, the Court interpreted the re-

---

355. 146 CONG. REC. H7244, 7245 (Sept. 6, 2000).

356. See *supra* notes 180-181 and accompanying text.

357. 146 CONG. REC. H7244, 7245 (Sept. 6, 2000) (statement of Representative Howard Berman).

358. 367 U.S. 687 (1961).

359. *Id.*

360. *Id.* In this case, the American Automobile Association used an accrual-based accounting method when calculating its income. *Id.* at 688. The Association used this system for a number of years, although it was not specifically authorized by the Tax Code. *Id.* at 694. Before these provisions were added to the Code, it was left up to the discretion of the courts and Commissioner to decide whether the accrual system had been used appropriately. *Id.*

361. 367 U.S. at 695. This repeal was done retroactively, in order to remove any impact of the provisions. *Id.*

362. *Id.*; H.R. Rep. No. 293, 84th Cong., 1st Sess. 4-5, (1954).



peal as a “clear mandate” from Congress that the accounting system “was not acceptable for tax purposes.”<sup>363</sup>

The Works Made for Hire and Copyright Corrections Act of 2000 creates an extremely similar situation to the one in *American Automobile Ass'n*.<sup>364</sup> Record companies claimed ownership to the copyrights in sound recordings by labeling them as works made for hire many years before the enactment of the 1999 amendment.<sup>365</sup> The 2000 Act repealed the only law that specifically stated that sound recordings were eligible for work-for-hire status.<sup>366</sup> It was entirely possible that courts may have decided to follow the logic found in *American Automobile Ass'n* and find that the repeal of the 1999 amendment implied that Congress believed that sound recordings can not qualify for work-for-hire status.<sup>367</sup> This potential danger led Congress to include Section 2(a)(2) in the 2000 Act, which instructs courts to disregard both amendments when deciding whether a sound recording is a work-for-hire.<sup>368</sup> In addition, the repeal was given a retroactive effect to prevent any potential problems that the 1999 amendment could have caused recording artists who created a sound recording between November 29, 1999 and October 27, 2000.<sup>369</sup> Because Congress carefully drafted this provision, recording artists and record companies should be able to trust that courts will not give either amendment any effect in future cases determining the work-for-hire status of sound recordings. However, there is always a risk that courts could allow the amendments to affect their decisions in spite of the language in the

---

363. *American Automobile Ass'n*, 367 U.S. at 695. The Court interpreted the repeal to mean that the accounting method was not acceptable because Congress had “repealed the only law incontestably permitting the practice.” *Id.*

364. 146 CONG. REC. H7244, 7245 (Sept. 6, 2000) (statement of Representative Howard Berman).

365. *Id.*

366. *Id.*

367. *Id.* Representative Berman stated that “under a well-known canon of statutory construction, courts assume that Congress is aware of existing judicial decisions when it enacts legislation and, unless Congress indicates otherwise and to the extent reasonable, courts interpret such legislation to be consistent with those decisions.” *Id.* Because two district courts mentioned that sound recordings did not fit within one of the enumerated categories in the work-for-hire definition, future courts could have interpreted the 2000 amendment as being Congress’ approval of those decisions. *Id.* See also *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999); *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999) (claiming, in dicta, that sound recordings are not works-for-hire under the statute because they do not fit within any of the categories of specially ordered or commissioned works).

368. 146 CONG. REC. H7244, 7245 (Sept. 6, 2000) (statement of Representative Howard Berman). To view the text of the section, see *supra* note 185.

369. 146 CONG. REC. H7244, 7245 (Sept. 6, 2000) (statement of Representative Howard Berman).

2000 amendment.<sup>370</sup> If courts use the amendment in this way, then artists will be entitled to use their termination rights and regain the rights to their sound recordings.

Recently, a district court judge in the Southern District of New York had the first opportunity to interpret the effects of both the 1999 and 2000 Acts. In *UMG Recordings, Inc. v. MP3.com*,<sup>371</sup> the defendant argued that the plaintiff filed numerous fraudulent copyright certificates with the Copyright Office for its artists' sound recordings because they listed the recordings as works made for hire.<sup>372</sup> The Recording Artists Coalition filed an amicus brief that asked the court to refrain from holding that sound recordings are works made for hire because they did not want the case to impact their continuing battle to protect their right to reclaim their recordings.<sup>373</sup> However, the judge never had an opportunity to rule on the work-for-hire issue because the parties settled the claim at the beginning of the damages portion of the trial.<sup>374</sup> By entering the judgment without ruling on the work-for-hire issue, Judge Jed S. Rakoff preserved the recording artists' claim that they are entitled to reclaim their recordings through the termination provision of the Act.<sup>375</sup> However, online infringement suits, such as *MP3.com*, are becoming more frequent,<sup>376</sup> so this issue

370. *Id.* Representative Berman stated that there was a possibility that courts could determine that the retroactive application of the repeal is unconstitutional under the Fifth and Fourteenth Amendments. *Id.* However, Congress inserted a "severability clause" into the provision of the Act making it retroactive; therefore, the entire statute cannot be found unconstitutional. *Id.*

371. 2000 WL 1262568 (S.D.N.Y. Sept. 6, 2000).

372. Tamara Conniff, *UMG, MP3 Battle Continues*, HOLLYWOOD REP., Nov. 7, 2000, at 1. MP3.com was found guilty of willful copyright infringement of recordings owned by UMG and ordered to pay \$25,000 in damages per recording infringed. *UMG*, 2000 WL 1262568 (S.D.N.Y. Sept. 6, 2000). In response, Mp3.com argued that they should not be forced to pay any damages, claiming that UMG did not actually own any of the recordings because the record company had falsely listed themselves as authors on their Copyright registrations based on the work-for-hire theory. Conniff, *supra* note 372, at 1 (citing *UMG*, 2000 WL 1262568 (S.D.N.Y. Sept. 6, 2000)).

373. See Conniff, *supra* note 372, at 1; see also *RAC View on UMG/MP3.Com Case*, BILLBOARD, Nov. 25, 2000, at 3.

374. See *RAC View on UMG/MP3.Com Case*, *supra* note 373, at 3. The final judgment against MP3.Com totaled \$53 million. *Id.*

375. *Id.*

376. The other high-profile online infringement case that is currently pending is *A&M Records v. Napster, Inc.*, 2001 WL 115033 (9th Cir. Feb. 12, 2001). In this case, the Recording Industry Association of America brought suit on behalf of all of the major recording labels against Napster alleging that Napster has committed contributory copyright infringement by allowing Internet users to download other Internet users' copies of copyrighted recordings. *Id.* Recently, the Court of Appeals of the Ninth Circuit found that the record companies have a high likelihood of succeeding on the infringement claim and ordered the district court to reconstruct an injunction that would prevent Napster from operating until the outcome of the case has been determined. *Id.*

will not disappear anytime soon. Courts are eventually going to have to decide whether the record companies do, in fact, own the right to their artists' recordings.

### B. *The Need for a Permanent Solution*

Due to the rising number of online infringement cases involving the recording industry and the fast approaching effective date for termination notices in 2003, it is imperative that the record companies and recording artists reach a definitive solution to the work-for-hire issue. It would not be beneficial for either group to wait for courts to rule on the issue because courts in various jurisdictions could answer the question differently, which would cause great turmoil throughout the record industry. Such inconsistency would lead to a situation where some recordings are considered works made for hire in one jurisdiction, but recordings created in the exact same way are not considered works made for hire in another jurisdiction. This would severely hamper the industry's ability to create record contracts and continue business.

One solution suggested by the Copyright Office would be to create a statutory provision that qualifies sound recordings as works made for hire, except when applied to the main contributors on the recording.<sup>377</sup> This solution would benefit both recording artists and the music companies. Under this solution, the backup musicians and the producers who help record the album would be subject to the work-for-hire clause, so they would be unable to enforce any termination rights thirty-five years later.<sup>378</sup> The artist, however, whether it is a person or a group, would not be subject to the work-for-hire clause, so their contracts with the record companies could be terminated after thirty-five years.<sup>379</sup>

This solution would protect the main artists' termination rights, while simultaneously protecting the interests of both the artists and record companies, by preventing background artists from terminating their licenses and hampering the distribution of the work. Congress created the termination provisions in the Act to protect authors that transfer the rights to their works before they have the ability to appre-

---

377. *Hearings, supra* note 91, at 93 (statement of Marybeth Peters, Register of Copyrights).

378. For a discussion of the potential impact the termination rights could have on the music industry, see generally Frisch, *supra* note 160.

379. *Id.* Marybeth Peters suggested that the exemption should apply to artists who "have royalty contracts with respect to the distribution of the sound recording." *Id.* However, she also mentioned that may not be an adequate definition because many backup musicians also receive royalties for performing on recordings. *Id.*

ciate the work's value.<sup>380</sup> Recording artists have an equal right to benefit from the termination rights provision as other artists. The record companies typically hold all of the bargaining power when negotiating record contracts, especially with new artists. These record companies should not be allowed to reap all of the benefits of an artist's work forever.

The record companies have argued that allowing artists to terminate their record contracts would remove any incentive from the record companies to sign an unknown artist. They assert that the record industry is a risky business because few sound recordings actually recoup their costs.<sup>381</sup> In order to stay in business, companies have to structure contracts in a way that will maximize their profit from the few successful artists.<sup>382</sup> In that situation, the successful artists end up subsidizing the labels' ability to take risks on unknown groups.<sup>383</sup> However, this argument does not create an enormous amount of sympathy for the record industry. Sales figures show that the companies are not exactly in danger of going broke.<sup>384</sup> In addition, under section 203 of the Act, the record companies would be still able to exclusively benefit from their artists' works, by the terms of the record contract, for thirty-five years before the author can terminate.<sup>385</sup> If a record company truly fears that one of its artists will terminate her contract, the company can always negotiate with the artist in an attempt to dissuade her from leaving. If the companies agree to treat their artists fairly from the beginning, then the artists will be less motivated to terminate their agreements. In addition, simply because the authors can terminate the license does not mean that they necessarily will.<sup>386</sup> There is no harm in allowing artists to reclaim their works, especially if the record company is no longer promoting the album. The artist should have the opportunity to find a new market for their product.

This solution would also promote predictability and stability within the industry by preventing background musicians and others, who have a licensed contribution on the recording, from terminating their

---

380. See *supra* note 123 and accompanying text.

381. See *supra* note 239 and accompanying text.

382. See Norrell, *supra* note 165, at 456.

383. *Id.*

384. According to the RIAA, sales figures for sound recordings reached almost \$15 billion in 1999. RIAA Market Reports on U.S. Recorded Music Shipments, at <http://www.riaa.com/MD-US.3.cfm> (last visited Mar. 1, 2001). This total was almost a billion dollar increase over sales from the previous year. 1999 Music Consumer Trends, at [http://www.riaa.com/pdf/1999\\_Consumer\\_Profile.2.pdf](http://www.riaa.com/pdf/1999_Consumer_Profile.2.pdf) (last visited Mar. 1, 2001).

385. 17 U.S.C. §203 (1994).

386. See *supra* note 99 (discussing the limited uses of section 304, the termination provision for works created before 1978).

agreements. One reason that artists, who are able to retain ownership of their recordings, have registered their recordings with the Copyright Office as works made for hire is that they do not want the backup musicians on the album to claim a right to the recording.<sup>387</sup> They fear that a random backup guitarist will arrive at the door of the copyright owner thirty-five years after a recording is created and terminate his licensed performance on the album. If this were to occur, then the license grantee would no longer own the rights to that part of the recording.<sup>388</sup> Because it is difficult to eliminate the contribution of one musician from a recording, the license holder would no longer be able to market the recording.<sup>389</sup> By allowing sound recordings to partially qualify for work-for-hire status, this problem can be avoided.

Even a new legislative solution may not solve the problem entirely because the legislation would have no effect on recordings created between 1978 and the enactment of the legislation, unless it was applied retroactively. There are a large number of commercially successful recordings that were created in the past twenty-two years including: "Come on Over" by Shania Twain; "Cracked Rear View" by Hootie & The Blowfish; and "Jagged Little Pill." by Alanis Morissette.<sup>390</sup> All of these recordings have the potential to retain some commercial success for thirty-five years, and it would be only fair to allow the artists who created these extremely successful recordings to reap the benefits of their own success. By applying the statute retroactively, any potential problems that could result from allowing the courts to decide the matter would be eliminated, and the artists could control the future of their creations.

## VI. CONCLUSION

A recording artist must overcome incredible odds to become successful in the industry. Many musicians work for years before obtaining a recording deal. Once they finally receive an offer from a record company, the company is in complete control of the deal because it assumes all of the financial risk.<sup>391</sup> The drafters of the Copyright Act were very aware of the reality that, in general, artists have no bargaining power when they negotiate a deal before they realize

---

387. *Hearings, supra* note 91, at 93 (statement of Marybeth Peters, Register of Copyrights).

388. *See* Frisch, *supra* note 160, at 212.

389. *Id.*

390. SHANIA TWAIN, *COME ON OVER* (Polygram 1997); HOOTIE & THE BLOWFISH, *CRACKED REAR VIEW* (Atlantic Records 1994); ALANIS MORRISSETTE, *JAGGED LITTLE PILL* (Maverick Records 1995). Each of these recordings is in the top fifteen of the RIAA's all-time bestseller list. All-Time Best Sellers, at <http://www.riaa.com/Gold-Best-5.cfm> (last visited Mar. 1, 2001).

391. *See supra* note 239 and accompanying text.

the potential for their works. As a result, the termination rights provision was created to allow artists who were under-compensated throughout their careers to have a second chance at the opportunity to profit from their creations.<sup>392</sup>

By passing the sound recording amendment in 1999, Congress stripped recording artists of these very rights without allowing them to express their views. Instead, the amendment was passed based on an assumption that sound recordings were works-for-hire because the record companies labeled them as such.<sup>393</sup> However, before the amendment was passed, it was not a forgone conclusion that sound recordings could be considered works made for hire. Artists are not employees of the record companies and most sound recordings did not fit within any of the previously enumerated categories of works that qualified for work-for-hire status.<sup>394</sup> By passing the Works Made for Hire and Copyright Corrections Act of 2000, Congress acknowledged its mistake in concluding that sound recordings were works-for-hire. The Copyright Act was designed to promote creativity and works of authorship.<sup>395</sup> By returning recording artists' termination rights, Congress reinstated the artists' incentives to create music. Now recording artists can dedicate their lives to creating music with the knowledge that they will have the opportunity to own their works at some point in the future.

*Kathryn Starshak*

---

392. See *supra* note 123 and accompanying text.

393. See *supra* notes 143-144 and accompanying text.

394. See *supra* notes 193-330 and accompanying text.

395. See *supra* notes 24-26 and accompanying text.

