

2005

Copyright Issues for Sound Recordings of Volunteer Performers

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Recommended Citation

Stephen Adams, Copyright Issues for Sound Recordings of Volunteer Performers, 8 *Vanderbilt Journal of Entertainment and Technology Law* 119 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol8/iss1/5>

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Congress has enacted copyright statutes to satisfy the goal of the Copyright Clause in the Constitution,¹ which is “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.”² Federal copyright subject matter protects sound recordings.³ Section 106 of the Copyright Act of 1976 grants exclusive rights to the owner of the copyright in a copyrighted work.⁴ These rights originally vest in the author of the work, as long as the work is not a work for hire.⁵ Works made for hire vest in the employer of the

1. H.R. REP. NO. 94-1476, at 47 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5660.

2. U.S. CONST. art. I, § 8, cl. 8.

3. 17 U.S.C. § 102(a)(7) (2000).

4. *Id.* § 106.

5. *Id.* § 201.

employee creating the work, or if it is a commissioned work, it can vest in the commissioning party.⁶ If a work is a joint work, the authors are co-owners of the copyright,⁷ or in other words, have a complete and undivided interest in the work.⁸

As is true of other copyrightable works, the author or authors of a sound recording may transfer away some or all of the rights they have in that sound recording.⁹ This is typical for sound recordings. The rights in the work are most often transferred to the record company.¹⁰ This transfer of rights can create several problems for record companies. First, for some types of sound recordings, record companies fail to have all the performers transfer their rights in the sound recording. Second, beginning in 2013, authors will be able to regain the rights to their works.¹¹ Section 203 of the Copyright Act allows authors to terminate any transfer of rights that they have transacted.¹²

For specific types of sound recordings, this creates an interesting problem. Large choral works, when recorded, often require large orchestras and even larger choruses. This creates a situation where the authors of these sound recordings number in the hundreds. The copyright issues become particularly interesting where members of these performing organizations are not employees. It is not uncommon to find in any given city a large community choir made up completely of volunteers. Additionally, several well known large performing choirs are composed entirely of volunteers, including the Mormon Tabernacle Choir and the Atlanta Symphony Orchestra Chorus. If the performers in these groups are truly volunteers, how does it affect the copyright of the sound recordings that they author? Does the record company get the copyright? Does it vest in the performers?

The question quickly becomes whether volunteers can create a work for hire. Normally, the record companies who distribute copies of these sound recordings have a clause in their contract stating that the performers have created a work made for hire.¹³ The existence of this

6. *Id.*; see also *id.* § 101 (defining “work for hire” as including commissioned work).

7. *Id.* § 201(a).

8. See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.03 (Matthew Bender & Co. ed., 2004).

9. 17 U.S.C. § 201(d) (2000).

10. See NIMMER, *supra* note 8, § 5.03[B][2][a][ii].

11. See 17 U.S.C. § 203(a)(3) (termination may be effected beginning at thirty-five years from the transfer; thirty-five years from 1978 is 2013).

12. *Id.*

13. NIMMER, *supra* note 8, § 5.02[B][2][a][ii].

clause, though, does not make it so. Volunteers do not typically sign these contracts. Also, volunteers do not fit within the definitions of what is required to give a work made-for-hire status. Thus, the volunteers end up being the authors of these sound recordings, and even if they transfer their rights to the record companies, they may terminate these transfers after a set time. Is copyright jurisprudence ready to handle a situation where three and four hundred people own a copyright in a single work? The copyright code does provide solutions for this type of situation, but the solution provided may not be the best one.

This Note discusses how this situation may arise, and it recommends possible solutions to alleviate it. The first section will present a brief history of copyright law. The second section will explain the purpose of the termination of transfers encoded in section 203 of the Copyright Act. The third section will discuss the importance of the employment relationship between musicians, the organization in which they perform, and the record companies. This section includes several examples of performance organizations and analyzes the employment relationships described above. The last section will present the copyright concerns in greater detail, including the historical attempts to solve this problem. Several solutions will be proposed to solve or mollify the effects of these copyright issues.

I. A BRIEF HISTORY OF COPYRIGHT

A. Copyrightable Subject Matter and Sound Recordings

The framers of the Constitution granted Congress the power to enact laws that would give authors rights to get economic benefits from the works they created.¹⁴ According to the Constitution, Congress has the power to protect the “writings” of authors,¹⁵ but it did not define what “writings” were. That job was left to the Supreme Court, which in one copyright case declared that “no one would now claim that the word writing in [the copyright] clause of the Constitution, though the only word used as to subjects in regard to which authors are to be secured, is limited to the actual script of the author, and excludes books and all other printed matter.”¹⁶ This statement showed that the Copyright Clause was intended to protect more than mere

14. See U.S. CONST. art. I, § 8, cl. 8.

15. *Id.*

16. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

words. For example, in *Burrow-Giles* the Court granted copyright protection to a lithograph.¹⁷

The subject matter of copyright has been expanded to cover more and more types of works as new media of expression have been created.¹⁸ In a House Report regarding the Copyright Act of 1976, the expansion of copyright is expressed:

The history of copyright law has been one of gradual expansion in the types of works accorded protection In some of these cases the new expressive forms—electronic music, filmstrips, and computer programs, for example—could be regarded as an extension of copyrightable subject matter Congress had already intended to protect . . . without the need of new legislation. In other cases, such as photographs, sound recordings, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable works.¹⁹

Sound recordings were originally given specific legislative protection as copyrightable works in 1971.²⁰ A copyrightable sound recording is any original work²¹ that “result[s] from the fixation of a series of musical, spoken, or other sounds,” not including soundtracks for movies or other audiovisual works.²² Congress stated, “[a]s a class of subject matter, sound recordings are clearly within the scope of the ‘writings of an author’ capable of protection under the Constitution, and the extension of limited statutory protection to them was too long delayed.”²³

B. Rights of Authorship

According to section 201 of the 1976 Copyright Act, all rights granted copyright protection vest initially in the author of the work.²⁴ These rights include all those listed in § 106, limited by §§ 107-122.²⁵

17. *Id.*

18. See H.R. REP. NO. 94-1476, at 51-52 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5664-65.

19. *Id.* at 51.

20. *Id.* at 55.

21. 17 U.S.C. § 102 (2000).

22. *Id.* § 101 (defining “sound recording”).

23. H.R. REP. NO. 94-1476, at 56.

24. 17 U.S.C. § 201; see *Lindsay v. R.M.S. Titanic*, No. 97-9248, 1999 U.S. Dist LEXIS 15837, at *13 (S.D.N.Y. Oct. 13, 1999).

25. Section 106 specifically lists the rights:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

Section 114 specifically limits the rights in the copyright of a sound recording, reducing them to only subsections (1), (2), (3), and (6) of § 106.²⁶ This means that the owner of a copyright in a sound recording has the right to make copies (phonorecords) of the sound recording, to prepare derivative works based on it, to distribute phonorecords of it, and to perform the sound recording through digital audio transmission.²⁷

In addition to the rights listed in Chapter One of the Copyright Act, section 201 gives the author the right to transfer “in whole or in part by any means of conveyance or by operation of law” the rights the Copyright Act grants originally to the author.²⁸ This means that the owner of a copyright in a sound recording may transfer, license, sell, lease, etc., any or all of the rights listed above.²⁹ Thus, any particular right the copyright owner wants to part with may be transferred to another person regardless of the other rights the owner retains, and the transferee is treated as if he is the copyright owner with respect to the specific rights he owns in that work.³⁰

When a work is created by more than one author, it is a joint work.³¹ “[A] work is ‘joint’ if the authors collaborated with each other, of [sic] if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as ‘inseparable or interdependent parts of a unitary whole.’”³² The rights granted to co-authors are the same as those granted to a single author; “the authors of a joint work are co-owners of copyright in the work.”³³ Similarly, “each co-author acquires an undivided interest in the entire work and has the right to use the work as he or she pleases.”³⁴ Congress has specified:

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106.

26. *Id.* § 114(a).

27. *Id.*

28. *Id.* § 201(d)(1).

29. *Id.*

30. *Id.* § 201(d)(2).

31. *Id.* § 101 (defining “joint work”).

32. H.R. REP. NO. 94-1476, at 120 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5735-36; *see also* 17 U.S.C. § 101 (defining “joint work”).

33. 17 U.S.C. § 201(a).

34. *Lindsay v. R.M.S. Titanic*, No. 97-9248, 1999 U.S. Dist LEXIS 15837, at *19 (S.D.N.Y. Oct. 13, 1999).

There is . . . no need for a specific statutory provision concerning the rights and duties of the co-owners of a work; court-made law on this point is left undisturbed. . . . [C]o-owners of a copyright would be treated generally as tenants in common, with each co-owner having an independent right to use or license the use of a work, subject to a duty of accounting to the other co-owners for any profits.³⁵

Though it is possible for one person to both perform, record and master a sound recording, it is common for a sound recording to be a joint work.³⁶ Congress stated that:

The copyrightable elements in a sound recording will usually . . . involve 'authorship' both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.³⁷

C. The Renewal Period

The author is not always in the strongest bargaining position when he tries to sell his work.³⁸ Generally, neither the publisher nor the author knows how well a new work will perform economically. Nimmer has stated, "[T]he form of property designated copyright, unlike real property and other forms of personal property, is by its very nature incapable of accurate monetary evaluation prior to its exploitation."³⁹ In order to get some economic benefit out of a work it is not unusual that the author "sells his copyright outright to a publisher for a comparatively small sum."⁴⁰ This is potentially disadvantageous to the author, because if the work is a success, the author will not reap any additional economic benefit beyond what the publisher paid for the copyright.

This concern is what the renewal term was intended to alleviate. "The renewal term permits the author, originally in a poor bargaining position, to renegotiate the terms of the grant once the value of the work has been tested."⁴¹ The 1909 Copyright Act provided that "the author of [a copyrighted] work, if still living . . . shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years."⁴² Originally the renewal term was intended to lengthen the term of a copyright beyond the original

35. H.R. REP. NO. 94-1476, at 121.

36. *See id.* at 56.

37. *Id.*

38. *See generally* NIMMER, *supra* note 8, § 9.02.

39. *Id.*

40. H.R. REP. NO. 60-2222, at 14 (1909).

41. *Stewart v. Abend*, 495 U.S. 207, 218-19 (1990).

42. 17 U.S.C. § 24 (1909) (current version at 17 U.S.C.A. § 302 (West Supp. 2005)).

term.⁴³ The 1909 Copyright Act provided that the renewal term vested in the author if he or she was alive at the time the renewal period began.⁴⁴ If the author died before the renewal period ensued, then the statute provided for a list of statutory successors in whom the renewal right vested.⁴⁵

Though the reasons listed above were probably “the most compelling reason[s] justifying a renewal provision,”⁴⁶ there were several other reasons (including sentimental ones) to include a renewal provision in the copyright code. “The renewal term of copyright is the law’s second chance to the author and his family to profit from his mental labors.”⁴⁷ “The evident purpose of [the renewal term] is to provide for the family of the author after his death. Since the author cannot assign his family’s renewal rights, [it] takes the form of a compulsory bequest of the copyright to the designated persons.”⁴⁸ “There are at least sentimental reasons for believing that Congress may have intended that the author, who according to tradition receives but little for his work, and afterwards sees large profits made out of it by publishers, should later in life be brought into his kingdom.”⁴⁹ One last (perhaps facetious) suggestion for a renewal term is that “authors are congenitally irresponsible, that frequently they are so sorely pressed for funds that they are willing to sell their work for a mere pittance”⁵⁰

Though contrary to the reasoning above, it was (and still is) possible for an author to sell or assign his interest in the renewal term.⁵¹ According to the Supreme Court, “the Copyright Act of 1909 does not nullify agreements by authors to assign their renewal interests.”⁵² Additionally, the Court has stated: “If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need. Nobody would pay an author for

43. *Stewart*, 495 U.S. at 217.

44. *See* 17 U.S.C. § 24 (1974) (amended by 1976 Copyright Act, 17 U.S.C. § 24 (2000)).

45. *Id.* (including the author’s widow(er) and children, executor, and next of kin as statutory successors).

46. NIMMER, *supra* note 8, § 9.02.

47. Seymour M. Bricker, *Renewal and Extension of Copyright*, 29 S. CAL. L. REV. 23, 27 (1955).

48. *De Sylva v. Ballentine*, 351 U.S. 570, 582 (1956).

49. *White-Smith Music Pub. Co. v. Goff*, 187 F. 247, 251 (1st Cir. 1911).

50. *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 656 (1943).

51. 17 U.S.C. § 304 (2000) (allowing for a renewal period for works in their first copyright term before 1978). The *Stewart* analysis applies to these works the same as to works already in their renewal period before the 1976 act was introduced. *See Stewart v. Abend*, 495 U.S. 207, 217-18 (1990).

52. *Fred Fisher Music*, 318 U.S. at 657.

something he cannot sell.”⁵³ But courts took a strict interpretation of what was required to transfer the renewal rights of an author: “The cases are clear that a copyright renewal creates a separate interest distinct from the original copyright and that a general transfer by an author of the original copyright without mention of renewal rights conveys no interest in the renewal rights without proof of a contrary intention.”⁵⁴

Lastly, even though the author could transfer his right in the renewal period (if he does so explicitly as required by case law), the author has to be alive at the time the renewal period arises in order for this transfer to be valid.⁵⁵ The Supreme Court in *Stewart v. Abend* stated that it previously had

[H]eld that when an author dies before the renewal period arrives, his [statutory successor] is entitled to the renewal rights, even though the author previously assigned his renewal rights to another party. “An assignment by an author of his renewal rights made before the original copyright expires is valid against the world, if the author is alive at the commencement of the renewal period These results follow not because the author’s assignment is invalid but because he had only an expectancy to assign; and his death, prior to the renewal period, terminates his interest in the renewal which by § 24 vests in the named classes.”⁵⁶

The 1976 Copyright Act retains the renewal rights for all works in their original copyright term and created before January 1, 1978.⁵⁷ It also retains the statutory successors from the 1909 Act.⁵⁸ Though the renewal period is longer,⁵⁹ the foregoing analysis still applies to renewal periods that occur after the January 1, 1978 deadline.

II. TERMINATION OF TRANSFERS

When the 1976 Copyright Act was passed into law, Congress changed the copyright term such that there was no renewal term.⁶⁰ For works created on or after January 1, 1978, copyright subsisted in

53. *Id.*

54. *Marks Music Corp. v. Harris Music Publ’g*, 255 F.2d 518, 521 (2d Cir. 1958) (citing *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469 (2d Cir. 1951)).

55. 17 U.S.C. § 24 (1974) (current version at 17 U.S.C. § 302 (West Supp. 2005)).

56. *Stewart*, 495 U.S. at 219 (quoting *Miller Music v. Charlie N. Daniels*, 362 U.S. 373, 375 (1960)); see also *Miller Music*, 362 U.S. at 375 (“The right to obtain a renewal copyright and the renewal copyright itself exist only by reason of the Act and are derived solely and directly from it.”).

57. 17 U.S.C. § 304 (2000).

58. Compare 17 U.S.C. § 304(a)(1)(C) (West Supp. 2005) (naming the author’s widow, widower, children, executors, or next of kin as statutory successors), with 17 U.S.C. § 24 (1974) (current version at 17 U.S.C. § 304 (West Supp. 2005))(same).

59. 17 U.S.C. § 304 (West Supp. 2005) (extended renewal term of 67 years from 28 years).

60. See generally *id.* § 302.

the owner for a single term of the author's life plus 50 years.⁶¹ The Sonny Bono Copyright Terms Extension Act later expanded the copyright term to the author's life plus 70 years.⁶²

With the dismantling of the renewal term, Congress needed a way to provide for the author "who according to tradition receives but little for his work, and afterwards sees large profits made out of it by publishers, [to] later in life be brought into his kingdom."⁶³ Congress did this by enacting 17 U.S.C. § 203. "The provisions of section 203 are based on the premise that the reversionary provisions of the present section on copyright renewal (17 U.S.C. § 24) should be eliminated, and that [§ 203] should substitute for them a provision safeguarding authors against unremunerative transfers."⁶⁴

This code section, entitled "Termination of transfers and licenses granted by the author,"⁶⁵ effectively gives similar rights to the author as those of the renewal period. Thus, an author can terminate and return to himself any transfer of copyright in which he has engaged.⁶⁶ The author must do this within a specified period of time from execution of the grant, generally thirty-five years from the execution of the transfer.⁶⁷

Congress had several reasons to discontinue the renewal system:

[T]he renewal structure was found to be an unsatisfactory means of achieving reversion for authors. It is procedurally clumsy and difficult. The fact that reversion under the renewal system is tied to the term of copyright creates a real possibility that works will be injected into the public domain by reason of an inadvertent failure to renew.⁶⁸

The termination provision enacted as part of the 1976 Copyright Act is an attempt to solve the problems of the renewal period structure "while at the same time achieving a reversion of rights."⁶⁹

61. See generally H.R. REP. NO. 94-1476, at 133-38 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5748-54 (noting an important reason for the change was to bring United States copyright law into line with the requirements of the Berne Convention).

62. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298 § 102, 112 Stat. 2827 (codified as amendment to 17 U.S.C. § 302 (2000)).

63. *White-Smith Music Pub. Co. v. Goff*, 187 F. 247, 251 (1st Cir. 1911).

64. H.R. REP. NO. 94-1476, at 124.

65. 17 U.S.C. § 203.

66. *Id.*

67. *Id.* § 203(a)(3).

68. NIMMER, *supra* note 8, § 11.01.

69. *Id.*

III. EMPLOYMENT AND COPYRIGHT OWNERSHIP

To establish whether the creator of a work is the owner of the copyright in that work, it must be established whether or not that person created a “work made for hire.” The “work made for hire” concept is an exception to the general rule that copyright vests in the author of a work. Section 201 of the copyright code 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 this title, and unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.⁷⁰

Thus, the person who creates a work made for hire does not get the copyright in the work (it does not vest in them), and as Nimmer points out, the “termination [of transfer] provisions are not applicable to works made for hire.”⁷¹ If a work made for hire is created by an employee, it will be protected as a work made for hire (meaning that the employer will own the copyright) unless there is a signed writing stating otherwise.⁷² If a work made for hire is created by a contractor, then in addition to the other requirements discussed below, there must be a signed writing that the work is to be treated as a work for hire, without which the copyright vests in the contractor, and not the commissioning party.⁷³

In order to determine whether a work is a work made for hire, one must apply the definition given in § 101, which has two parts. A work may be a work for hire when the person creating it is an employee. Also, under the appropriate circumstances, a work may be a work for hire when the person creating it is a contractor.

A. Work Prepared by Employees

Section 101 defines a work for hire as “a work prepared by an employee within the scope of his or her employment.”⁷⁴ However, the statute does not define when one is an employee. This question has been taken up by the courts many times, and it seems to be answered most definitively (with respect to copyright) in *Community for Creative Non-Violence v. Reid*.⁷⁵ In that case, Community for Creative Non-Violence (“CCNV”) asked Reid, a sculptor, to create a sculpture

70. 17 U.S.C. § 201(b).

71. NIMMER, *supra* note 8, § 5.03[A].

72. 17 U.S.C. § 201(b).

73. *Id.* § 101.

74. *Id.* § 101 (definition of “work made for hire”).

75. 490 U.S. 730 (1989).

representing a homeless family sitting over a steam grate.⁷⁶ When disputes later arose over who owned the copyright in the sculpture, the Supreme Court had to decide whether or not Reid was an employee of CCNV.⁷⁷ The Court, applying the general common law of agency, listed 13 factors to consider in determining whether Reid was employed by CCNV.⁷⁸ Though the Court gave no direction regarding how to weigh these factors (other than simply stating that none of the factors is determinative), it found that Reid was not an employee of CCNV.⁷⁹ Instead, he was considered an independent contractor.⁸⁰

Several cases have wrestled with these factors since *Reid*. In 1992, the Second Circuit noted:

It does not necessarily follow that because no one factor is dispositive all factors are equally important, or indeed that all factors will have relevance in every case.

....

... In contrast, there are some factors that will be [sic] significant in virtually every situation. These include: (1) the hiring party's right to control the manner and means of creation; (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 additional projects to the hired party. These factors will almost always be relevant and should be given more weight in the analysis, because they will usually be highly probative of the true nature of the employment relationship.⁸¹

76. *Id.* at 733.

77. *Id.* at 735.

78. The thirteen factors are:

- 1) The hiring party's right to control the manner and means by which the product is accomplished
- 2) The skill required
- 3) The source of the instrumentalities and tools
- 4) The location of the work
- 5) The duration of the relationship between the parties
- 6) Whether the hiring party has the right to assign additional projects to the hired party
- 7) The extent of the hired party's discretion over when and how long to work
- 8) The method of payment
- 9) The hired party's role in hiring and paying assistants
- 10) Whether the work is part of the regular business of the hiring party
- 11) Whether the hiring party is in business
- 12) The provision of employee benefits
- 13) The tax treatment of the hired party

Id. at 751-52.

79. *Id.* at 752.

80. *Id.*

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

The Second Circuit further emphasized the importance of the provision of employee benefits and the tax treatment of the hired party by stating, “[t]he importance of these two factors is underscored by the fact that every case since *Reid* that has applied the test has found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes.”⁸² Three years later, the Second Circuit confirmed this reading of *Reid* by finding that sculptors who had received benefits and whose paychecks had taxes removed from them were in fact employees, and therefore they had created a work made for hire.⁸³

The *Reid* test is not the only test to determine employment status. In *Dumas v. Gommerman*, the Ninth Circuit stated that “[o]nly the works of formal, salaried employees are covered by section 101(1).”⁸⁴ Though this concept of employment was disapproved of by *Reid*,⁸⁵ it is still a compelling argument. Nimmer suggests that there has been a “resurrection of the Ninth Circuit’s *Dumas* rule that only ‘formal, salaried employees’ qualify under the work for hire doctrine.”⁸⁶

B. Works Prepared by Contractors

The second part of the definition of a “work for hire” in § 101 delineates when a work created by a contractor will be considered a work made for hire. There, Congress limited works made for hire to nine specific types of works.⁸⁷ If the work contracted for does not fall under one of these nine categories, then the work is not a work made for hire, and the copyright vests initially in the author (the creator, who is generally the non-commissioned party). It may not be readily apparent why this part of § 101 applies to this discussion, because sound recordings, except those accompanying a motion picture or other audiovisual work, are not among the nine categories. Nimmer suggests that sound recordings are an “obvious candidate” for the

82. *Id.* at 863.

83. *See generally* Carter v. Helmsley-Spear, Inc., 71 F.3d 77 (2d Cir. 1995).

84. 865 F.2d 1093, 1102 (9th Cir. 1989).

85. *See generally Reid*, 490 U.S. 730.

86. NIMMER, *supra* note 8, § 5.03[B][1][a][iii].

87. 17 U.S.C. § 101 (2000) (stating that a work made for hire is: “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.”).

enumerated list found in § 101.⁸⁸ Congress must have agreed, because they added (and quickly removed) sound recordings to the list in § 101.

In 1999, Congress passed the Satellite Home Viewer Improvement Act. According to Nimmer, Congress “stealthily” added sound recordings to the list of works protected as works made for hire⁸⁹ (a not too unreasonable assertion, considering the name of the act and how this addition lacks any relation to it). It appears that this portion of the bill was added at the last minute, because it was not included in any previous drafts.⁹⁰ There was a great deal of criticism to the addition of sound recordings to the list of commissioned works protectable as works for hire. There was so much criticism that less than a year later, Congress passed the Work Made for Hire and Copyright Corrections Act which removed sound recordings from the list of items protected under § 101.⁹¹ Not only did Congress try to remove sound recordings from the purview of § 101, Congress added language to the definition of “works made for hire” such that neither the addition nor the later deletion of sound recordings from that section “shall be considered or otherwise given any legal significance.”⁹² As stated by Nimmer:

Wishing to avoid any imputation that the repeal itself connoted a substantive choice of policy, Congress expressed itself as neutrally as possible. As a consequence, the statutory provision regarding commissioned works is to be interpreted as if both the 1999 amendment and its 2000 repeal “were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.”⁹³

Why is the determination of whether a sound recording is a work made for hire important? It has been noted that “virtually all contracts that artists signed with record companies from 1972 onwards have contained acknowledgments that their contributions constitute works for hire. In addition, those same contracts typically contain a backup assignment.”⁹⁴ This backup assignment usually says that if the work made for hire language is not effective, the authors of the sound recording transfer their interest in the copyright to the record company.⁹⁵ Whether it is a work for hire or an assignment, ultimately the record company owns the copyright in the sound

88. See NIMMER, *supra* note 8, § 5.03[B][2][a][ii].

89. *Id.*

90. *Id.*

91. *Id.*

92. 17 U.S.C. § 101.

93. NIMMER, *supra* note 8, § 5.03[B][2][a][ii].

94. *Id.*

95. Interview with Robin Mitchell Joyce, Member, Bass, Berry & Sims PLC, in Nashville, Tenn. (Feb. 10, 2005).

recording. The difference, then, is in the ability to terminate the transfer of ownership in the copyright. As noted previously, copyright in a work made for hire vests with the employer or commissioning party (if there is a signed writing).⁹⁶ If an artist makes a sound recording that is not protected as a work made for hire, then the record company will only own the copyright in the work by assignment, and the assignment may be terminated regardless of any contractual language to the contrary.⁹⁷ Thus, beginning in 2013,⁹⁸ the determination of whether a sound recording is a work made for hire becomes important, particularly if there are a large number of people who helped to create the work. This leads to a discussion of whether performers in large ensembles will be considered employees for determining copyright ownership.

C. Examples and Analysis

In order to discuss in whom a copyright initially vests for sound recordings, it will be helpful to discuss several examples. These next few sections will discuss several ensembles that make sound recordings. There will be an introduction to each of the ensembles discussed, a discussion of how they are organized, the employment status of the recording artists, the nature of the relationship with the record companies, and the copyright status of the works recorded.

1. The Nashville Symphony Orchestra

The Nashville Symphony Orchestra (NSO) is gaining a strong reputation as a nationally prominent orchestra because of its Grammy-nominated recordings. The NSO has a recording agreement with Naxos,⁹⁹ a small record label founded in 1987 which has grown into a worldwide classical label. Since 2000 Naxos has released seven albums by the NSO.¹⁰⁰ The NSO is conducted by Kenneth Schermerhorn and currently has eighty-two musicians.¹⁰¹ The NSO's recording agreements and practices are a good representation of the

96. See 17 U.S.C. § 201.

97. *Id.* § 203(a)(5).

98. This is the first year in which authors may begin to terminate transfers of their copyright interests (thirty-five years from 1978). See *id.* § 203(a)(3); NIMMER, *supra* note 8, § 5.03[B][2][a][ii].

99. Telephone Interview with Mark Blakeman, General Manager and Vice President, Nashville Symphony Orchestra (Jan. 13, 2005) [hereinafter Blakeman].

100. Nashville Symphony, Recordings, <http://www.nashvillesymphony.org/concerts/recordings.html> (last visited Oct. 5, 2005).

101. Blakeman, *supra* note 99.

standard copyright practice for large orchestras in the United States (though there are some minor variations, which will be noted later).

When the NSO makes a sound recording, in whom do the rights to that sound recording initially vest? It can be assumed that the creators of the sound recording would be considered authors for the purpose of the copyright code.¹⁰² These authors would likely include the sound recording engineers, the conductor, and the musicians as performers of the music recorded (whom we will focus on). Unless the sound recording is a work made for hire, copyright vests in these performers. Of the two ways to create a work made for hire, we will assume that sound recordings do not fall into the nine categories in § 101. This leaves the issue of whether the musicians are employees creating a work within the scope of their employment.¹⁰³ Members of the NSO are full time, salaried, unionized musicians.¹⁰⁴ It is likely that with this description of employment, members of the NSO would meet the minimal employment test suggested by *Aymes*, and certainly the employment standard set by *Dumas*. But who are they employed by? They are employees of the NSO, and not of Naxos. Does this present a problem for the work for hire status of the works? Not necessarily. As with most orchestras in the United States, the members of the NSO are also members of the American Federation of Musicians (AFM), whose collective bargaining agreement governs the terms of the recording contracts that orchestras make with record labels.¹⁰⁵ These contracts in turn agree that for the sake of recording purposes, the musicians' work will be works made for hire for whoever signs the contract (usually the record company).¹⁰⁶

Naxos presents an odd case, because Naxos refuses to recognize the AFM agreement.¹⁰⁷ As a solution to this problem, the Nashville Symphony Association (NSA) becomes a signatory to the AFM agreement, and both the AFM and Naxos are satisfied.¹⁰⁸ Because the musicians are employees creating the sound recording as part of their employment, the rights in the sound recordings that the NSO makes do not vest initially in the musicians. The sound recordings are works for hire. Since Naxos does not recognize the AFM agreement, it cannot be the employer for whom the musicians are working. This is different

102. See 17 U.S.C. § 201(a).

103. See *id.* § 101 (defining "work made for hire").

104. Blakeman, *supra* note 99.

105. *Id.*

106. Interview with W. Michael Milom, Partner, Bass, Berry & Sims PLC, in Nashville, Tenn. (Jan. 12, 2005) [hereinafter Milom].

107. Blakeman, *supra* note 99.

108. *Id.*

from record companies who do recognize the AFM contract: the musicians would technically be working for the record company while recording music, and so the rights in the sound recording would vest initially in the record company. Since Naxos doesn't recognize the contract with the AFM musicians, whoever is a signatory must own the copyright because he is the employer. In this case, that would be the NSA. Therefore the NSA must transfer its interest in the copyright to Naxos.

As recipient of the rights in a work made for hire, Naxos has control of the copyright for ninety-five years from publication of the work.¹⁰⁹ Also, because the sound recording is a work made for hire, the creators of the sound recording (which includes the musicians of the orchestra) do not have the right to terminate their transfer of copyright,¹¹⁰ because no such transfer ever took place. Naxos owns the copyright subject only to the NSA's right to terminate the transfer. If the NSA chooses not to terminate, then it is as if Naxos owns the copyright outright and may use the copyright as it wishes for the duration of the ninety-five years.

This situation is typical for most sound recordings made by orchestras in the US. There are several large recording ensembles, though, whose organization predicts a different result for copyright ownership. Two well known examples follow.

2. The Mormon Tabernacle Choir

The Mormon Tabernacle Choir (MTC) is a world renowned choir based in Salt Lake City, Utah. The choir has around 360 members¹¹¹ and has performed with the Philadelphia Orchestra and the Utah Symphony.¹¹² In 1999 the Orchestra at Temple Square was formed and now performs with the choir whenever an orchestra is needed.¹¹³ The MTC has performed at the inauguration of five U.S. presidents, several World's Fairs,¹¹⁴ and has a weekly radio broadcast entitled "Music and the Spoken Word," which was started in 1929.¹¹⁵

109. 17 U.S.C. § 302 (2000).

110. *See Id.*

111. Mormon Tabernacle Choir, Information, <http://www.mormontabernaclechoir.org/info/> (last visited Oct. 5, 2005).

112. Mormon Tabernacle Choir, The Orchestra at Temple Square, <http://www.mormontabernaclechoir.org/orchestra/> (last visited Oct. 5, 2005).

113. *Id.*

114. *See* Mormon Tabernacle Choir, *supra* note 111.

115. Mormon Tabernacle Choir, Music and the Spoken Word, <http://www.mormontabernaclechoir.org/info/matsw> (last visited Oct. 5, 2005).

According to one discography,¹¹⁶ the choir has recorded at least 106 published recordings since 1910.¹¹⁷ The MTC has made at least fifty-three recordings since 1978.¹¹⁸

The MTC is composed of volunteer musicians, as is the Orchestra at Temple Square.¹¹⁹ Though several of the members of the choir and orchestra are professional musicians, no member of the choir considers performing with the choir a job. Most of the members have full time jobs and participate in the choir as a secondary interest.¹²⁰ Though it appears that the members of the choir are not likely employees of the MTC, an analysis would be helpful to prove the likelihood of that assertion.

Though members of the choir are not paid, do they receive any compensation? For every local performance, members of the choir get free tickets.¹²¹ This, though, does not amount to much, because all tickets for home performances of the choir are free.¹²² When the choir performs on tour, no free tickets are given, regardless of how much the tickets cost.¹²³ Choir members do not receive free copies of their sound recordings, but may purchase them at a discounted rate.¹²⁴ In contrast, the MTC pays for all travel arrangements for its members when the choir goes on tour (but does not pay for family of choir members who travel with the choir). The MTC also provides the music and the costumes for members,¹²⁵ although these are likely considered loans because they must be returned. Therefore, the members of the MTC receive little to no reimbursement for their services, likely not enough to meet the standard from *Reid*, and certainly not the “salaried” employee standard from *Dumas*. Since the members of the choir receive no benefits and also receive no tax benefits (tax benefits are neither paid for by the choir nor likely even possible by being a

116. This discography was recommended by Scott Barrick, the general manager of the MTC. According to Barrick, the information in this discography could be used in the future to make an official discography. Telephone Interview with Scott Barrick, General Manager, Mormon Tabernacle Choir (Jan. 5, 2005) [hereinafter Barrick].

117. Russell B. Josephson, Salt Lake Mormon Tabernacle Choir Discography, http://www.josephsons.org/slmtc/mtc_rec.htm (last updated Apr. 9, 2005).

118. *Id.*

119. Mormon Tabernacle Choir, Around the World With America's Choir, http://www.mormontabernaclechoir.org/info/item?item_id=3 (last visited Oct. 5, 2005).

120. See Mormon Tabernacle Choir, Becoming a Member of the Choir, http://www.mormontabernaclechoir.org/info/item?item_id=2 (last visited Oct. 5, 2005).

121. Barrick, *supra* note 116.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

member of the choir),¹²⁶ *Aymes* would dictate that choir members are not employees.

Applying the rest of the *Reid* factors also leads to the conclusion that MTC members are not employees. There is much skill required in performing a choral work. Most of the recordings are made at the Tabernacle, where the MTC rehearses and performs, or some other site designated by the choir. Though on average members perform with the choir for nine or ten years,¹²⁷ membership is voluntary and can be terminated at any time. The MTC has practice every Thursday and Sunday (and some Tuesdays), and members need only maintain a seventy-five percent attendance record.¹²⁸ The MTC itself is not in the business of making sound recordings; it considers itself a religious organization,¹²⁹ and performances and sound recordings are secondary interests. Perhaps the most important consideration is that the choir itself considers its members to be volunteers and not employees.¹³⁰ It is not likely that choir members will ever be considered employees, either for copyright or any other purpose. An analysis of whether the choir members are employees of the record company that publishes the sound recordings produces the same results.

It is interesting, then, that though the members of the MTC are not employees for the scope of the sound recording, the record company should consider the sound recording a work for hire. As earlier stated, most record companies insert “boilerplate language in all recording contracts which specified that the sound recordings were works for hire.”¹³¹ The contracts that the MTC made with record companies (including CBS, Columbia, Sony, ABC Records, and London)¹³² stipulated that the sound recordings were works made for hire.¹³³ This becomes stranger considering that the recording companies had very little to do with the sound recording at all. According to the general manager of the MTC, the recording companies had little more than a “concurring role” in deciding what music was recorded. Though several of the recording company’s

126. *Id.*

127. Barrick, *supra* note 116.

128. Mormon Tabernacle Choir, Frequently Asked Questions, <http://www.mormontabernaclechoir.org/faq> (last visited Oct. 5, 2005).

129. Members of the choir are required to be members of the Church of Jesus Christ of Latter-day Saints (aka Mormon). See Mormon Tabernacle Choir, *supra* note 120.

130. See Mormon Tabernacle Choir, *supra* note 119.

131. NIMMER, *supra* note 8, § 5.03[B][2][a][ii].

132. See Josephson, *supra* note 117 (providing a more complete list of record labels that the MTC has worked with).

133. Barrick, *supra* note 116.

employees may have worked on the sound recording, the choir, the choir members, the conductor and the accompanist are not employees of the record company. It would appear that except for any recordings made during the small period between 1999 and 2000 (the brief period where sound recordings could be considered a work for hire if made by a contractor), the sound recordings made by the choir are not and cannot be protected as works made for hire. The rights in the sound recordings must vest initially in the authors, who are the musicians. The record companies must receive their rights in the sound recording through transfer.

As it stands, the MTC accepts that the record companies own the copyright in the sound recording.¹³⁴ The general manager of the MTC stated that in the past, the record company got the copyright in the sound recording, and in order to solve this problem, the MTC formed its own record label in 2003.¹³⁵ It is not likely that this will have the result that the MTC wants, because the problem remains: the copyright “vests initially in the author or authors of the work”¹³⁶ or the artists who perform the piece recorded. Unless the members of the choir transfer their copyright interest, the “copyright” that the record company holds will not be as useful as the company believes. The copyright in the sound recordings the MTC creates likely vests in the three to five hundred musicians and others who are joint authors in the work. This might be very disconcerting to both the record companies and the MTC itself, now that it has its own record label.

3. The Atlanta Symphony Orchestra and Chorus

The Atlanta Symphony Orchestra (ASO) and Chorus (ASOC) have together gathered an impressive number of awards and commendations. Sound recordings produced by the ASO and ASOC have won thirteen Grammy Awards; most of the sound recordings that the ASO makes feature the ASOC.¹³⁷ The ASOC was founded in 1970 by the late Robert Shaw, who brought the ASO and ASOC into prominence.¹³⁸ The ASOC is composed of 200 members,¹³⁹ and the ASO itself has ninety-five musicians.¹⁴⁰ Together, the ASO and ASOC

134. *Id.*

135. *Id.*

136. 17 U.S.C. § 201(a) (2000).

137. Atlanta Symphony Orchestra, <http://www.asochorus.org/> (last visited Oct. 5, 2005).

138. Atlanta Symphony Orchestra, Meet the ASO, <http://www.atlantasymphony.org/meet/chorus.html> (last visited Oct. 5, 2005).

139. See Atlanta Symphony Orchestra, *supra* note 137.

140. TELARC, Atlanta Symphony Orchestra, <http://www.telarc.com/biography/>

have produced around 43 albums, most of which have been distributed on the Telarc label.¹⁴¹

The copyright issues regarding the sound recordings of the ASO and ASOC are similar to those of the MTC, but the differences merit some note, beginning with the organization of the ASO. The ASOC was added to the ASO in 1970, as an ancillary group to the orchestra. Though the members of the orchestra are salaried, unionized musicians,¹⁴² the chorus itself is made up entirely of volunteers.¹⁴³ Applying the *Reid* test, it is unlikely that the chorus members could be considered employees (the results are the same as for the members of the MTC), and applying the *Dumas* test of “formal, salaried” employment, as volunteers, members of the ASOC cannot be considered employees. This creates a dichotomy: volunteer singers who create a work that vests initially in themselves and professional orchestral musicians who create the same work, but as a work made for hire it vests initially in Telarc.

Though this situation seems novel, it is not difficult to imagine it happening in other media. Imagine a freelance writer creating the text to a play, and the production company who wants to turn it into a musical has its in-house arranger/composer work with the writer to transform it. Or in a situation similar to *Reid*, a corporation who hires an artist to create a sculpture, and the artist creates a joint work with a designer from the corporation assigned to assist in the project. In both of these situations, a joint work is created where one of the creators gets the copyright in the work, whereas the other was creating the work as part of the scope of his employment, and thus that author’s portion of the copyright vests in his employer as a work made for hire.

This may seem an odd set of circumstances, but it does not alter the result. Telarc’s contract with the ASO states that Telarc receives the copyright in the sound recording.¹⁴⁴ For the members of the orchestra, this makes sense. They have created a work that, under their contracts with the AFM, is a work for hire, and so the copyright that would have initially fallen to them now vests in Telarc. But for

bios.asp?aid=2&mscssid=W1NV6CBX1Q689LH5GB7J08GDK7P3FP87 (last visited Oct. 5, 2005).

141. Atlanta Symphony Orchestra, ASOC Discography, <http://www.asochorus.org/Discography.asp> (last visited Oct. 5, 2005); see also Telephone Interview with John Sparrow, Vice President and General Manager, Atlanta Symphony Orchestra (Jan. 5, 2005).

142. Telephone interview with Jeff Baxter, Choral Administrator, Atlanta Symphony Orchestra (Jan. 4, 2005) [hereinafter Baxter].

143. See Atlanta Symphony Orchestra, *supra* note 137.

144. Baxter, *supra* note 142.

the members of the choir, who are more than twice as many in number as the orchestra members, the portion of copyright that would have fallen to them is also assumed to be owned by Telarc, and likely called a work made for hire by the sound recording contract. The result is the same as for the members of the MTC. If the individual members of the choir signed over their rights to Telarc, then Telarc has control over those rights for at least thirty-five years, after which the members of the choir may terminate that transfer. If they did not sign any agreement concerning copyright, either with the ASO or Telarc, then Telarc is controlling a copyright that neither statutorily vested nor contractually transferred to them.

IV. PROBLEM AND PROPOSED SOLUTIONS

A. Identification of Problems

The examples given above present two possible scenarios for copyright ownership of sound recordings. The first possibility is that volunteer performers have signed no contract, and have become authors of a sound recording by doing something they enjoy. Though contracts between the orchestra/choir organizations and the record companies may discuss copyright, the members have not signed these contracts, and are not a party to them.¹⁴⁵ Thus, the copyright initially vests in them as joint authors. In the second situation, these voluntary or otherwise non-employed musicians have signed contracts that transfer their rights for the sound recording to the record company. But this transfer can be terminated after thirty-five years under the 1976 Copyright Act.¹⁴⁶ Thus, if the authors are ambitious, they can return ownership in the copyright to themselves. The result of both of these situations is that members of large recording ensembles that are not employees have rights in the copyright that the record company generally believes it controls.

145. For example, members of the MTC sign a "commitment sheet" with the choir. This commitment sheet is not a copyright release, and likely does not grant the MTC the power to transfer the performers' rights to the record company. The choir members also do not sign, nor have they in recent memory signed any contract or copyright transfer with the record company. See E-mail from Scott Barrick, General Manager, Mormon Tabernacle Choir, to Stephen Adams (Jan. 18, 2005) (on file with the author).

146. See 17 U.S.C. § 203(a)(3) (2000).

1. Rights of Co-Authors

Why is this a matter for concern? Several of the performing groups cited above have recorded albums that have produced significant amounts of money.¹⁴⁷ The performers as authors have rights in the copyright, which means that the record company is accountable for part of its earnings to these performers, separately from whatever agreement is reached between the record company and the performance organization. Nimmer has stated the issue this way:

In an early case, it was held that one joint owner of a work need not account to the other joint owner for the profits obtained by the former in using the work. This rule might be justified Nevertheless, this rule has almost without exception been rejected in modern decisions, so that the prevailing rule is that a joint owner is under a duty to account to the other joint owners of the work for a ratable [sic] share of the profits realized in the work.¹⁴⁸

Thus, each author of the work, barring an agreement to the contrary, owns his proportionate interest in the work (1/total-number-of-authors interest).¹⁴⁹ In essence, just because the copyright in the sound recording may be registered in the name of the record company, that does not relieve the record company of accountability to the other joint authors.

The consent to take out the copyright in the name of one does not destroy the interest of the others, who have jointly labored with the applicant for such copyrighted [work].

. . . Where two or more persons have a common interest in a property, equity will not allow one to appropriate it exclusively to himself, or to impair its worth as to others.¹⁵⁰

According to this logic, each of the members of a chorus or orchestra is an author of a work who should receive their proportionate amount from the income derived from the work. This, though, would be disastrous to the royalties agreement between the record company and the performance organization. Additionally, this may be prohibitively expensive to coordinate and perhaps even impossible to accomplish for recording groups that border on 500 musicians or their statutory successors.

In a similar vein, the exclusive rights that the sound recording company believed it owned solely (by virtue of the work made for hire

147. For example, five recordings by the Mormon Tabernacle Choir have reached "gold record" status, and two have reached "platinum record" status. See Mormon Tabernacle Choir, *supra* note 111.

148. NIMMER, *supra* note 8, § 6.12[A].

149. *Id.* at § 6.08.

150. *Maurel v. Smith*, 271 F. 211, 215-16 (2d Cir. 1921).

status) are now jointly owned by a large group of individuals. Each of these individuals not only has the option to exercise any of the rights listed in § 106, but also has the right to transfer a non-exclusive license to any other person who wants to exercise these rights. “Because one joint owner cannot be liable for copyright infringement to another joint owner . . . it follows that a joint owner may, without obtaining the consent of the other joint owners, either exploit the work himself, or grant a nonexclusive license to third parties.”¹⁵¹ In addition to licensing, the “ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law”¹⁵² As this simply states, any of these authors could sell or license their part of the copyright, allowing any person who purchases such a license to sell phonorecords of the sound recording, possibly oversaturating the market.

2. Difficulties of Volunteers to obtain their rights

Note that it is possible that the situation described above may never arise. No member of a volunteer performing association may ever try to collect the remuneration that federal statutes provide for. If a volunteer does transfer his rights, he may not remember or may not care enough to terminate that transfer. Additionally he may have passed away and his family may not know anything about his rights. If all the members of a performing organization transfer their interest as a group, it could be a difficult task to find a majority of the group to terminate the transfer thirty-five years later.¹⁵³

Though these problems make it difficult to conceive that any volunteer or group of volunteers would attempt to sue for their rights in a sound recording, it is not impossible. For example, the MTC has a webpage that lists all of its current and former members.¹⁵⁴ The ASOC has a web page, accessible only to members of the chorus, which lists information about the members.¹⁵⁵ Armed with this information, it would be possible to contact a majority of the performers and begin the process to terminate the transfer (which could be as simple as sending a letter explaining the situation, and which the member could sign and return).

151. NIMMER, *supra* note 8, § 6.10.

152. 17 U.S.C. § 201(d)(1) (2000).

153. *See id.* § 203 (requiring a majority of people who signed away their rights to terminate the transfer).

154. Mormon Tabernacle Choir, Historical Roster, <http://www.mormontabernaclechoir.org/roster/> (last visited Oct. 5, 2005).

155. Baxter, *supra* note 142.

A second concern is the loyalty of members of volunteer performing organizations. Members of the MTC commit to give many hours for performances and practice, and some do so for up to twenty years. Some members of the ASOC have been with the group since its inception in 1970, and others travel from as far away as Tennessee to perform with the group. These examples show a good deal of commitment to these performance organizations. Such commitment might be used by the organization to have members sign their copyright interest to the organization instead of the record company, which might shift the balance of power for negotiations. This problem could be solved in the future by having the members sign transfers to the record company, the benefits of which will be discussed below.

B. Suggested solutions

1. Pre-emptive solutions

The first thing that should be done where sound recordings are being made is to contract for the copyright. If the copyright in the sound recording is intended to remain with the record company, then care should be taken to make sure that it is wholly owned by the record company in the first place. This means that every musician, whether volunteer or professional, employed or not, should sign a statement transferring whatever interest he may have to the record company. This is recommended not only for sound recordings by well known recording ensembles, but for every sound recording of a large or small ensemble (whether the sound recording will be for sale or not).¹⁵⁶ This also prevents the problem mentioned earlier of members of performing ensembles from transferring their rights to the performance organization instead of the record company. Though this may seem a harsh measure, especially for high school bands or choirs, it is simple to implement. This requires nothing more than having the performers sign a form when they arrive for the recording session.

Having performers sign a transfer is only a temporary solution because these transfers may be terminated. A recommendation that will make it more difficult to terminate the transfer to the record company is to have every musician sign the same agreement. If each individual author signs a separate agreement, then that author may simply terminate his agreement and his portion of copyright returns

156. See, Milom, *supra* 106 (stating that he recommends signing such an agreement to every recording ensemble who consults him, whether the sound recording be made by a professional group, a church, or school).

to him.¹⁵⁷ If the authors sign one agreement, a majority of authors are required to terminate such a transfer,¹⁵⁸ making it significantly more difficult to terminate that transfer.

This solution, though not infallible, provides the record company at least thirty-five years of breathing room. If a termination is not effected, then ultimately the record company will enjoy a full term of copyright in the sound recording.¹⁵⁹

2. Statutory solutions

There are two possible statutory solutions to the problem: reinsert sound recordings into the categories of commissioned works protected as works made for hire, or “shoehorn” sound recordings into one of the various categories.

Enacting legislation that would again include sound recordings as works made for hire might be the optimal solution. As required in § 101, this would require that the creator of the work and commissioning party sign a statement agreeing that the work is a work made for hire.¹⁶⁰ If this requirement were satisfied (seeing as how there is no requirement for remuneration in the statute), it is logical to suppose that the record company will be considered the author for copyright purposes.¹⁶¹ The volunteers could then neither sue for their portion of the income from exploiting the work, nor terminate the transfer, since the copyright never vested in them.¹⁶²

It should be noted that this solution is not a probable one. Noting how quickly Congress repealed the inclusion of sound recordings as a category in § 101 (less than a year after the inclusion was enacted),¹⁶³ it is unlikely that another attempt to pass such a law will happen without a large fight. Nor is it likely that musicians will let Congress slip the law in almost secretly, as was done previously.

An alternate solution, then, is to use the categories currently listed in § 101, and try to fit sound recordings within one of them. As

157. *Id.*

158. 17 U.S.C. § 203(a)(1).

159. This situation brings up interesting questions: if two authors create a joint work, one whose efforts create a work for hire vesting in his employer, when does the copyright end? Does it end when the work for hire term of the copyright ends, or does it end fifty years after the non-work-for-hire author dies? If the company and an author own the work, does the company’s protection in the work end at the time the work-for-hire protection ends, or when the other author’s protection ends, and vice-versa? Though academically interesting, these questions are outside the scope of this note.

160. *Id.* § 101 (defining “work made for hire”).

161. *Id.* § 201(b).

162. *See id.* § 201(a).

163. NIMMER, *supra* note 8, § 5.03[B][2][a][ii].

Nimmer puts it, “[i]t simply means that, for a work to qualify [for protection as a work made for hire], it must be shoe-horned within one of the other categories.”¹⁶⁴ Nimmer’s discussion of this proposition is more than satisfactory, and it is recommended that the interested reader peruse it to discover the multiple facets of this argument. Making sound recordings works for hire through this method seems like the optimal solution, but shoe-horning sound recordings into other categories will not necessarily work. One of the possible categories that sound recordings could fit into is the “contribution to a collective work”.¹⁶⁵ This category may be broad enough to cover such works as Christmas music albums,¹⁶⁶ patriotic songs, or hymns, which may contain many different songs and selections from more than one sound recording (these types of albums make up a large percentage of the MTC’s output).¹⁶⁷ It is not likely broad enough, though, to cover an album which has a single work on it. It is typical, for example, to have on one compact disc a complete recording of Beethoven’s Ninth Symphony, and nothing else.¹⁶⁸ For the other § 101 categories that one is tempted to shoehorn sound recordings into, one will find similarly that not all sound recordings will fit and ultimately many sound recordings will not fit in any category. Additionally, though this solution may be tempting for many sound recordings, without the signed writing required by § 101, it will not be useful at all.

3. Other solutions

A very simple solution is to do nothing. Sound recordings have been made by groups like the MTC and ASOC since 1978 when the new Copyright Act went into effect. There is no record of any member of the MTC or ASOC suing a record label to account for their portion of the income from the sound recording. It does not seem very likely that volunteer members are going to do so, either, because of their interest and commitment to the organization to which they belong. This solution must also be fair to the record companies. If no one sues them, they are as well off as if they owned the copyright outright. If a member of these performing organizations does sue the record companies, since it may be assumed that record companies have greater bargaining power and larger legal resources than volunteer

164. *Id.* § 5.03[B][2][a][ii].

165. 17 U.S.C. § 101 (defining “work made for hire”).

166. NIMMER, *supra* note 8, § 5.03[B][2][a][ii].

167. *See* Josephson, *supra* note 117.

168. *See* Atlanta Symphony Orchestra, *supra* note 141 (showing that this type of album makes up a large percentage of those that the ASOC puts out).

musicians, it may also be assumed that they understood the law and took their chances. Record companies cannot rely on the presumption that because the contract with the performing organization states that the sound recording is a work for hire¹⁶⁹ that it is actually a work made for hire. Though possibly detrimental to the record company, it is equitable in light of their decision to not secure the copyright from the authors.

One solution more beneficial to record companies deals with the authorship of the sound recordings. An idea not suggested by case law is that a court interested in preserving the status quo could determine that the author/s of the sound recording are not the individual performers, but the entire performing organization as a whole. This solution could simplify the process: it would eliminate the need to have volunteer performers sign agreements transferring their rights, and existing contracts between the organizations and the record companies could easily include transfers of the copyright (which might not be necessary if the work made for hire clause in these contracts was valid or acted as a transfer). There are several external criteria that already suggest this solution. One is the albums themselves: most albums do not contain the name of every musician who performed to make the sound recording; typically, they have the name of the orchestra, the conductor, any soloists, and the names of recording engineers and the like. Another is the nature of the contracts for the sound recording: they are between the organization and the record company, not between the performers and the record company. Those performers who wanted to be named had the right to contract with or petition the record company; their failure to do so may act as an estoppel to claim either copyright or their portion of the income. If necessary, it could be guided by the criteria that suggest it. Those who have a copyright are those named on the album or in the contracts. All others could be presumed to have understood that failing to request recompense or recognition at the time of recording barred them from doing so in the future.

This solution would require courts to change the concept of authorship, but as authorship is already a court created doctrine (there is no definition for what an author is in § 101 of the Copyright Code), it is also modifiable by courts. It is also a matter of proof. Without a list of members of the choir accompanying the compact disc, it will be difficult to prove that any particular performer participated in the recording.

169. This is a typical situation. See NIMMER, *supra* note 8, § 5.03[B][2][a][ii].

V. CONCLUSION

As the copyright code stands, it is unlikely that volunteers performing on sound recordings will lose their rights in the sound recording to the record company as works made for hire. Volunteering does not meet the court-created standards for employment under *Reid*, its variant *Aymes*, or under *Dumas*. Also, if the works are commissioned works, they cannot be protected as works for hire because sound recordings are not one of the listed categories under § 101.

Since the sound recordings made by these groups are not works made for hire, the copyright vests initially in the authors. Though these authors may sign away their rights to the copyright, this does not always happen. Even if the authors do transfer their rights in the sound recording, they or their statutory heirs may simply terminate this transfer within thirty-five years.

The code, then, provides that each of these authors (the number of which could reach into the hundreds on any particular sound recording) is entitled to their portion of the income that the sound recording makes. This income invariably does not go to these performers; it goes to the record company, and possibly a portion of it goes to the performing ensemble organization. Should any performer decide to sue, they would likely win whatever portion of the income that is statutorily theirs. The end result is that record companies could decide to simply stop using volunteer ensembles or decide to not distribute these recordings at all.

This problem has several solutions. The optimal solution for the record company is to petition Congress to make sound recordings protectable as a commissioned work made for hire. This could alleviate the problem of volunteer performers not counting as employees. An amendment of this sort is not likely to happen considering the outcry that was raised the last time Congress enacted this sort of legislation.

The second best option, the easiest to put into practice proactively, is to require each member of the performing ensemble, whether voluntary or not, to sign a statement transferring their interest in the copyright to the record company. This would give the company at least thirty-five years of temporary relief, and if no one terminates their transfer, permanent control of the copyright. The record company should provide a single document that every performer is required to sign. This increases the difficulty of termination over multiple documents which each performer signs separately, because a majority is required to terminate a transfer. This practice could solve a host of future problems, and barring new legislation, is the most logical approach.

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