

THE RECORD INDUSTRY'S ACHILLES HEEL:  
TERMINATION OF TRANSFER IN SOUND  
RECORDING COPYRIGHTS

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## INTRODUCTION

It is a widely held belief that large record companies often force newly discovered recording artists to sign highly unfavorable contracts in order to get their records released. Unfortunately, the belief holds true far too commonly, with artists caught between their desire to profit from their art and their desire to bargain for a better deal.<sup>1</sup> However, what most consumers and artists do not know is that there is a solution to this problem. In the Copyright Act of 1976,<sup>2</sup> Congress enacted provisions that allow artists to reclaim their works after a specified number of years by terminating the transfer of copyright rights to the record company.<sup>3</sup>

This commentary will address the effect that these termination-of-transfer provisions will soon have on the record industry. It is aimed primarily at readers who are not specialists in copyright law, to inform them of the potentially great impact of these provisions over the next six years.<sup>4</sup> In essence, the termination-of-transfer provisions give the recording artists a tool to force the record companies back to the bargaining table after the market has decided the value of the recordings. They will allow an artist whose popularity has endured to hold the record companies hostage if the companies wish to maintain the rights to their catalog of recordings.<sup>5</sup>

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<sup>1</sup> See Michael Bertin, *Indentured Servitude: The Cold, Hard Truth About Recording Contracts*, AUSTIN CHRON. (Texas), June 19–25, 1998, at \_\_\_\_\_, available at <http://www.austinchronicle.com/issues/vol17/issue41/music.labels.html> (last visited Apr. 12, 2007); see also Courtney Love, Recording Artist, Address at the Digital Hollywood Online Entertainment Conference (May 16, 2000), available at <http://archive.salon.com/tech/feature/2000/06/14/love/> (last visited Apr. 12, 2007); FUTURE OF MUSIC COALITION, MAJOR LABEL CONTRACT CLAUSE CRITIQUE 1 (2001), <http://www.futureofmusic.org/images/FMCcontractcrit.pdf> (last visited Mar. 6, 2007).

<sup>2</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

<sup>3</sup> See 17 U.S.C.A. §§ 203, 304(c)–(d) (West 2006).

<sup>4</sup> For a discussion that explains the reasons behind this timeframe see *infra* Part I.C.

<sup>5</sup> In fact, the stakes for terminations of transfer were raised by Congress when they enacted the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”). Pub. L. No. 104-39, 109 Stat. 336. Prior to the DPRA there was no statutory right of public performance for sound recordings. The DPRA granted a limited public performance right to sound recordings where the

Part I summarizes the applicable law, beginning with Congress's initial grant of copyright protection to recorded music. It will continue with a discussion of the 1976 Act and the termination-of-transfer provisions that were enacted as part of the Act. Part I will also cover copyright ownership in light of the work-made-for-hire ("WFMH") and joint-work provisions under the 1976 Act through the use of three different hypothetical examples, and it will conclude by discussing copyright law's public performance rights in sound recordings. The discussion will continue in Part II, which analyzes the impact of the law on the parties involved: recording artists, record producers and recording engineers, the recording industry, and the general public. After determining the potential impact, Part III will propose an approach to the problem based on the policy expressed in the constitutional grant of authority to Congress to award copyright protection.<sup>6</sup>

## I. OVERVIEW OF APPLICABLE LAW

### A. *Early Copyright Protection for Sound Recordings*

Strange as it may seem, the federal copyright system offered no protection to recorded music—or any form of sound recording—until the 1970s. The Copyright Act of 1909<sup>7</sup> had offered protection to musical works, but that category included only the composition of the

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performance was made via a digital audio transmission. *See* 17 U.S.C.A. §106(6) (West 2006) (granting performance right); *see also* 17 U.S.C.A. § 114(a) (West 2006) (denying § 106(4) public performance rights to sound recordings). The grant of such rights to owners of sound recording copyrights instantly made those rights far more valuable. There were, however some limitations placed on the digital audio transmission rights, which only allow artists to profit from public performances of certain types (i.e. those that are not a digital broadcast to the general public over the air). *See* 17 U.S.C.A. § 114(d)–(f). Two of the major areas today that are subject to the public performance right in sound recordings are Internet streaming and satellite radio. The potential income streams from these media outlets change the game for artists not only because of the additional income potential they generate, but because many record contracts subject to termination never addressed digital media because they were signed in the 1970s, long before the advent of the Internet or satellite radio.

<sup>6</sup> *See* U.S. CONST. art. I, § 8, cl. 8.

<sup>7</sup> Copyright Act of 1909, ch. 320, 35 Stat. 1075.

song—the song as written—and did not cover sound recordings of such works.<sup>8</sup> Thus a songwriter could get a copyright in a song he or she had written, but the recording artist who went into the studio and recorded a performance of that song could not.<sup>9</sup> In 1971, however, Congress decided to grant federal copyright protection to sound recordings made after February 15, 1972<sup>10</sup> in order to combat rampant piracy of recorded music.<sup>11</sup>

For an example of how the copyrights in musical works and sound recordings interact, consider the Johnny Cash hit, “Hurt,” which was written by Trent Reznor in 1994 and recorded by Johnny Cash in 2003.<sup>12</sup> As the songwriter, Trent Reznor owns the copyright in the musical work, but Johnny Cash’s performance as captured on CD is the subject of a separate copyright—a sound recording copyright. Thus anyone who wants to make copies of the Johnny Cash recording has to get permission from both Trent Reznor and Johnny Cash (or their respective assignees).

#### B. *The Copyright Act of 1976*

The Copyright Act of 1976<sup>13</sup> replaced the 1909 Act, but it continued to distinguish between musical works and sound recordings (and to offer protection to both).<sup>14</sup> The 1976 Act

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<sup>8</sup> See *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 61 (D.D.C. 1999) (describing the separate copyrights in a sound recording) (citing 6 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT; A TREATISE ON THE LAW OF LITERARY, MUSICAL AND ARTISTIC PROPERTY, AND THE PROTECTION OF IDEAS, § 30.01 (2006) (1963) [hereinafter *Nimmer & Nimmer*]).

<sup>9</sup> *Id.*; see also *BTE v. Bonnacaze*, 43 F. Supp. 2d 619, 627 (E.D. La. 1999) (“Sound recordings and the underlying musical compositions are separate works with their own copyrights.”).

<sup>10</sup> Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (granting copyright protection to sound recordings fixed after February 15, 1972). Thus, any sound recording made before February 15, 1972 is not subject to federal copyright law and, therefore, is outside the scope of this discussion.

<sup>11</sup> See 1 *Nimmer & Nimmer*, *supra* note 8, § 2.10[A] at 2-173.

<sup>12</sup> Reznor’s musical work is © 1994 Leaving Hope/TVT Music, Inc. (ASCAP). Cash’s sound recording is © 2003 American Recordings, LLC.

<sup>13</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

<sup>14</sup> See 17 U.S.C.A. § 102(a)(2), (7) (West 2006).

took effect as of January 1, 1978.<sup>15</sup> It fundamentally changed the system of copyright protection by making changes such as extending protection to unpublished works and changing the way that copyright duration was measured.<sup>16</sup> Under the 1909 Act, the initial term of copyright protection was twenty-eight years from first publication, and the author was able to renew the copyright for a second twenty-eight year term, providing a total term of protection of fifty-six years.<sup>17</sup> Under the 1976 Act, in most cases the term of protection extends for the life of the author plus 70 years.<sup>18</sup> This protection is for a single term; there is no longer a provision for renewal of copyright under the 1976 Act. In addition, the protection for authors under the Current Act now begins at the creation of the copyrightable work, rather than when it is first published.<sup>19</sup> For works-made-for-hire and anonymous or pseudonymous works, protection lasts ninety-five years from publication, or 120 years from creation, whichever expires first.<sup>20</sup>

One of the reasons behind the dual-term system of the 1909 Act was to allow authors a second opportunity to negotiate with publishers at the end of the first copyright term.<sup>21</sup> Because only the author or his statutorily designated heirs could renew the copyright,<sup>22</sup> the renewal right “provide[d] authors a second opportunity to obtain remuneration for their works.”<sup>23</sup> However, because copyright duration under the 1976 Act no longer contains a renewal provision, Congress

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<sup>15</sup> See Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

<sup>16</sup> *Id.*

<sup>17</sup> Copyright Act of 1909, ch. 320 § 23, 35 Stat. 1075, 1080.

<sup>18</sup> 17 U.S.C.A. § 302(a) (West 2006).

<sup>19</sup> *Id.*; see also Copyright Act of 1909, ch. 320 § 23, 35 Stat. 1075, 1080.

<sup>20</sup> 17 U.S.C.A. § 302(c) (West 2006).

<sup>21</sup> See *Stewart v. Abend*, 495 U.S. 207, 217 (1990) (“The right of renewal found in § 24 provides authors a second opportunity to obtain remuneration for their works.”).

<sup>22</sup> Copyright Act of 1909, ch. 320 § 23, 35 Stat. 1075, 1080; see also *Stewart*, 495 U.S. at 218–19 (“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.”).

<sup>23</sup> *Id.* at 217.

had to create a new solution to provide authors a “second opportunity.”<sup>24</sup> The solution fashioned by Congress in the current Act is known as termination of transfer.<sup>25</sup>

C. *Termination of Transfer*

1. Overview

Because the duration of copyright under the 1976 Act did not contain a renewal term, Congress developed a new way for authors to get a second bite at the apple, by creating the termination-of-transfer provisions in § 203 and § 304 of the Act.<sup>26</sup> Termination of transfer is separated into § 203 and § 304 rights because the provisions apply differently to transfers made before January 1, 1978 and those made on or after that date.<sup>27</sup>

What both termination-of-transfer provisions allow for is the termination by the author or authors of almost any transfer of copyright rights to the work. When there is a single author, this is relatively straightforward, but when multiple authors are involved it can be slightly more complicated. In the case of a transfer made in 1978 or later (i.e., a § 203 transfer) by two or more authors of a work with multiple authors,<sup>28</sup> the termination must be made by a majority of the authors who executed the transfer.<sup>29</sup> In contrast, for a transfer made before 1978 (i.e., a § 304 transfer) termination may be made by the individual author who executed the transfer to the

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<sup>24</sup> *Id.*

<sup>25</sup> *See* 17 U.S.C.A. §§ 203, 304(c)–(d) (West 2006).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Works with multiple authors are known as joint works. *See infra* Part I.D.4 (discussing joint works).

<sup>29</sup> *See* 17 U.S.C.A. § 203(a)(1) (West 2006).

extent of his or her share in the copyright renewal.<sup>30</sup> The only transfers that cannot be terminated under § 203 and § 304 are transfers made by will and transfers of rights in WMFHs.<sup>31</sup>

Terminated interests revert to the author or authors of the work (with some limited exceptions for derivative works).<sup>32</sup> This allows authors to reclaim their copyright interests after the terms specified by the statute. In addition, Congress made the termination rights of authors under both sections inalienable<sup>33</sup> (in contrast to the renewal provisions of the 1909 Act, under which authors could assign away their rights to renew).<sup>34</sup> This means that regardless of contractual terms, authors of works other than WMFHs have the right to terminate any transfer of rights not made by will. In order to effect a termination, the author, authors, or statutorily designated heirs must provide proper notice to the grantee of the transfer, as specified by Copyright Office regulations.<sup>35</sup> The statutory provisions allow for service of the notice as early as ten and no fewer than two years before the date of the termination.<sup>36</sup>

## 2. Section 304 Terminations

When the 1976 Act was enacted, it granted a nineteen-year extension on the second term of copyrights subsisting on the Act's effective date.<sup>37</sup> Congress later granted an extension of twenty more years under the Sonny Bono Copyright Term Extension Act ("CTEA"),<sup>38</sup> for a total

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<sup>30</sup> See 17 U.S.C.A. § 304(c)(1) (West 2006).

<sup>31</sup> See 17 U.S.C.A. §§ 203(a), 304(c)–(d) (West 2006); see also *infra* Part I.D.3 (discussing works-made-for-hire).

<sup>32</sup> See 17 U.S.C.A. §§ 203(b), 304(c)(6) (West 2006).

<sup>33</sup> See 17 U.S.C.A. §§ 203(a)(5), 304(c)(5) (West 2006).

<sup>34</sup> See *Stewart*, 495 U.S. at 215 (discussing how authors could assign their rights in renewal, but that was merely an expectancy contingent on their survival to the time designated for renewal).

<sup>35</sup> 37 C.F.R. § 201.10 (2006).

<sup>36</sup> See 17 U.S.C.A. §§ 203(a)(4), 304(c)(4) (West 2006).

<sup>37</sup> Copyright Act of 1976, Pub. L. No. 94-553 § 304, 90 Stat. 2541, 2573.

<sup>38</sup> Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298 § 102, 112 Stat. 2827, 2827–28 (1998).

of thirty-nine years of extension to the second term.<sup>39</sup> For example, a song recorded in 1972 would have originally had an initial term of protection of twenty-eight years (i.e., until 2000), with the ability to file in 1999 (the year before protection expired) to renew the copyright for an additional renewal term of twenty-eight years (i.e., until 2028). With the enactment of the 1976 Act, however, the renewal term was extended by nineteen years, from twenty-eight to forty-seven years, so that a 1972 song could get protection until 2047 (an initial term of twenty-eight terms, and then a renewal term of forty-seven years). After the CTEA, the renewal term would last even longer: sixty-seven years, or until 2067 for a song recorded in 1972.

Section 304 terminations are applicable only to transfers that were executed before January 1, 1978,<sup>40</sup> and the terminations cover only the extended periods granted to works that were copyrighted under the 1909 Act—the nineteen-year extension granted by the 1976 Act and the twenty-year extension granted by the CTEA.<sup>41</sup> Using the previous example, if the song were recorded in 1972 and the transfer was executed in 1973, then the termination of that transfer would affect only the copyright protection from 2028 to 2067 (the thirty-nine years acquired by Congress's extension grants).

Therefore, any sound recordings eligible for a § 304 termination would not be eligible for termination until 2028 at the earliest (fifty-six years after 1972). As we will soon see, however, terminations under the other termination-of-transfer statute, § 203, will take effect as early as 2013.<sup>42</sup> Because of the significant amount of time that will pass between the ripening of the first § 203 terminations and the first § 304 terminations, many of the questions applicable to

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<sup>39</sup> See 17 U.S.C.A. § 304(a)–(b) (West 2006).

<sup>40</sup> See 17 U.S.C.A. § 304(c)–(d) (West 2006).

<sup>41</sup> See *id.*; see also *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610, 617 (2d Cir. 1982) (stating that the Congressional purpose in granting § 304 termination rights was to “permit[] the author or his family to enjoy the nineteen-year extended renewal term provided by the Act.”).

<sup>42</sup> See *infra* Part I.C.3.

terminations in sound recording copyrights will have been settled by the time the § 304 terminations begin. Therefore, § 304 terminations will not be discussed further in this commentary.

### 3. Section 203 Terminations

Section 203 covers copyright transfers executed after January 1, 1978.<sup>43</sup> Under this section, terminations can be effected within a five-year period beginning thirty-five years from the date of the transfer.<sup>44</sup> This would make transfers of copyrights in sound recordings executed in 1978 first eligible for termination in 2013. Thus, the § 203 terminations will be the first terminations of sound recording transfers ripe for determination by a court. For example, a song recorded in 1990 would be protected until seventy years after the author of the recording died, so if the author died in 2010, the copyright would not expire until 2080.<sup>45</sup> But if a transfer of copyright rights in the sound recording were executed in 2000, then that transfer would be eligible for termination in 2035.

Because of the advance notice requirement set forth in § 203(a)(4), the notice of termination in a sound recording to be effected in 2013 could have been served as early as 2003 and must be served no later than 2011. Assuming that the notice is provided to the proper party and is in the prescribed format, it seems there would be few problems with such a termination as a general matter. However, in the case of sound recordings, there are specific questions of fact as to who the author is—who has the right to terminate the transfer—or if the transfer is terminable at all (e.g. whether or not the sound recording was a WMFH).<sup>46</sup> It seems very likely the authors who are eligible for the first terminations will wait until the latest possible time to

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<sup>43</sup> 17 U.S.C.A. § 203(a) (West 2006).

<sup>44</sup> 17 U.S.C.A. § 203(a)(3) (West 2006).

<sup>45</sup> See 17 U.S.C.A. § 302(a) (West 2006).

<sup>46</sup> See *infra* Part I.D.3.

serve their notices because the first artists to attempt to terminate the transfers in their sound recordings will likely find themselves as a party to a lawsuit against a powerful record label. For this very reason, it is unlikely that there will be many cases on this issue until close to 2011. After the first few cases are decided, the flow of litigation over terminations should slow considerably as it will be far more likely for parties to settle their disputes once they can more accurately predict how courts will address particular factual issues such as authorship.

D. *Copyright Authorship and Ownership in Sound Recordings*

1. Generally

Only the author or the statutorily designated heirs of a deceased author have the right to terminate a transfer.<sup>47</sup> Thus, authorship will be a critical factual issue in the debate over terminations applicable to sound recordings. In many cases, determining who authored a work is a simple matter, but because sound recordings usually involve the contributions of several parties, it may be difficult to determine exactly who the author is—or authors are—with regard to a particular sound recording.<sup>48</sup>

It is likely that most of the determinations of authorship will hinge on whether the sound recording was a WMFH or a joint work. Whether a sound recording is a WMFH or a joint work is heavily dependent on factual considerations. I will, therefore, use three hypothetical examples to demonstrate how factual situations can impact the analysis of whether a sound recording is a WMFH or a joint work and how that impacts the determination of authorship. First, I will introduce the hypothetical examples, then I will review the applicable WMFH law and discuss how it applies to each example, and finally I will discuss the law behind joint works and see how each of the examples fares in that context.

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<sup>47</sup> See 17 U.S.C.A. §§ 203(a)(2), 304(c)(2) (West 2006).

<sup>48</sup> See 1 *Nimmer & Nimmer*, *supra* note 8, § 2.10[A][3] at 2-178.2–.2(1).

2. Hypothetical Examples

*i. The Independent Band*

After working diligently for several months, the Independent Band members have written twenty good songs. The band spends a month rehearsing the songs until it is able to perform them with precision. Next, the band members scrape together the money they have made working their day jobs and playing gigs, and they go into a studio and record the songs. They share the duties of producer and recording engineer while they are in the studio. The band spends thousands of dollars and numerous hours getting the tracks just right, so the finished product sounds great. The members cut out the six weakest songs and determine the order for the remaining fourteen. Once the details of the album have been decided, the band pulls its remaining money together to put the tracks together in a final album, named "IBA." The Independent Band members once again share the duties of producer and engineer during the mastering process for the IBA album.

The Independent Band has some CDs made of the album and begins to sell them at its shows. Due to the strength of the CD, the band's popularity grows, and it soon begins to receive attention from record companies. After discussions with several labels, the band members seek advice from an attorney, who advises them about the pitfalls of the contract provisions. He explains that the contracts are standard for the type of recording deal offered, and the band really has no position from which to bargain. Figuring they are unable to do any better, the band members sign a contract with Big Record Label to distribute their album for them. The deal pays royalties to Independent Band, but in return the band must assign any and all copyrights to Big Record Label. Upon release, the album is a massive success, far beyond anyone's expectations.

Unfortunately, even though Big Record Label is selling millions of CDs, the royalty checks to the Independent Band are miniscule.

*ii. The Studio Wizards*

The Studio Wizards have a good sound, and have developed a following through their live shows. An executive from Big Record Label happens to see one of their shows, and signs the group to a development contract, which includes the same provision regarding assignment of copyrights as did the Independent Band contract. Big Record Label provides the Studio Wizards a tremendous amount of time and money to create and record their album. The band, using some of the money provided to it by Big Record Label, contracts with Creative Genius to produce the album. Creative Genius is an innovative producer who does all his own engineering, and has developed several unique recording techniques in order to help create the visions he has for the bands that he has produced in the past. The members of the Studio Wizards hope that Creative Genius, through his innovative techniques, will enable them to create the unique sonic vision they have for the album.

Creative Genius and the Studio Wizards head off to a remote studio and spend several months creating a masterpiece, entitled "SWA." Every note is perfect, and together they develop new musical styles and recording techniques. Because of the extensive amount of time the album took to make, all of this creativity did not come cheap, and SWA is by far the most expensive album that Big Record Label has ever produced. Once released, it is one of the most successful albums in history. After an extended tour, the Studio Wizards head back into the studio with Creative Genius to record their follow-up. The process continues for several years, with similar results. Again, although the innovative records released by the Studio Wizards are very popular, the group's royalty income is disappointing.

*iii. The Boy Band*

Big Record Label executives decide to follow a trend that they have noticed in popular music: hiring a group of performers (the Boy Band) to create an album at the studio's direction. They put one of their producer employees, Puppet Master, in charge of the group. Puppet Master auditions several performers selects the handful that will comprise the group, and signs them to a contract that includes assignment of any and all of their copyrights to Big Record Label. He then chooses the music from selected songwriters for the group members to record. Puppet Master is instrumental in the recording sessions, ensuring that the Boy Band album, "BBA," has the sound that Big Record Label is trying to achieve in order to capitalize on the popular music trend. He does this by directing the performances of the band members, as well as directing the recording engineer, and producing the album.

BBA is released at just the right time, and finds huge success, especially with teenage girls. The Boy Band is mobbed everywhere it goes, and sells out every date on its concert tour. Puppet Master works with the group, providing the best choreographer in the business to ensure that the live show is captivating. As the tour carries on, Puppet Master is reviewing song submissions for the Boy Band's second album, which is produced in a fashion similar to the debut. Unsurprisingly, although both albums meet with tremendous commercial success, the Boy Band members see little royalty income from album sales.

3. Works Made for Hire

If a work is a WMFH,<sup>49</sup> the hiring party is considered the author of the work.<sup>50</sup> For example, if a graphic artist who is an employee of an advertising agency creates a drawing for an ad campaign to which she is assigned, the author of the work would be the advertising agency,

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<sup>49</sup> See 17 U.S.C.A. § 101 (West 2006).

<sup>50</sup> See 17 U.S.C.A. § 201(b) (West 2006).

not the artist. This is one of the more straightforward examples of a WMFH, but there are two different ways a work can be “made for hire,” which are discussed below.

If a sound recording were to be considered a WMFH, then the performing artist would not be able to terminate the transfer because, under the 1976 Act, copyrights in WMFH are not eligible for terminations of transfer.<sup>51</sup> In addition, even if a WMFH were eligible for termination, the artist is not the author; therefore, he or she would not have the right to terminate transfers of the work anyway.<sup>52</sup>

*i. Works Created By Employees*

Under the 1976 Act, there are two ways that a work can be a WMFH. First, a work is a WMFH if it is created by an employee within the scope of his or her employment.<sup>53</sup> In *Community for Creative Non-Violence v. Reid*<sup>54</sup> (“CCNV”), the Supreme Court held that whether a party was an “employee” would be decided under the “common law of agency.”<sup>55</sup>

The Court’s decision in *CCNV* enumerated thirteen factors to be used in analyzing the relationship between the parties to see if an employment relationship exists.<sup>56</sup> Not all of the factors listed by the Court come into play in every case, but the Second Circuit specifically addressed the *CCNV* factors in its decision in *Aymes v. Bonelli*<sup>57</sup> and specified five of them that will be applicable in nearly all cases: “(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

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<sup>51</sup> See 17 U.S.C.A. §§ 203(a), 304(c) (West 2006).

<sup>52</sup> See *id.*

<sup>53</sup> 17 U.S.C.A. § 101 (West 2006); see *Cnty. for Creative Non-Violence v. Reid (CCNV v. Reid)*, 490 U.S. 730, 738 (1989) (discussing the two ways a work can be “made for hire” and deciding that the nine categories are exclusive for commissioned works).

<sup>54</sup> 490 U.S. 730 (1989).

<sup>55</sup> *Id.* at 741 (“[T]he term ‘employee’ should be understood in light of the general common law of agency.”).

<sup>56</sup> *Id.* at 751-52.

<sup>57</sup> 980 F.2d 857 (2d Cir. 1992).

treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party.”<sup>58</sup> The *Aymes* court also made clear that when a court is reviewing the factors, it must “consider [each factor’s] relative importance in [the] case” rather than weigh all factors equally.<sup>59</sup> The Second Circuit did point out the tax treatment and employee benefits factors, although not necessarily determinative, were so important 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.”<sup>60</sup> Thus, where the hiring party does not extend benefits or treat the author as an employee for tax purposes, it is very unlikely that the work will be considered a WMFH under the employee category.

Most recording artists would not consider themselves employees of their record company in a colloquial sense.<sup>61</sup> However, because the term must be analyzed under agency law principles, the provisions of the record contract and the specifics of the relationship between the artist and the record label will be essential elements in a court’s analysis of sound recording authorship. Because all copyrightable works created by an employee are the property of an employer,<sup>62</sup> whether a recording artist was the record company’s employee under the factors enumerated in *CCNV* will be a key factual determination for a court faced with a dispute over an attempted termination of transfer in a sound recording. In order to analyze this, we will consider

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<sup>58</sup> *Id.* at 861.

<sup>59</sup> *Id.* at 862.

<sup>60</sup> *Id.* at 863 (citations omitted).

<sup>61</sup> See David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC’Y 387, 399 (2001) [hereinafter *Time Bomb*] (“Sheryl Crow testified that recording artists no more work for record companies than do novelists for publishers.” (citing *United States Copyright Office and Sound Recordings as Work Made for Hire: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. 79 (2000) [hereinafter *2000 Hearings*] (statement of Sheryl Crow))).

<sup>62</sup> See 17 U.S.C.A. §§ 101, 201(b) (West 2006).

the five key *CCNV* factors set out in *Aymes* in light of the three previously introduced hypothetical examples.

In the Independent Band example, Big Record Label had no right to control the manner and means of creation, because the IBA album was completed before Big Record Label ever got involved with the Independent Band. There was a high amount of skill required by the Independent Band members not only in writing and performing the songs, but in recording, mastering, and arranging the album as well. No employee benefits were afforded to the Independent Band members during the recording process, nor were any taxes paid for them. The album was simply purchased after it was complete, and royalties were paid based on a fixed percentage of sales. The relationship was more like a business partnership than that of an employer/employee. In addition, Big Record Label had no right to assign additional projects to the Independent Band. It is clear that the Independent Band members would not be considered employees of Big Record Label under the *Aymes* key *CCNV* factors.

In the Studio Wizards example, the right to control the manner and means is with the Studio Wizards and Creative Genius, even though the studio is paying for it, because Big Record Label is not exerting any control over the creation of the work; it is just providing funds. The skill required is high, perhaps even higher than in the Independent Band example, because of the innovative musical and recording techniques developed by the Studio Wizards and Creative Genius during their recording sessions. Although Big Record Label provides money for the studio work of the Studio Wizards and Creative Genius, the band members and producer do not receive employee benefits, nor are taxes withheld, because the money distributed by the studio is merely a recoupable advance on royalty earnings of the group (a common practice in recording

artist contracts).<sup>63</sup> Big Record Label does not have any authority in the relationship to assign additional projects to the Studio Wizards. Therefore, even though the creation of the SWA occurred after the relationship with Big Record Label began, and at its expense, it still does not appear that the key *Aymes/CCNV* factors would indicate that the Studio Wizards members were employees of Big Record Label.

The Boy Band example is somewhat different. In that example, the studio, through Puppet Master, exerts a tremendous amount of control over the creation of the album, and the Boy Band members are merely performing at Puppet Master's direction. The skill required from the Boy Band is far lower than it is for the Independent Band or the Studio Wizards, because they are simply performing songs. They did not write the songs, nor do they participate heavily in the recording process, because Puppet Master is building the record to suit Big Record Label's goal of capitalizing on the current music trend. Big Record Label also seems to have the ability to assign additional recording projects to the group through Puppet Master. However, Big Record Label does not provide benefits to or pay taxes for the members of the Boy Band. If what the court in *Aymes* said about the importance of tax and employee benefits as factors<sup>64</sup> is true, even the Boy Band's members may not be considered employees of Big Record Label in a *CCNV* analysis, although the issue is far less clear than in the Independent Band or Studio Wizards examples.

*i. Specially Commissioned Works*

If a recording artist is found to be an independent contractor, and not an employee under the *CCNV* test, a court must still consider whether the sound recording qualifies as a WMFH

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<sup>63</sup> See *Time Bomb*, *supra* note 62, at 399 n.77 (2001) (“every penny the record label spends on behalf of the artist . . . is 100 percent recoupable” (quoting *2000 Hearings*, *supra* note 62, at 75 (statement of Michael Greene))).

<sup>64</sup> See *Aymes*, 980 F.2d at 863.

under the second method, which applies when the work is “specially ordered or commissioned,” but *only* if there is a writing signed by both parties *and* the work falls within one of nine enumerated categories.<sup>65</sup> Although the independent contractor category of WMFH seems more complicated when looking at the statute,<sup>66</sup> the analysis is more straightforward, as the courts have settled most of the outstanding questions applicable to works made by independent contractors. The key elements for this type of WMFH are that (1) the work be specially commissioned,<sup>67</sup> (2) there is a written agreement signed by both parties,<sup>68</sup> and (3) the type of work falls within one of the nine listed categories.<sup>69</sup>

The work must be “specially ordered or commissioned” according to § 101.<sup>70</sup> Courts have held this to mean that the agreement to make the work a WMFH must come prior to the creation of the work, in order to keep WMFH status predictable.<sup>71</sup> The requirement that the agreement be written helps to clarify the ownership in the intangible property that is eligible for copyright protection.<sup>72</sup> Whether the writing itself must precede the creation of the work is

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<sup>65</sup> 17 U.S.C.A. § 101(2) (West 2006).

<sup>66</sup> *Id.*

<sup>67</sup> *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 561 (2d Cir. 1995), *cert. denied*, 516 U.S. 1010 (1995) (explaining that a work under the nine categories can be considered for hire only if specially ordered or commissioned for that purpose).

<sup>68</sup> *CCNV*, 490 U.S. at 738 (quoting 17 U.S.C.A. § 101(2) (West 2006)).

<sup>69</sup> *See Lulirama Ltd. v. Axxcess Broad. Servs., Inc.*, 128 F.3d 872, 877 (5th Cir. 1997) (“A work created by an independent contractor can constitute a work for hire only if it fits one of the nine narrowly drawn categories of works delineated in the second part of section 101’s definition of ‘works made for hire.’” (citing *CCNV*, 490 U.S. at 748)).

<sup>70</sup> *See* 17 U.S.C.A. § 101(2) (West 2006).

<sup>71</sup> *See Dumas*, 53 F.3d at 559 (holding that the parties must agree before the work’s creation in order to satisfy “Congress’s goal of ‘predictability’”); *see also* *Billy-Bob Teeth, Inc. v. Novelty, Inc.*, 329 F.3d 586, 591 (7th Cir. 2003) (“For an item to be a commissioned work, then, the parties must agree in advance that that is what it will be.” (citing *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410 (7th Cir. 1992))).

<sup>72</sup> *See Nordisco*, 969 F.2d at 412 (“The statement also came too late. The requirement of a written statement regarding the copyright on a specially commissioned work is not merely a statute of frauds . . . . [T]he signed-statement requirement in section 101(2) has a second

slightly less clear, but in the cases where courts have accepted writings that were executed after creation, the writing was confirming an agreement made prior to the work's creation.<sup>73</sup> Prior to the Supreme Court's decision in *CCNV*, there was some disagreement between courts as to whether a commissioned work had to be within the nine specific categories listed in § 101, but the *CCNV* decision made clear that the categories were exclusive.<sup>74</sup>

However, once the Court had settled the question as to whether or not the categories were exclusive, it led to the question of how broadly the categories themselves should be interpreted. For example, it has been argued that a sound recording could fall under several of the categories, such as contribution to a collective work, compilations, or audiovisual works.<sup>75</sup> The silence by Congress in this area<sup>76</sup> has sparked intense debate and has left the issue to be addressed by the courts.

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purpose—to make the ownership of property rights in intellectual property clear and definite, so that such property will be readily marketable.” (citations omitted)).

<sup>73</sup> See *Nordisco*, 969 F.2d at 413 (“The writing must precede the creation of the property in order to serve its purpose of identifying the (noncreator) owner unequivocally.”); see also *Dumas*, 53 F.3d at 559 (assuming a writing can come after the work's creation if it merely confirms a prior agreement made before the work's creation).

<sup>74</sup> *CCNV*, 490 U.S. at 738, 748 (“[T]he legislative history underscores the clear import of the statutory language: only enumerated categories of commissioned works may be accorded work for hire status.”).

<sup>75</sup> See *Lulirama*, 128 F.3d at 877 (Defendant argued “audiovisual” should be broadly construed, as the district court found.). For a far more thorough analysis of the arguments regarding how broad or narrow the categories should be construed see David Nimmer, Peter S. Menell, & Diane M. McGimsey, *Preexisting Confusion in Copyright's Work-for-Hire Doctrine*, 50 J. COPYRIGHT SOC'Y 399 (2003) [hereinafter *Work-for-Hire*]. See also *Time Bomb*, *supra* note 62, at 398–403 (providing analysis of attempts to shoehorn sound recordings into other categories).

<sup>76</sup> Congress did add sound recordings to the list of qualifying works in § 101(2) in 1999 and then retroactively repealed the addition in 2000. Analysis of Congress's actions in 1999 and 2000, what should be inferred from them, and their impacts on terminations of transfer in sound recordings has already been done in an excellent article by David Nimmer and Peter S. Menell. See *Time Bomb*, *supra* note 62. As Congress's repeal detailed that the additions and subsequent repeal should be as though the amendment were never made, the analysis will continue without further discussion of the amendments, which are beyond the scope of this commentary. See Pub. L. No. 106-379, 114 Stat. 1444 (Oct. 27, 2000). However, as the Congressional repeal made

In *Lulirama Ltd. v. Access Broadcast Services, Inc.*,<sup>77</sup> the Fifth Circuit directly addressed the issue of whether sound recordings could be considered audiovisual works for the purpose of determining WMFH status. The court ultimately held that “the term ‘audiovisual works’ [does not] encompass[] ‘purely audio works.’”<sup>78</sup> Part of the Fifth Circuit’s basis for the decision came from the Supreme Court’s holding in *CCNV*.<sup>79</sup> The court found that “an audiovisual work must have a visual component.”<sup>80</sup> The view of the *Lulirama* court has since found support in district courts outside the Fifth Circuit.<sup>81</sup> In addition, the court in *Ballas v. Tedesco*<sup>82</sup> found that “sound recordings are not a work for hire under the second part of the statute because they do not fit within any of the nine enumerated categories” in light of the holding in *CCNV*.<sup>83</sup>

Although the decisions discussed above only apply to expansion of the “audiovisual works” category, they seem to indicate courts are most likely to read the statutory categories narrowly after the *CCNV* decision. Thus, although compilation albums or collective works that contain recordings by multiple artists may be classified as WMFH under the “specially ordered or commissioned” prong,<sup>84</sup> it seems less likely that an album of recordings initially released

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clear that the addition in 1999 and repeal in 2000 should be treated as though they never occurred, it will not be discussed further because the analysis will be made in light of the current law.

<sup>77</sup> 128 F.3d 872 (5th Cir. 1997).

<sup>78</sup> *Lulirama*, 128 F.3d at 878.

<sup>79</sup> See *Lulirama*, 128 F.3d at 877 (“Strict adherence to the language and structure of the Act is particularly appropriate.”) (quoting *CCNV*, 490 U.S. at 748 n.14).

<sup>80</sup> *Id.* at 878.

<sup>81</sup> See, e.g., *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999) (citing *Lulirama*, 128 F.3d at 878; *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999)).

<sup>82</sup> 41 F. Supp. 2d 531 (D.N.J. 1999).

<sup>83</sup> *Ballas*, 41 F. Supp. 2d at 541.

<sup>84</sup> See 17 U.S.C.A. § 101(2) (West 2006) (“A ‘work made for hire’ is -- . . . (2) 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

together by a single artist would be classified as a collective work if the categories were narrowly construed. This depends on how individual tracks on an album are viewed by a court: each as an individual work that when combined constitute a compilation or collective work, or more like chapters that are subdivisions within a single literary work.

Obviously, the record industry would prefer that each track on an album be seen as an independent work so it can claim that an album is a compilation or collective work and take advantage of the WMFH doctrine to deny recording artists with whom the record company had a prior agreement and signed written instrument (i.e. a record contract) any opportunity for termination. Artists, on the other hand, would prefer that the album be viewed as neither a compilation nor a collective work, even though it is made up of individual tracks. The most logical place to begin settling the dispute is in § 101 of the Current Act, which provides the definitions of compilation and collective work. According to the statute, the key element to a compilation is the collection and assembling of materials in such a way that the selection, coordination, or arrangement constitutes an original work.<sup>85</sup> A collective work is a subset of the definition of compilation, where independent works are assembled into a collective whole.<sup>86</sup> So is a record album a compilation or collective work under these definitions? The answer is not entirely clear.<sup>87</sup>

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agree in a written instrument signed by them that the work shall be considered a work made for hire.” (emphasis added).

<sup>85</sup> 17 U.S.C.A. § 101 (West 2006).

<sup>86</sup> *Id.*

<sup>87</sup> The analysis of this issue is extremely complicated, and has been taken up by Professors Nimmer and Menell in their articles. *See Work-for-Hire, supra* note 76; *see also Time Bomb, supra* note 62. Unfortunately there is no definitive answer at the current time, and there may not be until courts begin to decide cases on this issue.

However, when the decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>88</sup> is considered, it seems that simply arranging a limited number of tracks may not constitute the originality required for protection<sup>89</sup> under the 1976 Act.<sup>90</sup> The Second Circuit has specifically held that originality in selection and arrangement requires “making non-obvious choices from among more than a few options.”<sup>91</sup> So does choosing track order constitute enough originality to make an album a compilation? It does not seem that the Second Circuit would think so because of the limited number of choices involved. This view would hold true especially in the case where a court views a record album to be similar to a novel, book of short stories by a single author, or book of poetry that merely has subdivisions within the single work.

So how do recording artists fare in the WMFH context? It seems that it is very unlikely in most cases that recording artists would be considered employees of the record companies under a *CCNV* analysis, thus disqualifying the work from becoming a WMFH due to an employee relationship. Within the specially ordered or commissioned prong, whether the album is specially ordered or commission is dependent on the particular facts. It is clear that the

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<sup>88</sup> 499 U.S. 340 (1991).

<sup>89</sup> Under the 1976 Act, a work gains copyright protection if it is sufficiently original and is fixed in a tangible medium of expression. 17 U.S.C.A. § 102 (West 2006). The standard for originality is low: there must simply be some creative expression that the author independently creates. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (citations omitted) (With regard to creativity, the court held that “even a slight amount will suffice.”). The fixation requirement means that the work must be recorded in some permanent form, from which it can be perceived or communicated. *See* 17 U.S.C.A. § 101 (West 2006) (“A work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.”). The sorts of recorded music that this paper discusses qualify for such protection quite easily.

<sup>90</sup> *See Feist*, 499 U.S. at 345.

<sup>91</sup> *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 674, 682 (2d Cir. 1998) (citing *Hearn v. Meyer*, 664 F.Supp. 832, 847 (S.D.N.Y. 1987)).

agreement must become before the work's creation, and that there must be a written instrument commemorating the agreement, even if it is unclear whether the instrument can be executed after the creation of the work. The majority of courts have found that sound recordings are not directly within the nine categories that can qualify to be specially commissioned, so if they were to qualify it will depend on whether they are considered as compilations or collective works. Again, this question will depend on particular facts, as well as how courts view albums of sound recordings, but it seems that the Second Circuit and others that follow its lead will be unlikely to find that there is sufficient selection and arrangement to constitute an original work because the selection is from the limited number of tracks the recording artist creates for the album. In the end, there is no bright-line rule, and the WMFH analysis will come down to factual determinations.

The above analysis is key to the termination-of-transfer question, because if the sound recordings do not qualify as WMFHs, the authors of the songs may terminate any assignments of their copyrights thirty-five years after the assignment occurred. We shall now turn to the question of who exactly the authors are, and what effect multiple authorship has on the termination issue.

#### 4. Joint Authorship (Joint Work)

The other major issue that affects authorship interests in a sound recording is the doctrine of joint works. As mentioned in Part I.C.1, where the work is a joint work a § 203 termination must be made by a majority of the authors who executed the transfer (i.e., if four authors executed a transfer then at least three of those authors must agree to terminate in order for a § 203 termination to be effected).<sup>92</sup> Thus, determining who is an author with the power to

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<sup>92</sup> See 17 U.S.C.A. § 203(a)(1) (West 2006); see also *supra* note 29 and accompanying text.

terminate is a prerequisite to proper terminations with regard to joint works. The 1976 Act defines a joint work as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”<sup>93</sup>

According to the Act, the authors in the joint work co-own the copyright in that work,<sup>94</sup> meaning that they hold “equal undivided interest in the whole work.”<sup>95</sup> Because the term “author” is not defined in the Act, there have been several disputes over joint authorship in works. As part of resolving the disputes, courts in the majority of circuits have determined that there are two requirements in order for a work to be a joint work: (1) a party must contribute something that is independently copyrightable,<sup>96</sup> and (2) the parties involved each intended the other parties to be joint authors.<sup>97</sup>

Although several circuits have come to the same conclusion, perhaps the best-known case is *Aalmuhammed v. Lee*<sup>98</sup> from the Ninth Circuit. The case revolved around an advisor to the motion picture *Malcolm X* named Jefri Aalmuhammed, who had assisted Denzel Washington

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<sup>93</sup> 17 U.S.C.A. § 101 (West 2006).

<sup>94</sup> See 17 U.S.C.A. § 201 (a) (West 2006) (“The authors of a joint work are coowners of copyright in the work.”).

<sup>95</sup> *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998).

<sup>96</sup> *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 2000) (“A ‘joint work’ in this circuit ‘requires each author to make an independently copyrightable contribution’ to the disputed work.” (quoting *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir. 1990))); see also *Erickson v. Trinity Theater, Inc.*, 13 F.3d 1061, 1069 (7th Cir. 1994) (“Even if two or more persons collaborate with the intent to create a unitary work, the product will be considered a ‘joint work’ only if the collaborators can be considered ‘authors.’”).

<sup>97</sup> *Aalmuhammed*, 202 F.3d at 1234 (“The[] [Second and Seventh] [C]ircuits have held that a person claiming to be an author of a joint work must prove that both parties intended each other to be joint authors.” (citing *Thomson*, 147 F.3d at 202–05); see also *Erickson*, 13 F.3d at 1068–69; *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991) (“The touchstone here is the *intention, at the time the writing is done*, that the parts be absorbed or combined into an integrated unit . . . .” (citing H.R. REP. NO. 94-1476, at 120 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736; S. REP. NO. 94-473, at 103 (1975))).

<sup>98</sup> 202 F.3d 1227 (9th Cir. 2000).

and Spike Lee as they were creating the movie.<sup>99</sup> Because of the contributions he made to the film, Aalmuhammed claimed that the film was a joint work, and that he was one of the authors.<sup>100</sup> The court disagreed, holding that even though Aalmuhammed made valuable contributions, “authorship is not the same thing as making a valuable and copyrightable contribution.”<sup>101</sup> The court also pointed out that the author of a work was the one who was the “master mind” behind its creation.<sup>102</sup> Thus, the court found that control was an important factor in determining whether or not there was co-authorship in a work when there is an absence of objective evidence, such as a written agreement.<sup>103</sup>

Both the *Aalmuhammed* court and several other circuit and district courts have found that merely providing advice or assistance is not enough to make someone a co-author.<sup>104</sup> The reasoning behind these findings stems from the belief that if an author would have to forfeit a portion of his or her copyright for seeking assistance, such a situation “would compel authors to insulate themselves and maintain ignorance of the contributions others might make,” and the art would suffer by losing those other contributions.<sup>105</sup> So under the requirements set forth in the

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<sup>99</sup> *Aalmuhammed*, 202 F.3d at 1229–30.

<sup>100</sup> *Id.* at 1230.

<sup>101</sup> *Id.* at 1232.

<sup>102</sup> *Id.* at 1233 (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884)).

<sup>103</sup> *Id.* at 1235 (“[A]bsence of control is strong evidence of the absence of co-authorship.”); *see also Thomson*, 147 F.3d at 202 (“An important indicator of authorship is a contributor’s decisionmaking authority . . .”).

<sup>104</sup> *See Aalmuhammed*, 202 F.3d at 1235 (“[V]ery valuable contributions . . . [are] not enough for co-authorship of a joint work.”); *Erickson*, 13 F.3d at 1071 (“To qualify as an author, one must supply more than mere direction or ideas.”); *see also Childress*, 945 F.2d at 509 (describing that in the case where someone provides the author helpful advice “[the author] does not so easily acquire a co-author.”).

<sup>105</sup> *Aalmuhammed*, 202 F.3d at 1235; *see also Thomson*, 147 F.3d at 202 (“Care must be taken . . . to guard against the risk that a sole author is denied exclusive authorship status simply because another person render[s] some form of assistance.”)(quoting *Childress*, 945 F.2d at 504)).

Second, Seventh, and Ninth Circuits, authors can seek assistance in their creative endeavors without necessarily sacrificing their authorship interests.

This ability to accept help without sacrifice is especially important in the field of sound recordings because (as the hypothetical examples have shown) there are usually several people involved in the process of making sound recordings other than the performing artists, and each such person may attempt to claim he or she is a joint author of the sound recording. Two types of people most commonly involved in the case of sound recordings are producers and recording engineers, who assist the performing artists in recording their individual performances and mixing those recordings together to complete the sound recording.<sup>106</sup>

In the Independent Band example, joint authorship is not much of a concern, because the band members alone produced and engineered the recordings. Each individual member clearly intended to be joint authors with the others because they collectively worked on the writing of the songs, they intended their individual performances to be put together in the recording, they produced/engineered the tracks themselves, and they agreed on the track listing as a group. So only the Independent Band members would be considered as joint authors of the recording. Big Record Label could not claim to contribute anything to the album while it was being made, because the album was already complete when they purchased it, so it could not qualify as a joint author of the Independent Band's album.

In the Studio Wizards and Boy Band examples, however, there are clearly parties outside the groups that may be able to claim joint authorship in the sound recordings. In both examples, the producer plays a role significant enough to constitute an independently copyrightable

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<sup>106</sup> See *infra* Part II.B.

contribution. There are differences, however, in the intent of the parties, and the amount of control exercised by the producers.

Creative Genius worked collectively with the Studio Wizards, enabling them to reach the goals the group had for their album, through both his use of innovative recording techniques and his experience after producing several successful albums. Although he was instrumental in the process, he focused on enabling and refining the band's vision for the album, rather than dictating his own. Nevertheless, the band in selecting him for his innovative techniques and vision intended for his contributions to shape the album, and he would most likely be able to successfully claim joint authorship in the work because of the intent of the band members combined with his copyrightable contributions to the sound recordings. Big Record Label, however, in contributing nothing more than money to finance the recordings certainly did not make an independently copyrightable contribution to the recordings, and would not be able to qualify as a joint author.

The Boy Band example differs markedly from that of the Studio Wizards. The level of control exerted by Puppet Master in selecting the group members, deciding what songs the group would record, directing the performances, and producing the album to meet the goals set forth by Big Record Label was far beyond that of Creative Genius. Puppet Master was acting more like a "master mind" than a collaborative member of the group. In fact, his control is so over-arching that he may even be considered by some courts to be the sole author, regardless of the intent of the Boy Band members, because of the lack of control exerted over the project by the band members. Lacking that, however, Puppet Master would almost certainly be able to qualify as a joint author because the group's creation and the recording of the album was done at his direction; it would be extremely difficult for the band members to convince a court that he was

never intended to be at least a joint author of the project. In addition, because the group and album were the vision of Big Record Label (trying to capitalize on market trends), it may have an independent claim to joint authorship in the sound recordings. That is, however, irrelevant because any interest as a joint author Puppet Master could claim would belong to Big Record Label under the employee prong of the WMFH analysis.<sup>107</sup>

As I mentioned earlier, determining the parties that have the power to terminate is a prerequisite to a proper termination of transfer in joint works. Thus, when dealing with sound recordings created under a recording contract, joint authorship must be considered before terminations of transfers are attempted because without the agreement of at least a majority of the authors that executed that contract, a § 203 transfer cannot be properly effected.

## II. HOW DO THESE PROVISIONS IMPACT THE PARTIES INVOLVED?

### A. *Recording Artists*

The recording artists such as the Independent Band, Studio Wizards, and Boy Band are a key element of any sound recording. They are the individuals whose performances are captured on the phonorecord. A recording artist will usually be a substantial contributor of the requisite originality<sup>108</sup> to make a sound recording copyrightable.<sup>109</sup> However, even though they contribute substantial amounts to the popularity of a sound recording, they receive little benefit unless they

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<sup>107</sup> See 17 U.S.C.A. § 201(b) (West 2006); cf. David L. Hayes, *Performing an Intellectual Property Audit of Copyrights*, 403 PLI/Pat 175, 192 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3934, Feb. 1995) (implying the rights are severable through an example where employees and independent contractors working on a joint work have separate termination interests).

<sup>108</sup> See *Feist*, 499 U.S. at 345 (citing 1 *Nimmer & Nimmer*, *supra* note 8, § 2.01[A], [B]).

<sup>109</sup> See *BTE v. Bonnezaze*, 43 F. Supp. 2d 619, 627 (E.D. La. 1999) (recognizing that although a drummer's contributions to a band may not entitle him to joint authorship in the songs recorded, his performances do give him an interest in the sound recording copyright).

are well-established artists, because new artists usually are in poor bargaining positions when their contracts are signed with the record companies.<sup>110</sup>

This type of situation is exactly what Congress was attempting to address when it enacted the provisions for termination of transfer in the 1976 Act.<sup>111</sup> The purpose of the provisions was to allow the artists to reclaim their copyrights and profit from them on a level more commensurate with their contribution.<sup>112</sup> The biggest problems facing recording artists attempting to terminate transfers to record companies are concerns over whether the sound recordings are WMFH and who else may be able to claim joint authorship, as these are the factual determinations that could impact or defeat their efforts to reclaim their copyrights. If an artist is successful in effecting a termination, then the artist could profit not only from direct sales of the sound recording, but could gain revenue from licensing public performance rights of the sound recording. The most likely scenario, however, is that artists would merely sign a new agreement with either their current label or a competitor, albeit with more favorable terms because the popularity of the artists' work would already have been established in the marketplace.

#### B. *Record Producers and Recording Engineers*

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<sup>110</sup> See *supra* note 1.

<sup>111</sup> See *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 172–73 (1985) (“[T]he termination right was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product.” (footnote omitted)).

<sup>112</sup> See *Range Road Music, Inc. v. Music Sales Corp.*, 76 F. Supp. 2d 375, 377 (S.D.N.Y. 1999), *reh’g denied*, 90 F. Supp. 2d 390 (S.D.N.Y. 2000) (“An aim of the 1976 Act was to ‘correct the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited,’ by permitting authors to terminate unprofitable transfers and renegotiate new grants for the extended renewal term with interested publishers.” (citing H.R. REP. NO. 94-1476, at 124 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5740)).

Record producers such as Creative Genius and Puppet Master and recording engineers often assist artists and record companies in directing the artist's performances, establishing creative direction, and actually capturing the sounds to be recorded. In addition, they are often involved in the mixing and mastering of an album. The question that arises when considering their role in making a sound recording is whether their contributions are sufficient to constitute joint authorship. The answer will depend greatly on the facts of the given situation, but, as the Studio Wizards and Boy Band examples both demonstrate, producers are very likely to make sufficient contributions. Many courts have specifically addressed this issue, and they have found that it is certainly possible that individuals other than performers are capable of making sufficient contributions to make them joint authors.<sup>113</sup> In fact, Congress and the Copyright Office have expressed the belief that authorship is often contributed by both performer and producer.<sup>114</sup> However, the determination will be factually specific to each case, because the court would need to consider not only the creative contributions, but also who is the "master mind" of the sound recording and whether there was intention to be co-authors.<sup>115</sup>

If a producer or engineer makes sufficient creative contributions, and he or she is employed by someone other than the recording artist, then the employer may have an ownership interest as well. Again, these determinations will depend greatly on the specifics of each

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<sup>113</sup> See *Systems XIX, Inc. v. Parker*, 30 F. Supp. 2d 1225, 1228 (N.D. Cal. 1998) ("Congress discussed in the Act's legislative history that '[t]he copyrightable elements of 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 setting up the session, capturing and electronically processing the sounds, and compiling and editing them to make a final sound recording.'" (quoting H.R. REP. NO. 94-1476, at 56 (1976))).

<sup>114</sup> *Id.* at 1228 (quoting Compendium of Copyright Office Practices, United States Copyright Office, § 495.01 at 400-37 (1984)).

<sup>115</sup> See *Brown v. Flowers*, 196 F. App'x 178, 181 (4th Cir. 2006) (per curiam) (holding that merely claiming to be a recording engineer and producer without more was insufficient factual basis for claiming co-authorship to withstand a Rule 12(b)(6) motion).

situation. For example, if the engineer is an employee of the producer under *CCNV*, then the work he or she prepared for the producer will be considered to be authored by the producer under the WMFH doctrine.<sup>116</sup> There will probably be a great amount of focus on who chose and hired the producer, because if he or she can be classified as an employee of the record company, then the record company will be considered the author of all the producer's contributions. And if producers or engineers are independent contractors, then they stand to gain substantially because they may be able to claim joint authorship.<sup>117</sup>

Another consideration that must be made for producers and engineers who contribute is who controls the creation of the sound recording in light of the decision in *Aalmuhammed*.<sup>118</sup> The control element required to gain joint authorship is the element that would keep most studio musicians (hired simply to perform a given part completely at the direction of the hiring party) from gaining authorship interests, and in certain situations, like the Boy Band example, it may prevent the recording artists themselves from being authors. It is likely that in most cases engineers will fail to meet this standard as well. Even though the engineer may make recommendations to the producer or artist on how to record specific elements, the producer or artist can decide whether to use the suggestions. So, because the producer exerts control over the engineer's suggestions, under the *Aalmuhammed* view of creation, the producer would likely be entitled to claim any authorship on the part of the engineer. The amount of control that the

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<sup>116</sup> See 17 U.S.C.A. § 201(b) (West 2006); cf. David L. Hayes, *Performing an Intellectual Property Audit of Copyrights*, 403 PLI/Pat 175, 192 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3934, Feb. 1995) (implying the rights are severable through an example where employees and independent contractors working on a joint work have separate termination interests).

<sup>117</sup> This is, of course, dependent upon courts continuing to hold that sound recordings are not eligible to be specially commissioned WMFH, as discussed above. See *Ballas*, 41 F. Supp. 2d at 541.

<sup>118</sup> See *Aalmuhammed*, 202 F.3d at 1235 (“[A]bsence of control is strong evidence of the absence of co-authorship.”).

producer exerts over the creation of the recordings will also be at issue. For example, if the producer merely makes suggestions, but the artist exerts final decision-making authority (e.g. the Studio Wizards and Creative Genius), then the recording artist may be entitled to the authorship interest that could be attributed to the producer. So the relationship between the artist and producer must be analyzed closely to decide the joint authorship question.

If producers and/or engineers are successful in attempts to claim authorship in sound recordings, they stand to derive the same benefits from the sound recordings as terminating artists. They would be entitled not only to sales of phonorecords of the sound recordings but also to the licensing fees from public performances of the works.

C. *The Record Industry*

The recording industry stands to lose a substantial amount in this battle, so it will be doing all it can to protect its investments. The record companies, like Big Record Label, have benefited substantially from sales of phonorecords, and their long-term returns are seriously threatened by the termination of transfer provisions of the 1976 Act. It seems that the bulk of record sales for most recording artists will likely occur within the first thirty-five years after the album's initial release, but in this age of re-mastered versions of old albums, Internet streaming, and satellite radio the profits beyond the first thirty-five years of a sound recording could become substantial.

Record companies will depend greatly on the WMFH provisions to try to defeat terminations. The likelihood of a WMFH argument's success will depend greatly on how courts view the relationship between the companies and recording artists, because it seems likely that a majority of courts will not allow sound recordings to qualify as "specially ordered or

commissioned” WMFHs.<sup>119</sup> The relationship between the record company and producers and engineers will also have to be considered, as the record companies may be able to claim joint authorship with the artists if they are entitled to the producer’s or engineer’s share of authorship as a WMFH, as in the case of *Puppet Master*.

Elements of the WMFH analysis such as skill in creation will most likely favor the artists heavily, because it is their specific performance that is reflected in the sound recordings at issue. This will make the provisions of the recording contracts, how the artists were paid (and how taxes and benefits were handled), and how much control the companies exerted over the artist’s work the key factual elements in a suit concerning an attempted termination against a record company.<sup>120</sup>

If artists are successful in effecting terminations of transfer in their sound recording copyrights, then the record companies will lose not only the future profits but also the ability to maintain their catalog of recordings. The record companies will also lose some amount of bargaining power with upcoming artists as they will have an incentive to negotiate deals that the artists will not be likely to terminate down the road.

#### D. *The General Public*

The public as a whole also has a stake in these disputes because it comprises the consumers of the sound recordings at issue. Such consumers will most likely be impacted in two ways: price and availability. As artists terminate transfers, they will need to seek other means of distribution, whether by signing a new distribution deal or trying to independently distribute their

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<sup>119</sup> 17 U.S.C.A. § 101(2) (West 2006); *see also supra* Part I.D.3.

<sup>120</sup> *See Aymes*, 980 F.2d at 861 (setting out the factors that will be significant in almost every analysis of an employment relationship in a WMFH case).

sound recordings (perhaps via the Internet). Depending on the efficiency of distribution deal negotiations, older albums may become more difficult for a consumer to find.

Terminations may also affect pricing in several ways. As record companies see their anticipated future income streams disappear, they will try to maximize their profits during the thirty-five years they have ownership of the copyrights. This could lead to higher prices for albums that the record companies still own. Some labels may even produce stockpiles of extra CDs that could be sold after the termination had been effected. In contrast, terminated recordings may drop in price because, in most cases, the artists that now own the copyrights will have a much greater return per-unit, even if they do have to share some of the profits with producers and engineers.

In addition to the direct price and availability effects that the public may see, termination of transfers may impact what recordings are made. In a market where record companies only have thirty-five years to extract their profits, they will be less likely to take risks on artists that may or may not produce hit records. This may decrease the availability of new music to the public—as least as to music that is distributed through conventional channels. However, with the continual improvement of recording technology that is within the price ranges of some artists and the distribution capabilities of the Internet, as record industry offerings decline the independent artists may see a surge in demand for their recordings.

At this point it is not exactly clear what the impacts on the record-buying public will be; it is more of a philosophical and economic analysis than a legal one. It is clear, however, that the public has a large stake in the game because it drives the market for sound recordings. Because one of the goals of copyright law is to benefit the public as a whole,<sup>121</sup> the public interest must be

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<sup>121</sup> See U.S. CONST. art. I, § 8, cl. 8.

considered when making the legal decisions that will set the direction for the sound recording marketplace.

### III. HOW SHOULD COURTS ADDRESS THE ISSUES THAT MAY ARISE IN A SOUND RECORDING TERMINATION OF TRANSFER SUIT?

Because many factual issues will determine whether a termination of transfer in a sound recording can be effected, it is nearly inevitable that courts will be pressed into service to decide whether an artist will be able to reclaim his or her sound recording copyrights. When faced with these decisions, the courts need to keep in mind the policy behind copyright law in order to strike the proper balance between the competing interests at stake. When the framers of the Constitution granted Congress the power to award copyright protection, the purpose was “[t]o promote the Progress of Science and useful Arts.”<sup>122</sup> This clearly indicates the framers’ reasoning behind the ability to award copyrights. Congress attempted to achieve the Constitution’s mandate by passing and making amendments to the 1976 Act, allowing authors to maximize the benefits from their works. Even the Supreme Court of the United States has found that the policy behind copyright law “is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”<sup>123</sup> This seems to indicate courts faced with a recording artist paid under the traditional royalty system should focus mainly on protecting the interests of the recording artists and the public, rather than those of the record companies, in order to best fulfill the goals of the framers and Congress.

As it seems that the policy behind terminations of transfer is relatively clear, the questions that most courts will have to address will be the factual determination of authorship.

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<sup>122</sup> *Id.*

<sup>123</sup> *Mazer v. Stein*, 347 U.S. 201, 219 (1954), *reh’g denied*, 347 U.S. 949, 74 S.Ct. 637 (1954) (mem.).

This will entail an analysis of whether the sound recording was a WMFH, and who may claim to be a joint author of the sound recording. In the WMFH analysis, courts should follow the analysis of the *Lulirama* and *Ballas* courts and continue to narrowly construe the enumerated categories of works eligible for WMFH status, as it most closely achieves the policy goals behind the termination of transfer provisions by protecting the artists featured in the recordings. This would also hold true when looking at the policy behind the WMFH doctrine. The statute clearly enumerates nine categories of works that can be WMFH if made by an independent contractor. The selection of these particular categories was part of a “carefully worked out compromise aimed at balancing legitimate interests,”<sup>124</sup> and Congress recently rejected an attempt to add sound recordings to these categories.<sup>125</sup> Thus, expanding the categories beyond the wording of the statute defeats the purpose of the compromise worked out by Congress. The increased incentive provided to artists by allowing terminations of transfers would benefit the public because more artists would be willing to make the sacrifices of recording their work in light of the long-term payoff, knowing they will be able to reclaim their copyrights if their record companies are not properly compensating them.

Courts will also need to closely consider the relationships between record companies and artists to determine whether an employment relationship existed under the test set forth by *CCNV*. Because the artists are highly skilled and sought out by the record companies for their particular talents, assuming they are not afforded employee benefits or treated as employees for tax purposes,<sup>126</sup> they should more often than not be found to be independent contractors

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<sup>124</sup> *Lulirama*, 128 F.3d at 877 (quoting *CCNV*, 490 U.S. at 748).

<sup>125</sup> See *supra* note 77.

<sup>126</sup> See *Aymes*, 980 F.2d at 863 (stating that every case since *CCNV* where tax status of party was that of an independent contractor the court found the party was held to be an independent contractor for WMFH purposes).

providing recording services to the record labels, regardless of who is paying for the recording sessions or choosing the producer.<sup>127</sup> This is especially true because money advanced by labels to cover recording costs is typically recoupable by the label from record sales.<sup>128</sup>

Of course, in the cases such as the Independent Band example where the artists come to the record label with a complete album, authorship should surely lie with the recording artists. In such a situation there never could have been a WMFH agreement with the record label prior to creation of the sound recording,<sup>129</sup> and the artists were not employed by the record company at the time the work was created.<sup>130</sup> In addition, there is no way that Big Record Label could claim to be a joint author because the creation was completed before they bought the album.<sup>131</sup>

In the Studio Wizards example, there was an agreement with Big Record Label before the work's creation, but, as discussed above, the Studio Wizards and Creative Genius would still not be considered employees of Big Record Label under a *CCNV* analysis. Thus, as long as a court did not find that the SWA was a WMFH under the independent contractor provisions (which it should not for the policy reasons previously set forth), then the Studio Wizards and Creative Genius would most likely be joint authors of the work and should be allowed to terminate the transfer. In situations like this where Big Record Label did nothing more than provide money to finance the album's creation, it would not qualify as a joint author.

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<sup>127</sup> See 1 *Nimmer & Nimmer*, *supra* note 8, § 2.10[A][2][b] at 2-177–2-178 (discussing that paying for recordings alone is not enough to constitute authorship) (citing *Forward v. Thorogood*, 758 F. Supp. 782, 784 (D. Mass. 1991), *aff'd*, 985 F.2d 604 (1st Cir. 1993)).

<sup>128</sup> See *Time Bomb*, *supra* note 62, at 399 n.77 (2001) (“every penny the record label spends on behalf of the artist . . . is 100 percent recoupable” (quoting *2000 Hearings*, *supra* note 62, at 75 (statement of Michael Greene))).

<sup>129</sup> See *Dumas*, 53 F.3d at 559 (requiring that there was agreement before the work's creation in order for it to be a WMFH); see also *supra* Part I.D.3.

<sup>130</sup> See *supra* Part I.D.3.

<sup>131</sup> See *supra* Part I.D.4.

The Boy Band example is somewhat trickier and would depend greatly on how the group members were treated by the label. If they were paid under a traditional royalty agreement, then they would most likely not be employees under a *CCNV* analysis because, as the *Aymes* court pointed out, the benefits and tax treatment factors are so important to the analysis that they are nearly determinative.<sup>132</sup> However, even if the band members were not employees, Puppet Master would likely be a joint author because of the work he prepared, and his joint authorship interest, which probably belong to Big Record Label under the employee prong of the WMFH doctrine. Thus, whether the members of the Boy Band would be able to effect a termination of the transfer would depend on the number of members in the band and how much of the interest in the work Puppet Master was found to have (i.e., was he the sole author, or were the band members joint authors?). These facts are determinative because it takes a majority of the authors that executed the transfer to effect a termination under the statute.<sup>133</sup> In all cases where there is ambiguity, however, the court should give deference to the performing artists in order to best achieve the policy goals behind the applicable provisions of the U.S. Constitution and the Current Act.

In fact, courts faced with a dispute over an attempted termination of transfer of the copyright in a sound recording should generally defer to the interest of an artist over that of a record company. This is the most effective way to ensure that the Constitutional policy goals for copyright law are met, by providing artists more incentives to create artistic works that benefit the public as a whole.

#### CONCLUSION

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<sup>132</sup> See *Aymes*, 980 F.2d at 863 (stating that every case since *CCNV* where tax status of party was that of an independent contractor the court found the party was held to be an independent contractor for WMFH purposes).

<sup>133</sup> 17 U.S.C.A. § 203(a)(1) (West 2006).

Congress enacted the termination of transfer provisions to protect authors from bad business deals. Its goal was to provide incentives for authors to create works of art for the public's benefit, thus achieving the constitutional goals of copyright law. Thus, courts faced with disputes over attempted terminations in sound recordings should give deference to recording artists over record companies. After all, do record companies really need to exploit the sound recordings of under-compensated recording artists for *more* than thirty-five years in order to stay in business?