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Cash from Chaos: Sound Recording Authorship, Section 203 Recapture Rights and a New Wave of Termination

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The thesis of this Article is that under an exclusive recording agreement entered into in the United States between a record label and recording artist on or after January 1, 1978, any key member of recording artist that signed the recording contract is a bona fide author of a sound recording for purposes of claiming standing in order to effectuate a termination of transfer of grant under Section 203 of the 1976 Copyright Act.

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Keywords

recapture, music, recapture rights, section 203, copyright, sound recordings

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**Cash From Chaos: Sound
Recording Authorship, Section 203
Recapture Rights and a New Wave
of Termination**

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INTRODUCTION

In 1980, independent record labels in the United States were thriving by satisfying consumer demand unfulfilled by major labels. Small record labels such as Alternative Tentacles, Mystic, SST, Epitaph, Frontier, Posh Boy, and Dischord Records were flourishing by capturing the zeitgeist of suburban teenage angst in sound recordings. These independent labels were prospering by satisfying a demand for underground music and releasing 12” and 7” vinyl punk rock records deemed technically and commercially un-mass-marketable by the majors. The following hypothetical played out many times during this period.

A suburban teenage garage band gets the attention of an independent record label and is offered an exclusive recording agreement. Up to this point the band’s biggest accomplishment had been per-

forming at a high school talent show or making a crude demo tape. The group is unrepresented by counsel and the recording agreement is a take it or leave it proposition. The band signs the deal as is. The band is not thinking about copyright law¹ and they are not motivated by making money;² they are just excited that anyone would want to pay for their studio time and release their records.

The record company has a reputation for releasing great albums and has a built-in niche audience that eagerly awaits to purchase the label's new releases. The band is flattered they were even asked to join the record company's roster and feel confident they will be positioned for a successful debut release. The label releases and sells tens of thousands of copies of the album on vinyl and cassette tapes, recoups and makes a tidy profit. Although the group receives a few small royalty checks, they never received any

¹ Article I, Section 8, Clause 8 of the United States Constitution is the source of power that gives Congress the right to promulgate copyright legislation. The copyright clause states "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

² Cf. Howie Cockrill, *DRM: Incentive Theory*, MULTIMEDIA & ENT. L. ONLINE NEWS (June 27, 2007, 10:41 AM), <http://beatblog.typepad.com/melon/2007/06/drm-incentive-t.html> ("Incentive Theory is often said to be the greatest ideological force behind U.S. copyright law. Through an Incentive lens, the purpose of copyright law is to incentivize creative behavior by granting certain monopolistic rights to producers or creators. . . . If copyright owners are unable to turn a profit or even make a living on the creative works that they invested a great deal of time and money in, then there is no INCENTIVE for them to continue to contribute creatively to society.").

formal or accurate accountings. Because of the unequal bargaining power between the label and the band, the band has entered into a contract that can be characterized as the epitome of an unremunerative transfer.³

As time goes by, incidental band members come and go and key creative members stay throughout all incarnations of the group. The key members are signatories to all exclusive recording agreements signed on behalf of the band throughout their career. The band achieves cult status in the genre of underground music they helped define. As the years go by, the group uneventfully dissolves and fades away.

Thirty five years later, history shows that those early sessions produced seminal recordings that influenced many modern day platinum selling rock bands. The former members of those teenage rock bands are now in their fifties and learn that they⁴ may be able to terminate the written grants of transfer memorialized in those early recording

³ “The provisions of section 203 are based on the premise . . . [of] . . . safeguarding authors against unremunerative transfers. A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.” H.R. REP. NO. 94-1476, at 124 (1976).

⁴ Aaron J. Moss & Kenneth Basin, *Copyright Termination and Loan-Out Corporations: Reconciling Practice and Policy*, 3 HARV. J. SPORTS & ENT. L. 55, 93 (2012) (“Sections 203 and 304(c) clearly contemplate that termination rights are to be held only by natural persons (artists) and their families/descendants, and not corporate entities, this revision expressly deems the individual author to be the legal author of the work for purposes of the Copyright Act’s termination provisions. This ensures that the rescued termination rights vest in the artists themselves, rather than in their loan-out corporations.”).

agreements.⁵ Along with being influential recordings that paved new musical ground for today's modern rock acts, those old sound recordings also have sentimental value to the music groups that originally gave them life. These former recording artists now desire to recapture their sound recording copyrights and re-issue their old masters in order to receive a larger share of the results and proceeds derived from future commercial exploitations.⁶ The problem members of these recording artists face is determining who⁷ if anyone⁸ can terminate the transfer of

⁵ 17 U.S.C. § 203(a) (2012) ("In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination"); *see also* 17 U.S.C. § 203(a)(3) ("Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.").

⁶ The company Tunecore operates on a business model that facilitates digital phonorecord deliveries of master recordings to digital stores such as iTunes, AmazonMP3, Rhapsody, Google Play, Rdio, Spotify, iHeartRadio, eMusic and MySpace for a flat fee of twenty nine dollars and ninety nine cents (\$29.99) for the first year and forty nine dollars and ninety nine cents (\$49.99) for each following year, per album. Under this model the sound recording rights holder retains one hundred percent (100%) of master rights, receives weekly iTunes sales trend reports, monthly overall music sales reports and retains all income derived from commercial exploitation of masters subject only to the annual fee mentioned above.

⁷ Under the definitions section, the Copyright Act of 1976 does not define the term "author." 17 U.S.C. § 101 (2012). *See also* Video Interview with Jay Cooper: *35 Year Copyright Reversion Clause, Works for Hire, and the Future of the Music Business*,

grant⁹ of sound recording copyrights that occurred thirty five years ago.

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ARTISTS HOUSE MUSIC (Nov. 2007), <http://www.artistshousemusic.org/videos/35+year+copyright+reversion+clause+works+for+hire+and+the+future+of+the+music+business> (explaining that “there’s no definition of author . . . the sound recording is subject to being recaptured because it is not defined as one of the nine categories that can be assigned as a work made for hire and therefore the author has a right to recapture 35 years later, now we get into the real issue. Who is the author? Is it the featured artist? Is it the featured artist and the producer? Is it the featured artist and the producer and the engineer? Who is the author? We don’t know who the author is.”); Larry Rother, *Record Industry Braces for Artists’ Battles Over Song Rights*, N.Y. TIMES, August 16, 2011, at C1 (“The legislation, however, fails to address several important issues. Do record producers, session musicians and studio engineers also qualify as ‘authors’ of a recording, entitled to a share of the rights after they revert?”).

⁸ See *Scorpio Music S.A. v. Willis*, No. 11CV1557 BTM(RBB), 2012 WL 1598043, at *2 (S.D. Cal. May 7, 2012). The *Scorpio Music* court held that a joint author of a musical composition who transferred his copyright interest in a separate grant may unilaterally terminate that grant. “Upon consideration of the language and purpose of 17 U.S.C. § 203 in conjunction with the law governing the rights of joint authors, the Court concludes that a joint author who separately transfers his copyright interest may unilaterally terminate that grant.” *Id.*

⁹ “In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions: (1) In the case of a grant executed by one author, termination of the grant may be effected by that author or . . . [i]n the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it” 17 U.S.C. § 203 (2012).

artist on or after January 1, 1978, any key member of recording artist that signed the recording contract is a bona fide author of a sound recording for purposes of claiming standing in order to effectuate a termination of transfer of grant under Section 203 of the 1976 Copyright Act.

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I. HISTORICAL TREATMENT OF SOUND RECORDINGS UNDER THE LAW

A. The 1909 Copyright Act

Under the 1909 Copyright Act, there was no federal copyright protection for sound recordings. In fact, there has been a long history of discrimination against sound recordings as protectable subject matter under federal law.¹⁰ For example, compared to

¹⁰ *Hearing Before the House Committee on Patents on Revision of Copyright Law*, 74th Cong., 2d Sess. 488-89 (1936) (“Recordings are not creations of ‘authors’ because they are

the fully realized public performance right afforded to musical composition rights holders, only recently have sound recording rights holders enjoyed a narrow public performance right in digital audio transmissions under federal copyright law.¹¹ Fortunately for authors and copyright owners, national discrimination of sound recordings has slowly faded away over the past sixty years¹² and has evolved into a more fully recognized federal right.

B. The 1971 Amendment

Due to the lobbying efforts of radio broadcast-

mechanical contrivances produced by efforts of engineers, technicians, performers and machines rather than by ‘authors.’”).

¹¹ U.S. COPYRIGHT OFFICE, CIRCULAR NO. 56, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS 1 (2012) (“The Digital Performance Right in Sound Recordings Act of 1995, P.L. 104-39, effective February 1, 1996, created a new limited performance right for certain digital transmissions of sound recordings.”); *see also* WILLIAM F. PATRY, PATRY ON COPYRIGHT, § 3:162 (2012) (“Sound recordings have limitations on protection not found with other works of authorship. They were not granted a performance right until 1995 and then only a limited one for digital audio transmissions.”).

¹² “[T]here is no doubt in my mind that recorded performances represent the ‘writings of an author’ in the Constitutional sense and are fully as creative and worthy of copyright protection as translations, arrangements, or any other class of derivative works. I also believe that contributions of the record producer to a great many sound recordings also represent true ‘authorship’ and are just as entitled to protection as motion pictures and photographs. No one should be misled by the fact that in these cases the author expresses himself through sounds rather than by words, pictures, or movements of the body” *Hearings on H.R. 4347, H.R. 5680, H.R. 6831 and H.R. 6835 before Subcomm. No. 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1863 (1965) (statement of Abraham Kaminstenstein, Register of Copyrights).

ers in the 1960s, federal protection of sound recordings was a controversial topic. Radio broadcasters feared that if sound recordings were recognized by federal copyright law it would subject them to payment of public performance royalties for use of sound recordings similar to those paid to music publishers for public performance of musical compositions. While the battle between radio broadcasters and record labels waged on, bootleggers thrived because there was no federal law prohibiting them from creating unauthorized copies of records.

As piracy became more and more widespread, the recording industry entered into a compromise with radio broadcasters. In 1971, Congress passed the Copyright Amendment. The 1971 Amendment represented a negotiated compromise that allowed record labels to combat illegal bootlegging via federal copyright protection against unauthorized reproduction of sound recordings.¹³ To appease broadcasters, the 1971 Amendment carved out an exception to the public performance right traditionally held by copyright owners. Under the compromise between labels and broadcasters, radio broadcasters would not have to ask permission, nor pay, for the right to publicly perform a sound recording on terrestrial radio and record labels would have the force of federal copyright law to combat piracy.

C. The 1976 Copyright Act

The 1976 Copyright Act was the culmination of a sixteen year effort to modernize United States

¹³ On March 10, 1974, the United States became a member of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, which became effective April 18, 1973.

copyright law. In the early 1960s, Congress sought a comprehensive revision to the 1909 Copyright Act.¹⁴ Congress eventually enacted the 1976 Copyright Act which incorporated the primary elements of the 1971 Copyright Amendment.¹⁵ The 1976 Copyright Act also changed the term of copyright to the life of the author plus fifty years, redefined the work made for hire doctrine and added a fair use provision. The 1976 Copyright Act was also designed to make United States intellectual property law comport with the laws of Europe and other countries.¹⁶ Additionally, as with the 1971 Amendment, the 1976 Copyright Act continued to recognize sound recordings as copyrightable subject matter.¹⁷

D. The 1999 Amendment

In 1999, under the guise of adding a technical amendment to the 1976 Copyright Act, the Recording Industry Association of America¹⁸ lobbied Congress

¹⁴ See Peter S. Menell & David Nimmer, *Judicial Resistance to Copyright Law's Inalienable Right to Terminate Transfers*, 33 COLUM. J.L. & ARTS 227, 229 (2009).

¹⁵ Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 386 (2002) ("The legislative history of the 1976 Act incorporates verbatim a number of passages from the legislative history of the 1971 Sound Recordings Act. In fact, Congress enacted the 1971 Act (rather than simply waiting to address sound recording copyrights in the 1976 Act) in order to avoid any unnecessary delay in granting copyright protection to sound recordings.").

¹⁶ PATRY, PATRY ON COPYRIGHT *supra* note 11, at § 1:82 (2012) ("By vesting copyright upon creation and fixation and providing for a single term of protection based on life of the author plus 50 years, the 1976 Act made substantial progress toward making U.S. law more compatible with the Berne Convention.").

¹⁷ 17 U.S.C. § 101 (2012).

¹⁸ The Recording Industry Association of America (RIAA) is a trade group that represents the United States recording

to add sound recordings as a tenth enumerated category¹⁹ of works deemed capable of being characterized as works made for hire.²⁰ Without any analysis

industry. The mission of the RIAA is to foster a legal and business environment that strengthens and advocates the creative and financial prosperity of its members. In support of this mission, the RIAA lobbies to protect the intellectual property rights of its members and monitors state and federal laws, regulations and policies. The RIAA also certifies Gold®, Platinum®, and Diamond® sales of phonorecords.

¹⁹ See Randy S. Frisch & Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 COLUM. J.L. & ARTS 211 (1993) (“A seemingly simple solution for record companies, of course, would be to lobby Congress for an amendment to the definition of a work for hire that would add sound recordings to the nine types of specially commissioned works.”).

²⁰ Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113 app. I—S. 1948, §1011(d), 113 Stat. 1501A-521, 1501A-544 (1999) (amending 17 U.S.C. §101) (repealed 2000) (“Work Made for Hire. – Section 101 of title 17, United States Code, is amended in the definition relating to work for hire in paragraph (2) by inserting ‘as a sound recording,’ after ‘audiovisual work.’”); see also *How Stella Got Her Masters Back: Reversion Rights*, SXSW Panel (Mar. 15, 2012), http://schedule.sxsw.com/2012/events/event_MP9606. Panelist Eric German, Esq. states the reason record labels believe sound recordings should be characterized as ‘works made for hire.’ “Congress was intending to clarify something that everyone already knew to be true. It’s been standard industry practice for decades and decades to assume these things are works made for hire Almost every single record deal that ever was says this is a work for hire and every artist represented by counsel knows that, signs it, that’s what they thought all along too. The point is the reason that it doesn’t say sound recordings in the work for hire section of the Copyright Act is really an accident of history. The work for hire provisions were drafted back in 1965; in 1965 there was no such thing as a sound recording copyright. Back in the day, sound recordings, masters weren’t protected by copyright. That didn’t come into existence until 1971, so by the time sound recordings existed,

or debate, Congress passed the amendment and President Clinton signed it into law. After backlash and a bitter dispute between record labels and the artistic community,²¹ the 1999 Amendment was repealed in 2000 without prejudice and with congressional instructions that no inference was to be made either way as to its enactment and repeal.²² As a re-

this work for hire language had already been drafted, so of course the work for hire provision didn't mention sound recordings because they weren't copyrighted but by the time we get to the late '90s, we get the Sonny Bono Term Extension Act and we start looking at the prospect of what's coming up in 2013. There is this idea that 'Oh my God' everyone assumes these are work for hires, every contract says they're work for hires but yeah, we have to clean up the historical language from the '60s. I don't think that anyone thought that it had to happen in order to affect anything in the law but I think it just might as well to avoid the issue that we're talking about today. So Congress puts this in 1999 and adds it. Here's the facts, everyone thought these were work for hire, every contract said they were work for hire, Congress said, 'Oh, by the way, we meant to have work for hire, let's amend the Copyright Act and put this in there. Yes, shit storm is the phrase you used. Because of procedural issues, everyone thought there wasn't enough debate on the subject. Artist advocacy groups got very vocal about this. So they decided to pull it back in 2000 and said, 'OK, we won't go through with that, and there's a 2000 amendment that deals with that.' *Id.*

²¹ See *How Stella Got Her Masters Back: Reversion Rights*, *supra* note 20 (discussed by panelist Eric German).

²² See 17 U.S.C. § 101 (2012) (amended "work made for hire" definition) ("In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, nor the deletion of the words added by that amendment – (A) shall be considered or otherwise given any legal significance, or (B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination, by the courts

sult, Congress left the issue of whether a sound recording could be a work made for hire unresolved and ambiguous.

History shows that the rights afforded to sound recording owners are evolving. Throughout the last hundred years sound recordings have gone from not being federally recognized copyrightable subject matter to a category of intellectual property that is slowly enjoying the full panoply of rights afforded to other types of works. Looking forward, future judicial opinions interpreting Section 203 of the 1976 Copyright Act are sure to further define the rights held by sound recording copyright owners.

II. RECORD INDUSTRY CUSTOM AND PRACTICE

Once a band is scouted and the label deems them worthy of a deal, the recording artist is offered

or the Copyright Office. Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made for Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.”); *see also How Stella Got Her Masters Back: Reversion Rights*, *supra* note 20 (discussed by panelist Daryl Friedman) “In ’99 at the suggestion of the recording industry association Congress put in a law that . . . added . . . sound recordings as a category of works for hire I . . . was in Washington at the time we worked on this issue I don’t believe that Congress had ill intent. I think they were just thinking they were doing the right thing because it would clarify what they had been told was a very clear issue but ambiguous in the law, so they added sound recordings as a category of work for hire. What happened is a shit storm of artist revolt when they found out about it and my CEO testified about it on the Hill, Sheryl Crow testified and eventually that was taken out and we’re back to the sort of ambiguous state.” *Id.*

an exclusive recording agreement whereby the parties agree that in exchange for an advance and promise of artist's royalties, the record label is entitled to the artist's exclusive recording services. Further to this agreement, the label takes the position that as a matter of law, all sound recordings (also known as 'masters') created during the term of the contract fall within the subject matter and scope of the exclusive recording agreement and shall be deemed to be property of the label from the moment of fixation. Typical language found in recording agreements usually characterizes these sound recordings as works made for hire²³ and as a result the label is deemed the author of the works. The recording agreement will also, as a matter of custom and practice, include language stating that in the event the masters are not found to be works made for hire then the artist shall have assigned the copyright in the sound recordings to the label.²⁴ This "belt and suspenders" approach offers

²³ But see *Fifty-Six Hope Road Music v. UMG Recordings*, No. 08-CIV-6143(DLC), 2011 WL 3874861 (S.D.N.Y. Aug. 31, 2011) in which a dispute concerning the ownership of the renewal term copyrights in pre-1978 sound recordings embodying the performances of reggae artist, Bob Marley. The court applied the "instance and expense test" under the 1909 Act and deemed the recordings created pursuant to exclusive recording agreements between Bob Marley and the predecessor in interest to defendant UMG Recordings, Inc. were works made for hire.

²⁴ *Sound Recordings as Works Made for Hire Before the Subcomm. on Courts and Intellectual Property Comm. on the Judiciary*, 106th Cong. (2000) (statement of Marybeth Peters, Reg. of Copyrights). "Although the recording industry has changed considerably since the 1960's, the contracts signed between record companies and performers appear to have changed very little. Most contracts contain clauses specifying that the works produced by performers are works made for hire. Such contracts generally contain an additional clause providing

some consolation to the label in the event that the work made for hire language is deemed invalid. If the work made for hire provision is deemed invalid, the record company can at least be assured they have the right to create derivative works and freely exploit the masters for at least thirty five years from the date of grant or first publication.

In the music industry a sound recording²⁵ is created by the process of layering individually recorded tracks of instrumental and vocal performances until the many parts are compressed into a final unitary whole. After sound recordings from a recording session are mixed and mastered (or compressed), under the terms of most recording agreements, usually between ten to thirteen individual recordings are selected to be included in an album.²⁶ The recordings are then arranged, copied,²⁷ packaged, marketed,

that if the work created is found to by courts to fall within neither prong of the definition of works made for hire, that the performer assigns all his rights to the record company.” *Id.*

²⁵ See 17 U.S.C. § 101 (2012) (“Sound recordings’ are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”); see also PATRY, PATRY ON COPYRIGHT, supra note 11, at § 3:160 (“Sound recordings are thus purely aural works, covering only the series of recorded sounds.”).

²⁶ Modern practice also includes digital distribution via streaming and sale of individually downloadable phonorecords in non-album a la carte configurations.

²⁷ See 17 U.S.C. § 101 (2012) (“Phonorecords’ are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or

distributed and sold to consumers in physical and digital formats or licensed to third party audiovisual content creators.

Because demand for physical product has dissipated²⁸ due in part to rampant illegal file sharing²⁹ over the past decade,³⁰ the modern practice of distribution and commercial exploitation of sound recordings is now being transformed and moving from an ownership to an access based model.³¹ Today, most record company business models are more focused on selling or streaming digital configurations of sound

device. The term “phonorecords” includes the material object in which the sounds are first fixed.”).

²⁸ D.X. Ferris, *Exclusive Interview: Hawthorne Heights on Leaving Wind-Up Records, Starting Their Own Label*, Alternative Press (Aug. 10, 2011), http://www.altpress.com/features/entry/hawthorne_heights_interview_leaving_wind-up_records_cardboard_empire (quoting Eron Bucciarelli of Hawthorne Heights: “In our opinion, the physical format is going the way of the dinosaur, and it doesn’t make sense to invest a lot of money into stocking up on an inventory.”).

²⁹ *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (9th Cir. 2001) (holding that unauthorized peer-to-peer file sharing of MP3’s over the internet for the purpose of space-shifting represented copyright infringement).

³⁰ *Album Sales Plummet to a 12-Year Low*, NME (Apr. 16, 2012, 10:56 AM), <http://www.nme.com/news/various-artists/63256> (reporting that “[o]verall LP figures over the last week are 27.62% down with week-on-week sales currently standing at 1,446,218. Compared with figures of 1,882,878 for the same week last year, that shows a 23.19% drop overall. That is lower than any of the 640 previous weeks that have elapsed since the year 2000.”).

³¹ Jareen Imam, *Young Listeners Opting to Stream, Not to Own Music*, CNN (June 16, 2012, 3:39 PM), <http://www.cnn.com/2012/06/15/tech/web/music-streaming> (“[T]he cloud model is where the state of music is heading, and for many people ownership is not essential.”).

recordings to consumers and for the lucrative³² business purpose of master use licensing.³³

³² In contrast to the dramatic decrease of physical phonorecord sales revenue in the United States caused by rampant illegal file sharing, the business of licensing sound recordings to film producers, television studios, ad agencies and video game publishers for use in their audiovisual projects has become a very lucrative revenue stream for record labels. In addition to the value derived from marketing impressions created for the artist an independent record label with a decent catalog can easily generate \$1 million dollars a year in gross revenues in licensing fees. One can reasonably infer that major record labels with much more extensive catalogs of successful recordings are generating a substantial amount of revenue from master use licensing of their catalog. A recent Rolling Stone magazine article reported that The Beatles recently licensed master rights to “Tomorrow Never Knows” for use in the Showtime series *Mad Men* for \$250,000. *‘Mad Men’ Paid \$250K for Beatles Song*, Rolling Stone (May 8, 2012, 8:45 AM), <http://www.rollingstone.com/music/news/mad-men-paid-250k-for-beatles-song-20120508>. I think the reason that third party master use licensing remains a healthy robust source of revenue is because the users of sound recordings in these instances are most likely to be established content creating entities themselves that are owned by major corporations and run by professionals. These enterprises understand and respect the importance of copyright law. These licensees have much to lose in the event they were to unlawfully use another entity’s intellectual property without permission. In addition to harming their reputation by participating in unlawful conduct, the 1976 Copyright Act provides for \$150,000 in statutory damages for copyright infringement per willful violation. Compare this to the no win proposition created by an illegal file sharing teenager who is trading MP3s with her friends. If the record label decides to bring an action against such an individual, the teenager is most likely going to be judgment proof and the record label will look like a bully in the court of public opinion.

³³ As commonly used in the music industry, the term “master use licensing” refers to the practice of licensing master rights to third party audiovisual content (film, TV show, video game)

Under the common arrangement summarized above, rights to ownership, control and exploitation of sound recordings are deemed to be held solely and exclusively by the record label. Although under the language of most exclusive recording agreements sound recordings are labeled works made for hire, federal copyright law holds that just because a writing or contract states the work is a work made for hire, it does not legally necessarily make it so.³⁴ One must analyze the substance of the relationship between the artist and label in order to determine if the work can be properly deemed to be a work made for

creators whereby the record label (licensor) grants to the audiovisual creator (licensee) permission to reproduce sound recordings in fixed and timed synchronization with a visual image.

³⁴ *Sound Recordings as Works Made for Hire Before the Subcomm. on Courts and Intellectual Property Comm. on the Judiciary, supra* note 24 (“... the fact that work-for-hire agreements and copyright registrations (characterize the works) as works for hire ... does not lead to the legal conclusion that the sound recordings that are the subjects of those agreements and registrations are indeed works made for hire. If a specifically ordered or commissioned work does not fall within one of the categories set forth in the ... statutory definition, the agreement of the parties cannot transform it into a work made for hire.”); *see also How Stella Got Her Masters Back: Reversion Rights, supra* note 20 (discussed by panelist Ken Abdo, Esq.). “Most recording agreements in existence have work for hire language, which basically means as a technical matter that the person offering the services is an employee of the employer. It is an inalienable right that someone has to their copyrights so just by saying something is a work for hire, even in a writing, doesn’t make it a work for hire. A work for hire is a technical term of art, so, there are many examples of what constitutes a work for hire across many different businesses, which is basically, you’re an employee, you’re treated as an employee, paid as an employee and therefore the creative content becomes the property of the employer.” *Id.*

hire.³⁵

A. Is a Sound Recording a Work Made For Hire?

Under Section 101 of the 1976 Copyright Act³⁶ there are two mutually exclusive means by which a work may acquire work made for hire status. One of the means by which a work can be deemed a work made for hire is if it was created by an employee under the course and scope of employment. The other means by which a work may acquire work made for hire status is if the work falls within one of the enumerated categories of works specially ordered or commissioned, is created for use in one of the nine enumerated categories, created by an independent contractor³⁷ and the parties expressly agree in a signed written instrument that the work shall be considered a work made for hire.

One consequence of being deemed a work made for hire is that the hiring party, rather than

³⁵ See *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1141 (2003). It is also true that the term “work for hire” need not expressly be included in such a writing. What is necessary is that it must appear from the document that the parties both intended that the work be considered a work for hire. *Id.*

³⁶ 17 U.S.C. § 101 (2012) (“A ‘work made for hire’ is – (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specifically ordered or commissioned for use as a contribution to a collective work, as 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.”).

³⁷ But see Neil J. Rosini, *Copyright Recapture 2012: Strategies for Owners and Transferees Facing the New Termination Threat*, STRAFFORD (June 26, 2012) at slide 36 (“Whether or not post 1/1/78 sound recordings by independent contractors are eligible for work for hire status is unclear.”).

the creator of the work, would be deemed the author and will own the copyright in the sound recording from the moment of fixation.³⁸ This means that the recording artist will not be a rights holder of the sound recording copyright. Instead the artist will only be entitled to receive royalties from exploitations of the masters under the terms of the recording agreement. Another consequence is the effect on copyright duration. Under the 1976 Copyright Act, the life of copyright for a work made for hire is 120 years from the date of creation or ninety-five years from publication, whichever comes first.³⁹ The most important implication for the purposes of this Article would be that if sound recordings are deemed to be works made for hire, they would not be subject to reversion under Section 203 of the 1976 Copyright Act.

The first step in the work made for hire analysis requires determination as to whether the creative party was an employee acting within the scope of his or her employment; the Supreme Court in *Community for Creative Non-Violence v. Reid* instructs us to look to the law of agency.⁴⁰ In interpreting Section 101 of the 1976 Copyright Act, the Supreme Court held that there are twelve factors⁴¹ that should be examined in order to determine if the party is an employee. With no single factor being determinative, the factors to be considered are: (1) the skill required to create the work; (2) the source of the tools and instrumentalities; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign ad-

³⁸ 17 U.S.C. § 201(b) (2012).

³⁹ 17 U.S.C. § 302(c) (2012).

⁴⁰ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989).

⁴¹ *Id.* at 751.

ditional projects to the hired party; (6) the extent of the hired party's discretion over when, and for how long, to work; (7) the method of payment; (8) the hired party's role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of employee benefits; and (12) the tax treatment of the hired party.⁴²

Under most situations, the modern recording artist signed to an exclusive recording contract will most likely not fall within the definition of an employee acting within the scope of his or her employment. The delivery requirements of a typical record deal provide that the artist shall deliver commercially satisfactory recordings that the label believes will sell. Other delivery criteria require that the recordings must be studio recordings, are to be recorded during the term, feature the performance of the recording artist, do not infringe any third party rights, and are of a certain quantity and minimum playing time.⁴³ Typically, the artist usually works unsupervised by the record label and the artist will have complete control over creative decisions affecting production of the sound recordings. The lack of label control over the artist shows a lack of a sufficient nexus between the artist and label that favors a finding that the recording artist is not an employee.

In instances where a third party producer is brought on board, although the artist may work closely with a producer, the artist is the hiring party in relation to the producer. The artist is responsible

⁴² *Id.*

⁴³ DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 110-11 (7th ed. 2009). (discussing delivery requirements for recordings under a typical recording agreement).

for engaging and paying for the services of the producer out of the artist's advance and all-in royalty. Because in most instances the recording artist is the final creative decision maker,⁴⁴ and because the label does not withhold taxes or pay social security taxes on behalf of recording artists, it is very unlikely that the record company will be able to successfully argue that the recording artist is an employee of the label acting within the scope of his or her employment when the works are created.

If the recording artist is found not to be an employee of the record label under the Community For Creative Non-Violence analysis, then we look to the second means provided under Section 101 of the work made for hire definition. Usually, the record label's stronger argument of characterizing sound recordings as works made for hire is found here and based on the position that the artist is an independent contractor. But, under an independent contractor analysis, only nine types of works can be works made for hire. The nine categories are (1) contribution to collective works, (2) part of a motion picture or audiovisual work, (3) translation, (4) supplementary work such as an introduction, index, appendice, forward, explanation, (5) a compilation (6) an instructional text, (7) a test, (8) as answer material for a test, or (9) an atlas. If the work falls within one of the nine enumerated categories and there is a signed writing expressly stating that the sound recording is

⁴⁴ See U.S. COPYRIGHT OFFICE, CIRCULAR NO. 56, *supra* note 11, at 3. Although the artist is in control of what happens during the tracking phase of the recording, I have experienced situations where a rogue producer in post-production will rearrange or shorten the recorded chorus or verse, add an effect or vocalist, or performance of a side-musician without consulting the artist or label.

a work made for hire, then the work will be deemed a work made for hire.

Here, the label's position would be based on the premise that a sound recording is either a work specifically ordered or commissioned for use as a contribution to a collective work,⁴⁵ a work that is part of an audiovisual work⁴⁶ or that the album embodying the sound recordings is a compilation.⁴⁷ Although, there is a dearth of Supreme Court judicial opinion on these matters, there have been several decisions in lower jurisdictions recognizing that sound recordings are not one of the nine categories of specially or-

⁴⁵ See *Sound Recordings as Works Made for Hire Before the Subcomm. on Courts and Intellectual Property Comm. on the Judiciary*, *supra* note 24. "Record companies have argued that even under the law as it existed before last November, the vast majority of commissioned sound recordings qualified as works made for hire because they were contributions to collective works or compilations, two categories of works included in the statutory definition. This theory may well be valid under traditional distribution models. A record album may well be considered a collective work, and a sound recording of each performance included on the album therefore may well be a contribution to a collective work. The courts have not yet addressed this issue, although several courts have stated that sound recordings as such are not among any of the nine categories of specially ordered or commissioned works. Some representatives of performers have rejected the theory that an individual sound recording on an album can usually be considered a contribution to a collective work, arguing that an album of songs by the same artist, delivered by that artist to a record company, does not qualify as a collective work." *Id.*

⁴⁶ See Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375 (2002) for an in depth discussion.

⁴⁷ See David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y U.S.A. 387 (2001) for an in depth discussion.

dered or commissioned works.⁴⁸ Because of the lack of authority on this issue, it is hard to predict with any degree of certainty whether record labels putting forth one of these theories would be successful in convincing a court that sound recordings are works made for hire under the terms of a traditional recording agreement.

Although the above arguments characterizing sound recordings as works made for hire will likely fail, record labels do have another alternative that will enable them to successfully obtain control over sound recording copyrights for at least thirty five years from the date of grant. Under this approach, a label would be able to control rights to sound recordings under the non-work made for hire terms of the recording agreement via the assignment clause,⁴⁹ but they would not own the copyright in the sound recording as a matter of law under the Section 101 definition of a work made for hire.

III. THE RECORDING SESSION

Recording an album is usually a long and arduous process and subject to many unforeseen occur-

⁴⁸ See *Lulirama Ltd. v. Axxess Broadcast Services, Inc.*, 128 F.3d 872, 878 (5th Cir.1997) (finding that the category of “audiovisual works” in the work for hire definition does not include sound recordings); see also *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999) (sound recordings at issue were “not works for hire under the second part of the statute because they do not fit within any of the nine enumerated categories”); see also *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999) (finding that “a sound recording does not fit within any of the nine [enumerated] categories”).

⁴⁹ See WILLIAM F. PATRY, COPYRIGHT LAW & PRACTICE 380–81 (1994) (“[Artist/record company] contracts typically contain ‘belt and suspenders’ language transferring copyright in the event a work is found not [to] be a work made for hire.”).

rences. The consistent variable is that a creation of a sound recording results from a culmination of many steps and a multitude of decisions. With the above in mind, this Part will examine a typical recording session for a four piece rock band comprised of vocals, guitar, bass and drums.

In the music industry, a typical sound recording is created by a process of layering individually recorded audio tracks of instrumental and vocal performances until the many individual tracks are compressed into a final unitary whole. During a traditional recording session each instrument is isolated and recorded on a separate track,⁵⁰ then mixed and mastered. The mixing phase refers to the process where the volume levels of the individual tracks are adjusted and some effects are added to enrich the vocal and musical performances. After all desired volume levels are decided upon for each individual track in the matrix, the final mix is then compressed into a unitary whole and becomes the final 'mastered' version of the recording.⁵¹ This mastered version of the

⁵⁰ Although an argument can be made that each separate track is a sound recording subject to copyright in and of itself, a better characterization is that creation of a sound recording is a process that occurs over a period of time. The master recording that has been tracked, mixed and compressed is the complete version of the work. An analogy can be made to creation of an audiovisual work, each day of principal photography is not intended to be a complete audiovisual work, but rather the final work is the culmination of a process that includes filming, scoring, directing and editing all the individual parts.

⁵¹ For the sake of clarity, please note that the term 'mastered' here refers to the process of aggregating the individual recorded tracks created during the recording session and compressing them into a unitary whole whereby. The purpose of the mastering process is to create the final sound recording along which includes the output volume levels the listener hears when listening to the commercially released recording. The

sound recording is then reproduced, distributed, marketed and commercially exploited by the record label.

Historically, most rock bands are organically created by a group of friends. The musical compositions performed by the band are usually written by a key member or key members of the group. These key members are the masterminds and source of creative vision for the band. The musical compositions are the underlying works that are performed when the band plays live and are embodied in sound recordings. The composition is made up of the lyrics and melody of musical work. In most instances, the key member gives aural effect to the ideas embodied in the composition.⁵² For example, the guitar player will have a riff and play it at practice; the singer may have a notebook of lyrics or a chorus in mind. During rehearsal the guitar player may play a riff over and over again until the drummer and bass player join in, followed by the singer, and the composition eventually takes shape, with certain parts extended, shortened, changed, or deleted as deemed necessary by the band. Once the final form of the musical composition is agreed upon, the band will usually practice performing it in their rehearsal studio until they get the opportunity to fix it in a recording.

Prior to the formal recording of a musical

term ‘mastered’ should not be confused with the term master recording which is just another name for a phonorecord as used in the music industry. Thus, a sound recording is the final result of ‘mastered’ audio recordings and the last mechanical step in creation of the work. A sound recording is also embodied in a master recording i.e., a phonorecord.

⁵² *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884) (“...[T]he author is the man who really represents, creates, or gives effect to the idea, fancy, or imagination.”).

work, there is usually a pre-production phase in which the artist creates low cost raw versions of recordings that are typically recorded at the band's rehearsal studio. These demos are usually devoid of any big production elements. The purpose of demo is to give the artist and label a rough idea of what the final recording will or should sound like. These rough drafts are usually listened to by the artist and sent to the record label and producer for creative feedback. Once the artist takes the producer's and label's creative notes into consideration, the artist will fine tune the composition in order to realize their creative vision of what the final sound recording should sound like. With the help of the producer and label, the artist decides which compositions will be recorded. Once they have a target list of works to record, the artist will head to the studio to begin tracking (also known as recording) the album.

The formal process of creating a sound recording begins with tracking the drums. The drums provide the foundation of the recording. The drums are the time keeping element upon which that the rest of the group builds upon. Along with the final mix down, the process of tracking the drums is usually the most cumbersome and labor intensive.

Although it is true that the sound engineer usually decides which microphones to use and where to place them, the overriding goal of the engineer when tracking the drums is to set up the microphones with the intention of not getting in the way of the drummer's performance. The drummer as recording artist usually does not concern himself with placement of microphones. The drummer as creator of his performance chooses which gear he will use for the recording session. These choices are based on his comfort level and on his subjective idea of what

equipment sounds the best. As a technical matter, once the drum tech sets up the kit, the drummer is mostly interested in having his drums set up in the usual manner in which he performs, making sure all the drum heads, stands and cymbals are tilted at the proper angles and within his reach.

Next, the engineer comes in, works around the placement of the drum kit and sets up the microphones for the purpose of capturing the drummer's performance, ever vigilant of making sure the microphones are not obstructing the drummer's performance in any way. In order to accomplish this goal, a reasonably competent sound engineer will work within a range of industry norms and practices that dictate the types of microphones used and the distance between the microphone and the instrument. Although the engineer has discretion to choose expensive microphones, if he has them at his disposal, for the most part the professional sound engineer's microphone of choice for recording musical instruments is going to be a high quality, moderately priced and durable microphone.⁵³

Once the microphones are set up, the engineer will ask the drummer to hit each drum head and cymbal over and over again while the engineer is in the control room. The engineer will then fine tune the microphone volume levels of each isolated microphone at the mixing board. The process of repeatedly hitting each drum head and cymbal is long and monotonous and could take hours until the exact desired tone of sound is captured. The engineer and producer are usually the parties deciding the appropriate drum sound to be desired for purposes of

⁵³ The Shure SM57 microphone is the mainstay of the live performance and recorded music industry.

tracking.

Once the right sound is agreed upon, the levels on the mixing board are noted for future reference. This process is repeated until all the desired sound levels are reached for all the individual drums and hardware included in the kit (i.e., the floor toms, snare, bass drum, hanging toms, high hat, crash cymbal, and ride cymbal). Once the desired levels for each piece of drum hardware are found, then the first layer, which is actually the combination of multiple layers of drum tracks, is recorded. The creativity provided by the drummer originates from his personal drumming style which is mainly derived from his internal timekeeping rhythm and how fast, hard or soft he hits the drums and cymbals while he plays.

On the first take, the entire band will perform the musical composition in unison in different isolation booths while the drum tracks are isolated and recorded. These ancillary vocal, guitar and bass tracks are not intended for use in the final sound recording. These ancillary recordings are referred to as scratch tracks and will later be discarded and recorded over. The sole purpose of the scratch tracks are to provide the drummer with an audio context to which he performs his drum parts.

Next the bass track is recorded. Usually the bass player sets up his bass cabinet and amplifier in a recording booth isolated from the rest of the band. The engineer will choose the types of microphones to be used and decide where to place the microphones. Again, these technical non-unique⁵⁴ decisions fall

⁵⁴ Samson Vermont, *The Sine Qua Non of Copyright is Uniqueness, not Originality*, 20 TEXAS INTELL. PROP. L.J. 327, 328 (“[U]niqueness is the true *sine qua non* of copyright and that the two components [independent creation by the author and a modicum of creativity] are rough heuristics for

within reasonable parameters dictated by studio industry custom and practice. During tracking of the bass performance, the bass player will listen to the previously recorded drum tracks on headphones.

The unique creativity provided by the bass player is derived from his interpretation of the musical composition, his picking style and the individual rhythm which finds expression when he physically plays the bass. Once captured, the isolated recording of the bassist's performance will be the second major layer of the recording matrix that goes into creating the final sound recording.

Next, the guitars are recorded under a similar process as was used to record the bass parts. The guitar player listens to the drum and bass tracks on headphones in an isolation booth and records his guitar parts. The creativity provided by the guitar player is mostly derived from his timing and unique method of strumming the instrument. The guitar player also decides which distortion box to use (if any) during his recorded performance. The guitar player also decides which instrumental guitar flourishes and leads are going to be added to the recording. These unique leads and flourishes are usually recorded on separate tracks on separate takes, using the aforementioned process of playback and "layering" additional tracks on top of each other. After the drums, bass and guitars are recorded, the vocalist will also go through a similar process of listening to the recorded music on headphones and have his isolated performance recorded on a separate track or tracks. The originality created by the vocalist's performance comes from his unique vocal tone, timing,

uniqueness. When we focus directly on uniqueness, many puzzles melt away.").

cadence, breathing capacity and energy behind the performance of the lyrics. At each step of the way each individual performance is mechanically captured in the sound recording.

During the entire recording process the producer will offer creative feedback to the recording artist. It is the job of the producer to inspire the band in order to draw out the best possible performance and capture it on the recording. The level of creative feedback and degree to which the recording artist cooperates with the producer varies immensely depending on the parties. As with all creative endeavors, the process of creating a sound recording is a very fluid process and the producer's degree of influence on the final result⁵⁵ is based mostly on the relationship and chemistry between the parties.

Once tracking is complete, the volume levels and effects layered on the individual tracks are mixed down into a final version by the sound mixing engineer. Depending on the agreement of the parties, the job of mixing the final recording may or may not be done by the recording engineer who may or may not be the same person as the producer. Once the final mix of individual isolated tracks is complete, the recording is compressed and 'mastered' by the engineer into a final unitary whole technically fit for commercial exploitation. This mastered recording is the first phonorecord which embodies the sound recording. This first phonorecord is the source asset from which all subsequent copies or phonorecords are reproduced.

⁵⁵ Sometimes in post-production a producer will re-arrange or shorten the recorded chorus or verse, add an effect or vocalist, or performance of a side-musician *without* first consulting the artist.

IV. SOUND RECORDING AUTHORSHIP

A. A Survey of Artistic, Legislative and Judicial Guidance

There are many sources that inform as to who is an author of a sound recording. Although the 1976 Copyright Act does not define the term “author,” Circular 56 issued by the United States Copyright Office expresses that a performer or producer is the author.⁵⁶ Recording artists,⁵⁷ commentators,⁵⁸ and ju-

⁵⁶ See U.S. COPYRIGHT OFFICE, CIRCULAR NO. 56, *supra* note 11 (“The author of a sound recording is the performer(s) or record producer or both.”).

⁵⁷ Katie Van Syckle, *Q&A: Dave Grohl on His ‘Sound City’ Doc and Taking Risks in Music*, ROLLING STONE (Jan. 25, 2013), <http://www.rollingstone.com/music/news/q-a-dave-grohl-on-his-sound-city-doc-and-taking-risks-in-music-20130125#ixzz2NLaBayS6>. Some artists even give great deference and creative credit to the actual studio and mixing board used in producing their sound recordings. Professional musician and vocalist David Grohl is quoted as saying “I always had a strong connection to that studio because Nirvana wasn’t meant to be the biggest band in the world. We just weren’t. So when we went there for 16 days, we weren’t making that album with the intention that we were going to change the fuckin’ world. We just wanted it to sound good . . . The fact that what happened actually, happened, makes me think there’s something a more than just wires and knobs in that place. Personally, I have a strong emotional connection to it. Musically, there’s something magical about that place, and when I heard that they were closing I thought, ‘I have a studio, I make records every day. If I could be reunited with this piece of equipment that I consider to be the best sounding board I’ve ever worked on and the board that’s responsible for the person that I am, it would be a huge full-circle emotional reunion for me.’ And that’s why I made the movie.” *Id.* This statement was made in reference to the Neve 8028 analog mixing console from Sound City recording studio. Sound City was the recording studio where Fleetwood Mac, Nirvana, The Red Hot Chili

dicial opinions⁵⁹ also provide clues as to who should be deemed an author of a sound recording. Although there is no definitive case law resolving the issue of who is an author of a sound recording, there is a rich history suggesting that an author of a work is the mastermind or creator of the work.⁶⁰

Legislative history also provides guidance as to who could be deemed an author of a sound recording. Congress has suggested that performers, studio engineers and producers may be deemed authors of sound recordings,⁶¹ and even suggested that the per-

Peppers, Neil Young, Bad Religion, Tom Petty, Rick Springfield plus many others recorded.

⁵⁸ See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT NIMMER § 2.10[A][3] (1999) (“Absent an employment relationship, or an express assignment of copyright from the performers to the record producer, the resulting ownership of the sound recording copyright will either be exclusively in the performing artists, or ... a joint ownership between the record producer and the performing artists.”).

⁵⁹ See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 1999) (explaining that exercising control over the finished work is strong indicia of authorship).

⁶⁰ *Burrows-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). Here the Court adopted a dictionary definition of “author,” and held that an author is “he to whom any owes its origin; originator; maker.” *Id.* See also *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989). Generally, the author of a work is the person who “actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.” *Id.*

⁶¹ H.R. REP. NO. 92-487, at 5 (1971); S. REP. NO. 92-72, at 5 (1971) (“The copyrightable elements in a sound recording will usually, though not always, involve ‘authorship’ both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may be cases where the record

son who sets up the recording session may be considered an author.⁶² Most telling from a historical perspective is the fact that Congress decided to leave the 1971 Amendment silent as to the issue of authorship. As a result, the 1909 Act controlled, and because Congress deemed that sound recording authorship should be left to the free market to decide, works were often characterized as works made for hire under work made for hire provisions of recording contracts.⁶³

producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, etc.) where only the record producer's contribution is copyrightable.”).

⁶² H.R. REP. NO. 94-1476, at 56 (1976) (“[S]etting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording” may constitute authorship of a sound recording.) *But see* *Forward v. Thorogood*, 985 F.2d 604, 605-606 (1993) (finding that plaintiff was not a joint author of a sound recording where he had merely arranged and paid for the recording session and requested that specific works were to be recorded. Plaintiff did not make any musical or creative artistic contribution to the sound recordings. Plaintiff did not serve as the producer, studio engineer nor in any way directed the manner in which the musical compositions were performed.); *see also* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT NIMMER § 2.10[A][2][b] (1999) (“If the act of ‘setting up the recording session’ were the record producer’s only basis for claiming original contribution to the recording, and hence ‘authorship,’ it would be ill-based indeed. This is no more an act of ‘authorship’ than is the act of one who makes available to a writer a room, a stenographer, a typewriter, and paper.”).

⁶³ H.R. REP. NO. 92-487, at 5 (1971); S. REP. NO. 92-72, at 5 (1971) (“As in the case of motion pictures, the bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.”).

B. Sheryl Crow “Featured Artist” Approach

The Subcommittee hearings of the 106th Congress were held to resolve the issues raised by the 1999 Amendment. During these work for hire hearings, recording artist Sheryl Crow testified as to who she thought should be deemed an author of a sound recording. In answering the question, she took a pragmatic position that focused on the financial and creative burdens associated with the creation and marketing of records. The answer to determining sound recording authorship in Ms. Crow’s mind was provided by looking at the music industry custom and practice and focusing on the party that carries the burden of creativity and economic responsibility.

In her mind, from a constitutional⁶⁴ perspective, the featured recording artist was the creative force⁶⁵ behind the sound recording. Also important,

⁶⁴ *Sound Recordings as Works Made for Hire Before the Subcomm. on Courts and Intellectual Property Comm. on the Judiciary, supra* note 24, at 162-66 (statement of recording artist, Sheryl Crow) “If anyone in this room sat in a recording studio, you would see that the artist featured on a sound recording functions as the author of the work. Without the creative vision of that featured artist, there would be no sound recording. To legislate that the record label should be recognized and credited as the author of the sound recording undermines what I feel the framers’ intent of the Constitution was. I am the author and creator of my work. Although I appreciate my record label’s advice to me, they by no means tell me what to do on my records...I am basically left to my own devices in creating a work. I choose what the sound should be by choosing and working closely with a producer, or in my case I produce my own material. I choose the musicians, the engineers, the studio all based on what I am striving to express artistically.” *Id.*

⁶⁵ *Id.* “. . . After I have composed the songs that will appear on the recording, I try to define how I want the album to sound . . . I try to bring a look and feel to the recording that will take

from a public policy vantage point, she stated that the featured artist (and not the engineer, producer, back-up singers, or studio musicians) is the party responsible for recouping the costs of creating and marketing the album to the record label. The fund from which the advance is recouped is derived solely from the featured artist's royalties.⁶⁶ In her opinion, the featured artist should be deemed the author because the featured artist was the creative force behind the recording. Further buttressing her position,

the listener on a journey. Because I produce my own records, I am basically the captain of the ship and ultimately, the decision maker, I must also decide what musicians I want to perform on each song, given the desired sounds I want to attain, what engineering staff to implement my sonic vision, (and) what studio will be appropriate”

⁶⁶ *Id.* “But the most important factor is that I pay for the recording of my albums and a portion of the marketing of the album out of my own royalties, as do all other recording artists. This is where we, as authors of our own work differ from the film industry. Comparisons with regard to the work for hire amendment have been made where it is necessary to treat films as a work made for hire to avoid issues of authorship. The record business is different than the film industry in a fundamental way. In the film industry, the studio pays the production costs, they hire the director, they hire the actors, they come out with a product that they have hired to be fulfilled, and then they own the film. The cost of the production is never charged back to the creative contributors. In the record industry, as a recording artist I do not receive a fee for making an album. I may receive an advance to cover the cost of the recording process, which I am responsible for paying back in full. In other words, I don't receive a dime from the sale of my records until I have paid for all the costs incurred during production up to the point of distribution In short, the sound recording artist is not only the author but is also the person in charge of all facets of production up to the point of distribution. We give the record labels our work to exploit for 35 years. Like other authors, we should be able to reclaim our work as Congress intended.”

she argued that the featured artist should benefit from the spirit of the statute because the featured artist was typically the unremunerated party who was ultimately burdened financially under the exclusive recording agreement.

C. Marybeth Peters “Key Contributor” Approach

Register of Copyright Marybeth Peters also testified during the work made for hire Subcommittee hearings of the 106th Congress. When asked for her opinion as to who should be deemed an author of a sound recording, Ms. Peters recommended a resolution that would result in works of joint authorship. These works would be partly owned by the “Key Contributor” as creator/author and partly owned by the record label as employer or commissioning party. Under her Key Contributor view, sound recording authorship would be deemed vested in part to recording artists as individual authors only if they contributed a major portion of copyrightable expression in the sound recording vis-à-vis their performance⁶⁷ and in part to the record label under the work made for hire doctrine.⁶⁸ The Register of Copyright recom-

⁶⁷ See *Sound Recordings as Works Made for Hire Before the Subcomm. on Courts and Intellectual Property Comm. on the Judiciary*, *supra* note 24. “. . . a ‘key contributor’ . . . is someone who has made a major contribution of copyrightable expression to a sound recording. Ordinarily, it would include the featured performer or performers. For example, Frank Sinatra and Madonna would clearly be key contributors of authorship to the sound recordings on which they perform. Each of the members of the Beatles and Metallica would also be key contributors. In contrast, a background musician would not be a key contributor.” *Id.*

⁶⁸ Incidentally this same result may arise if a band member also happens to own the record label. This occurred frequently in the early 1980s when many independent record labels were

mended a compromise whereby the 1976 Copyright Act would be amended creating an *exception* to the sound recording category under the Section 101 work made for hire definition (as revised by the 1999 Amendment) that would allow key contributors a right to terminate,⁶⁹ but only as to their portion of meaningful authorship.⁷⁰ Here, the meaningful au-

formed by recording artists out of necessity. Many bands that could not get signed by a major label simply resorted to releasing their own records. These independent record labels were created by a key contributing member of the band. Examples of dual label/key contributor ownership include the record labels Alternative Tentacles (owned by Jello Biafra, lead singer of the Dead Kennedys), Dischord Records (owned by Ian MacKaye, lead singer of Minor Threat), SST Records (owned by Greg Ginn, guitar player of Black Flag), Epitaph (owned by Brett Gurewitz, guitar player of Bad Religion) and BYO Records (owned by Shawn and Mark Stern, vocalist, guitar player and bass player of Youth Brigade).

⁶⁹ Subject to the ‘majority rule’ provision of 17 U.S.C. § 203(a)(1): “In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it”

⁷⁰ See *Sound Recordings as Works Made for Hire Before the Subcomm. on Courts and Intellectual Property Comm. on the Judiciary*, *supra* note 24. “Most sound recordings will have a number of potential coauthors, including all of the musicians who perform on the recording, the producer of the recording, and perhaps others. There could easily be a dozen or more potential coauthors of a single sound recording The Copyright Office believes that those who contribute significant authorship to a sound recording should have the right to terminate. I will refer to these persons as ‘key contributors.’ I use the term ‘key contributors’ because, as the recording industry has correctly emphasized, permitting every contributor to a sound recording to exercise termination rights could make the exploitation of a sound recording unworkable . . . a ‘key contributor’ . . . is someone who has made a major contribution of copyrightable expression to a sound recording. Ordinarily, it would include the featured performer or performers. For

thorship referred to by the Register of Copyright is the artist's unique performance fixed in the sound recording.

D. Other Theories for Determining Who is an Author of a Sound Recording

1. Authorship as Implied by Public Perception and Record Label Representations

A proponent of the proposition that a recording artist is the author of the sound recording may also try to argue that because of public perception

example, Frank Sinatra and Madonna would clearly be key contributors of authorship to the sound recordings on which they perform. Each of the members of the Beatles and Metallica would also be key contributors. In contrast, a background musician would not be a key contributor. Exempting those key contributors from the work made for hire provisions should result in only a limited number of potential terminations. This could be accomplished by retaining the inclusion of sound recordings among the categories of works eligible to be commissioned works made for hire, but excluding the contributions of these key contributors from work-made-for-hire status. The result would be that the sound recording would be a joint work that is in part work made for hire and in part a work of individual authors." *But see* Eriq Gardner, *Ray Charles' Children Win lawsuit Over Song Rights Termination*, HOLLYWOOD RPT. (Jan. 30, 2013, 10:18 AM), <http://www.hollywoodreporter.com/thr-esq/ray-charles-children-win-lawsuit-416809>. Here, Gardner holds the view that the recent case involving suit against the grandchildren of Ray Charles holds bad precedent for producers in their capacity to block termination notices. "Here is where Collins made the second piece of important precedent by deciding that the foundation lacks standing since the statutes were intended to apply only to authors, statutory heirs and grantees of transfers and their successors -- not beneficial owners, which could be bad news for other royalty recipients like record producers who might wish to challenge termination notices." *Id.*

and record label representations, the recording artist has a valid claim to assert authorship in sound recordings that capture the recording artist's performance. An authorship claim based on this quasi-source of origin theory may be made on the premise that authorship of a sound recording could be reasonably derived by examining who the public thinks the natural author is. Here, the artist could claim that members of the public would naturally identify the artist as the author of the work and that no reasonable member of the public would identify the record label as the author of the sound recording.⁷¹

Buttressing this position, the artist could show that the primary focus of marketing materials created by the label feature the name and likeness of the recording artist and were not focused on the record label in and of itself. Flowing from this equitable quasi-trademark position, the recording artist would argue that since it was to the label's advantage to commercially exploit the sound recordings by messaging that the recordings featured the artist's performances, then the artist now has a valid claim that she is the author. The artist can claim she was the origin of the sound recording, i.e., that the record label was not the primary source of marketable value inherent in the sound recording, but rather the value in the work was derived from the fact that the artist was the creator.

⁷¹ See *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000). Applying a similar rationale, the court held that "[i]t is striking in *Malcolm X* how much the person who controlled the hue of the lighting contributed, yet no one would use the word 'author' to denote that individual's relationship to the movie. A creative contribution does not suffice to establish authorship of the movie." *Id.* at 1233.

2. Authorship by Estoppel

Under an authorship by estoppel approach, one can leave out those individuals that do not send termination of grant notices within the window of opportunity as outlined under Section 203 from the realm of possible sound recording authors.⁷² If a party fails to assert termination rights as dictated by the statute in a timely manner, they are lost. As a practical matter, if only one out of several potential claimants were to deliver termination of grant notice within the requisite window of opportunity, then the class of potential authors closes as a matter of law to all other non-claimants.

Under this approach, only those individuals who timely filed for a Section 203 reversion are in the pool of eligible sound recording author candi-

⁷² 17 U.S.C. § 203(a)(3) (2012) (“Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or if the grant covers right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of the forty years from the date of execution of the grant, whichever term ends earlier.”); 17 U.S.C. § 203(a)(4)(A) (“The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date.”); *see also* Rosini, *supra* note 37, at slide 27-28 (“§ 203(a) provides right of termination for post-1978 grants made by author (applicable both to pre-1978 and post - 1978 works) with a Five Year Window open from the 35th anniversary through the 40th year (with a twist for publication rights) - measured from the grant. The twist: If the grant covers the right of publication of the work, effective date must occur between (i) the 35th anniversary through the 40th year measured from the date of publication OR (ii) between the 40th anniversary through the 45th year measured from the date of execution of the grant, whichever ends earlier.”).

dates. Those who did not file a timely termination notice have waived their statutory rights, including any potential joint authorship claims they may have had. This does away with the potential clutter of claimants by closing the class to those who do not file a timely notice of termination under the statute.

V. AUTHOR AS “KEY MEMBER”

The following Part will provide a reasonable, nuanced and equitable solution to the issue of determining who is an author of a sound recording for purposes of terminating a grant of transfer under Section 203 of the 1976 Copyright Act. This solution is not focused on the broad issue of who can be an author of a sound recording in general, but rather focuses on the practical and narrow issue of who is an author of a sound recording for purposes of recapturing rights under Section 203 of the 1976 Copyright Act.

The answer can be found by focusing on who is a key member of the recording group.⁷³ From this class of key individuals we then look to see which

⁷³ Session musicians can be excluded from the potential pool of sound recording authors because session musicians are not the sine qua non of the sound recording. But rather, the key member is the indispensable unique and essential ingredient that makes the sound recording an original work. *See also Sound Recordings as Works Made for Hire Before the Subcomm. on Courts and Intellectual Property Comm. on the Judiciary*, *supra* note 24 (testimony of Jay Cooper addressing issue as to why session musicians can be subject to work made for hire agreements). “There is one other intervening factor, which is that he [the session musician] is a member of the musician’s union. When you contract with musicians, you contract with a certain employment form. The union sanctifies this relationship and he is paid as an employee just like any other hired hand on that particular record date.” *Id.*

member of that class was a signatory to the recording agreement from which the sound recordings arose. Under this two-step approach, if an individual is a *key member* of recording artist and a *signatory* to a record contract signed in the United States on or after January 1, 1978, then that individual should be deemed an author of a sound recording entitling them to terminate the grant of transfer under Section 203 of the 1976 Copyright Act.

I propose that as a matter of equity, only key members of a band should be eligible to have standing as an author of a sound recording in order to assert a Section 203 termination. This *ad valorem*⁷⁴ vesting of sound recording authorship for purpose of Section 203 termination is based on the premise that if the key member was not in the band, then the record label would not have signed the band to an exclusive record contract. If a member of recording artist is a key member, then one can reasonably deduce that they are an initial creative agent and cause of the circumstances that gave rise to the existence of the recording agreement in the first place. *But for* the creative vision, unique skills and original talent of the key member,⁷⁵ the record label would not have

⁷⁴ BLACK'S LAW DICTIONARY 1594 (9th ed. 2009) defines an *ad valorem* tax as “[a] tax imposed on the value of something (esp. real property), rather than on its quantity or some other measure.” But instead of imposing a tax, I suggest here that courts impose (vest) authorship in key members according to their value as creators.

⁷⁵ Denis Dutton, *A Darwinian Theory of Beauty*, TED (Nov. 2010), http://www.ted.com/talks/denis_dutton_a_darwinian_theory_of_beauty. Denis Dutton presented a number of interesting related observations regarding beauty, based on the premise that “We find beauty in something done well.” Echoing what Dutton holds as axiomatic, I propose that the key member is

signed the band to an exclusive recording contract.

Since participation by the key member in the recording group is the primary cause for the existence of the recording agreement and the recording agreement is the legal document that gives rise to the circumstances from which the sound recording is created, then one can, following back in a logical manner, show a causal nexus between the key member as valued creative member of recording artist and prime mover of circumstances that led to the creation of the sound recording. Additionally, all key members of a recording artist who intend⁷⁶ to create joint works under the recording agreement would be the sole joint authors of the work for purposes of Section 203.⁷⁷

responsible for doing something well, i.e., performing. Because the performance of the key member captured in the sound recording is done well, then this is something the record label finds beauty in. Since the record label values this key member performance it has offered the group an advance and exclusive recording agreement. Without the key member's participation in the group, the record company would not have offered a record contract to this group of individuals. Without this recording agreement no subsequent sound recording derived from the agreement would have been created.

⁷⁶ *Childress v. Taylor*, 945 F.2d 500, 509 (2d Cir. 1991) (“... equal sharing of rights should be reserved for relationships in which all participants fully intend to be joint authors. The sharing of benefits in other relationships involving assistance in the creation of a copyrightable work can be more precisely calibrated by the participants in the contract negotiations regarding division of royalties or assignment of shares of ownership of the copyright . . .”).

⁷⁷ H.R. REP. NO. 94-1476, at 120 (1976) (“Under the bill, as under the present law, co 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.”).

A recording artist can show they are a key member by providing evidence that they are entitled to royalties under the exclusive recording agreement. Here, authorship can be justified by showing that the key member is a beneficial owner “plus.” The “plus” element is the reason the key member receives the royalty. If the reason the member receives a royalty is due to the fact that they were a meaningful creative contributor to the sound recording, then their position as key member is justified. This reason would trump the status of a member being a royalty recipient for non-creative, political or other business reasons. This would be a question of fact to be decided on a case-by-case basis. If a member of the band has shown they are a key member, then they have passed the first hurdle on their way to being deemed an author of a sound recording for purposes of recapturing copyrights under Section 203. If an individual shows they are a key member, they have justified their inclusion as a member of the eligible pool of candidates that may claim authorship of a sound recording with vested standing rights to assert a Section 203 termination.

The second step in the analysis looks at who signed the grant of transfer. Because Congress uses the language “executed” in reference to the types of grants that authors can terminate, one can apply the plain meaning rule to reasonably infer that Section 203 terminations of transfer are meant to apply only to written grants. Section 203 states:

In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, oth-

erwise than by will, is subject to termination under the following conditions: (1) In the case of a grant executed by one author, termination of the grant may be effected by that author or . . . In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it . . .⁷⁸

Section 203 plainly states that only individuals who execute the grant have reversion rights. As a matter of practice, an exclusive recording agreement is signed by the recording artist and an authorized representative of the label. Therefore, Congress must have intended that a recording artist who signs a recording agreement is an author capable of recapturing sound recording copyrights under Section 203.

When combining the rationale and analysis summarized above, the equitable and practical conclusion is that only key members of the recording artist who signed the recording agreement may recapture rights to sound recordings under Section 203. The advantage of this interpretation is that it leaves out all other authorship claimants from the realm of bona fide authors who can perfect a termination of grant transfer under Section 203. Under this “key member” approach, reversion rights under Section 203 may not be exercised by those individuals that contribute less than a major contribution of copyrightable expression to sound recordings and who are not the *but for* cause of the existence of the record contract from which the sound recording arose. These criteria would exclude former non-key band members, back-up singers, studio musicians, engi-

⁷⁸ 17 U.S.C. § 203 (2012).

neers and producers from the eligible class of Section 203 authors. Vesting only key members with sound recording authorship status for purposes of Section 203 terminations effectuates Congress' intent of "safeguarding authors against unremunerative transfers"⁷⁹ by giving a practical compromise that would further the objectives of the copyright law while recognizing that the statutory right of termination should only be given to recording artists that deserve it the most.

CONCLUSION

At the heart of the proposition that the recording artist is the true author of a sound recording is the intuitive notion that a sound recording is more than a mere mechanical contrivance. To deny the recording artist authorship of the sound recording would be to dismiss their creative originality. Because originality is the sine qua non of copyright, it would be counterintuitive to grant sound recording authorship status to individuals charged with capturing sounds instead of the performers who are originators of the creative performance expressed in those sounds. Additionally, by applying the public policy rationale of guarding against unremunerative transfers, we come to the reasonable conclusion that the key member is the party that should be able to recapture sound recording copyrights under Section 203 of the 1976 Copyright Act because *this* performer is the heart of the work.

⁷⁹ H.R. REP. NO. 94-1476, at 124 (1976).