EVERYTHING YOU NEED TO KNOW ABOUT COPYRIGHT REVERSIONS

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During my first thirty-five years as a music attorney the most frequently asked question by artist clients has been "Where are my royalties?" With the American record industry's annual revenue in economic free-fall from fourteen to six billion dollars during the past decade,[1] artists are learning to be less dependent on royalty payments from their record companies. Artists (and their heirs) are now exploring ancillary revenue sources as well as adopting an independent attitude toward exploitation of their work. Given this climatic change, it appears that the most frequently asked question of the next thirty-five years might be "How can I get the rights to my sound recordings and songs back from the labels and publishers who currently own them?" Some lawyers refer to this subsection of copyright law as "copyright termination" practice or "recapturing copyrights" but I will simply call it "Copyright Reversions."

This article is not a primer on the basics of Copyright Reversions because this type of information is already available on the Internet. Instead this is intended to be a comprehensive survey of the who, what, when, how, and why of this complex subject. In homage to the title of my colleague Don Passman's landmark publication, this article will hopefully provide "Everything You Need To Know About Copyright Reversions."

I. BACKGROUND

This article is intended for musicians, songwriters, record label owners, and music publishers (including their lawyers and accountants) who really want to drill down on the specifics of how Copyright Reversion really works and what the future may hold for this complex and important area of law. While the history of copyright terms can be traced to England's Statute of Anne in 1710,[2] we will begin our analysis with much more recent history.

The primary piece of legislation used to decipher Copyright Reversions for the purpose of this article is the Copyright Act of 1976, which went into effect as of January 1, 1978.[3] Section 203 of the Copyright Act allows authors to terminate any transfer of a their copyright(s) made on or after January 1, 1978 and to recapture control of such copyright interests.[4] Any grant, license, or agreement by an author (e.g., composer or recording artist) to a third party (e.g., administrator, co-publisher or record company) made on or after January 1, 1978 may be terminated—notwithstanding the terms of the transfer contract—allowing the rights with respect to the underlying copyright to be reclaimed by the "author."[5] This article shall also discuss

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[1] *See* David Goldman, *Music's Lost Decade: Sales Cut in Half*, CNNMONEY (Feb. 3, 2010, 9:52 AM), http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/#; Tim Arango, *Digital Sales Surpass CDs at Atlantic*, N.Y. TIMES, Nov. 25, 2008, at B1, available at http://www.nytimes.com/2008/11/26/business/media/26music.html.

[2] Statute of Anne, 8 Ann., c. 19 (1710) (Eng.).

[3] 17 U.S.C. §§ 101–805 (1976).

[4] 17 U.S.C. § 203 (2011).

[5] *See id.*

certain termination rights which exist in relation to works that were created before 1978 but the focus of this piece shall be on post 1978 songs and sound recordings.

The earliest copyright laws gave authors an exclusive copyright (i.e the right to own and control their creative work) for fourteen years from the date of publication.[6] From there, if the applicable author was still living, copyright protection could be renewed for an additional fourteen years.[7] This so-called "renewal term" and the question of whether it could be assignable by authors to third parties or their heirs has a history of being the fodder for litigation in the United States. Under the Copyright Act of 1976, the termination right seeks to circumvent the pitfalls of multiple copyright terms and clearly delineates a termination right for the benefit of authors and their heirs.

Specifically, under the Copyright Act of 1976, any grant, license or assignment made on or after January 1, 1978 may be terminated by the author thirty-five years from the date of such transfer if the work was not originally created as a work-made-for-hire for an employer.[8] The paternalistic intent of Congress is quite clear in the legislative history as well as in the mechanics of the applicable statutory provision.[9] Congress declared the necessity of the so-called "thirty-five year rule" to safeguard authors against unremunerative transfers given the likely unequal bargaining power of authors and the impossibility of determining a work's value until after it has been exploited.[10] As the Supreme Court has written on the subject of copyrights, "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors."[11]

Clearly, Congress recognized that musicians and songwriters frequently find themselves in a disadvantageous position when negotiating the rights to their works. As a result, there is a statutory right to renegotiate these rights either by: (1) entering into a new contract with the original record company, music publisher, or other third party (sometimes called the "grantees") following the timely exercise of a proper Termination Notice; or (2) recapturing these rights so that the author will be free to deal directly with new grantees at a point in time when the author is more business savvy and likely to have greater bargaining power than when the initial grant was made. But this termination right does not extend to so-called "works for hire" which are works in which someone other than the original creator is entitled to claim copyright "authorship" status.[12]

Unless you use the Mayan Calendar, the most significant date over the next twelve months will be January 1, 2013. It might surprise some people even in the music community to learn that sound recordings were not historically subject to federal copyright protection until enactment of the 1971 Sound Recording Act, which established Federal copyright protection for sound recordings created on or after February 15,1972.[13] Accordingly, the new kid on the block, in terms of Copyright Reversions, will be the opportunity that recording artists might have to regain ownership and control over their sound recordings starting in 2013 under the thirty-five year rule.[14] But that part will depend on whether the artist recording contract or songwriter

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[6] *See* Copyright Act of 1790, ch 15, § 1, 1 Stat. 124, 124 (1970).
[7] *Id.*
[8] *See* 17 U.S.C. § 203.
[9] *Id.*
[10] H.R. Rep. No. 94-1476 (1976).
[11] Mazer v. Stein, 347 U.S. 201, 219 (1954), *superseded by statute*, 37 C.F.R. 202.10(c) (1959).
[12] *See infra* Part II.A.3.
[13] Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (codified as amended at 17 U.S.C. §§ 101, 102(a)(7), 106(1), 106(3)–(4), 116, 401–402, 412, 501–504 (2011)).
[14] *See* 17 U.S.C. § 203.

publishing agreement is deemed a "grant" subject to a termination right or a "work for hire" conferred on the record label or music publishing company and therefore, not subject to a termination right. As the case law relating to Copyright Reversions and the work for hire status of sound recordings has not yet been definitively established and because so much is at stake here, a myriad of issues surrounding Copyright Reversions, especially as they relate to music, are certain to be the subject of court battles for many years to come. If these decisions are in the artists' favor, this will not simply be a game-changer it will be an industry-changer.

II. AN OPPOSING VIEWPOINT

Allow me to begin by disclosing my personal bias on this issue. For nearly four decades I have represented hundreds of musicians who have sold many millions of albums. I consider myself to be an artist's rights lawyer and feel strongly that their position will prevail in the contest for which the starter's pistol sounds on January 1, 2013. That said, I want you to know what the other side thinks about this issue. Let me start with the opposition's point-of-view. Since there is relatively little organized opposition to the concept of recapturing copyrights in songs, I will begin by focusing on the most contentious issue – the recapture of copyrights in sound recordings.

According to Billboard Magazine, last year's record sales by so-called "legacy artists" (e.g., Rolling Stones, Willie Nelson, The Police, etc.) represented roughly half of all albums sold and sixty percent of all singles sold.[15] So what's at stake? Any albums released in 1978 by these legacy artists, and hundreds of others, may soon be subject to Copyright Reversion. *Remember*: Any grant, license or assignment *made on or after January 1, 1978* may be terminated by the author thirty-five-years from the date of such transfer (provided that the author has properly followed the termination procedures outlined in this article).[16] I think it's safe to say that the record companies who currently own these copyrights are not planning to FedEx the sound recording masters back to these artists promptly upon the statutory termination date.

The Recording Industry Association of America (RIAA) is the trade group for America's record companies. It describes itself as "the trade organization representing the major music companies that create and manufacture 85% of all legitimately recorded music produced and sold in the United States."[17] In the course of my research for this article, I've located a surprisingly small number of position statements on this subject by the RIAA since the so-called "Millennial Flip-Flop."[18] Therefore, the following is simply my surmise as to what their position is likely to be.

A. Employer-Employee Considerations

As their opening salvo, record companies will likely take the position that sound recordings are not available for Copyright Reversion because they are "works made for hire" which are expressly excluded from the termination provisions of the Copyright Act.[19] Pursuant to

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[15] Glenn Peoples, *Now He Tells Us: Sean Parker Believes in The Record Industry*, BILLBOARD.BIZ (May 25, 2011), http://www.billboard.biz/bbbiz/industry/record-labels/business-matters-napster-co-founder-sean-1005203622.story.

[16] *See* 17 U.S.C. § 203

[17] *About Us*, RIAA, http://www.riaa.com/aboutus.php (last visited Mar. 22, 2012).

[18] *See infra* Part II.B.4.

[19] *See* 17 U.S.C. § 203(a).

the provisions of § 101 of the Copyright Act of 1976 there are only two means by which a sound recording can qualify as a work for hire.[20] The first is where an employee creates a work (e.g., song, sound recording, etc.) during the course and scope of his or her employment.[21] Most record companies will have a difficult time supporting this position. *Cmty. for Creative Non-Violence* ("CCNV") established that most artists do not qualify as "employees" under either the generally accepted definition of the word or the case law, as they do not work forty-hour weeks, receive W-2 forms, or satisfy many of the other criteria the Supreme Court holds necessary in order for someone to qualify as an "employee" under that prong of the test.[22] Moreover, in many instances the express language of the recording agreements, which are usually drafted by the record company, states that the relationship between the relevant parties is not that of an employer and employee. For example, many recording agreements have disclaimer clauses that are similar to the following: "Company (i.e., record company) and Artist (i.e., recording artist) are independent contracting parties. Under no circumstances shall Artist be deemed an employee of the Company nor is Company the employer of Artist."[23]

Unfortunately the Copyright Act of 1976 does not provide a definition as to who qualifies as an "employee." Rather, over the years the common law of agency and the Supreme Court decisions have evolved into a series of factors to be used in deciding if a person is an "employee."[24] None of these factors are solely determinative and they are measured differently depending on the facts in each case.[25] The thirteen factors listed in CCNV considered when determining if a hired party qualified as an employee include: (1) the hiring party's right to control the manner and means of production; (2) the skill required of the hiring party; (3) the source of the hiring parties instrumentalities and tools; (4) the work's location; (5) the duration of the parties' relationship; (6) whether the hiring party has the right to assign additional work; (7) the degree of the hired party's discretion of when to work and for how long; (8) the hiring party's regular business;(9) the hiring party's role in hiring and paying assistants; (10) whether the work is part of the hiring party's regular business; (11) whether the hiring party is in business; (12) whether the hiring party provides employee benefits and (13) the tax treatment of the hired party.[26]

Interpreting these factors in a light which is most favorable to their position, I suspect that record companies will argue that recording artists qualify as employees under the above-cited test as labels may control: the actual payment of the recording budget; the selection of tracks to be released as "singles"; the mastering of the album; the approval of producers and studios; and the right to require the delivery of additional albums.

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[20] *See* 17 U.S.C. § 101 (2011); *See also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) (using § 101 to determine whether a sculpture was a work for hire, when a non-profit organization hired an artist to create the it).

[21] 17 U.S.C. § 101.

[22] *Cmty. for Creative Non-Violence*, 430 at 747 n.13 (quoting Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill, Chapter XI, 12–13(1975)).

[23] Many sample license agreements can be found online as examples. *See Master Licensing Agreement*, MUSICDEALERS.COM, http://www.musicdealers.com/sites/default/files/MD-Master-License-Agreement-for-USv1.pdf (last visited Mar. 23, 2012); *Exclusive Recording Artist Agreement*, COSMIK.COM, www.cosmik.com/aa-june02/artistowned.doc (last visited Mar. 22, 2012).

[24] *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1958). See, e.g., Kelley v Southern Pacific Co., 419 U.S. 318, 323–24, and n.5 (1974); Ward v. Atlantic Coast Line R. Co., 362 U.S. 396, 400 (1960); Baker v. Texas & Pacific R. Co., 359 U.S. 227, 228 (1959).

[25] *Cmty. for Creative Non-Violence*, 430 at 752 (citing *Ward*, 362 U.S. at 400).

[26] *Id.* at 751–52.

Now, let's look at the aspects of this process that the record companies do not exert control over:

(1) An artist frequently writes the songs that are recorded which gives him or her a very important role in the creative process. Even in those instances where the artist does not write his or her own songs, they are usually the principal decision maker as to which songs will be chosen.

(2) A recording agreement between the artist and a record company requires the artist to be responsible for the recording costs. In the event the record company in fact pays the recording costs, they are almost always considered "advances" which the artist is required to repay out of his or her artist royalties.

(3) The artist frequently chooses the producer, contracts for the services of the producer and is responsible for all payments to the producer (including, but not limited to, the producer's royalty) which are paid out of the artist's so-called "all-in" artist royalty.

(4) The artist selects the studio musicians/engineers/mixers and any other third parties contributing to their album. These individuals are also contracted with and paid by the artist rather than the record company.

(5) The artist also (usually) chooses which particular songs will appear on his or her album and the sequence in which those songs appear.

I believe that when the record companies' likely arguments are weighed against the actual role of the typical artist in the creation of sound recordings, on a factor by factor basis, it becomes apparent that most artists do not qualify as "employees" under the relevant case law as the recording artists clearly exert greater independence and significant artistic integrity. Moreover, if the record companies were able to successfully argue that artists really were employees all along, they might attract some unwanted attention from an entity called the IRS (and I'm not talking about The Police's old record company) because this could result in some serious liabilities in relation to unpaid back taxes.

B. Independent Contractor

Since the labels will not be able to successfully assert that recording artists are employees, the only other alternative for them to repel an artist's claim to Copyright Reversion is to succeed in establishing the position that sound recordings nonetheless qualify as a work for hire because: (1) the sound recording was specifically ordered or commissioned by the company; (2) the work falls within one of the nine categories of works by independent contractors that qualify as works for hire as enumerated in § 101 of the Copyright Act; and (3) that the parties entered into a written agreement by which the artist granted these rights to the record company.[27]

[27] 17 U.S.C. § 101 (2011).

1. Specifically Commissioned By Company

Record companies will not be able to establish that most sound recordings were specifically ordered or commissioned by the hiring party. Let's be clear, we are not talking about those gimmick acts or novelty acts created by the record companies or production companies wherein said record company or production company assembled the recording artists, furnished them with songs, musicians and producers, taught them how to sing, dance and handle the media, and injected them into pop culture. That's a discussion for another day. Over the past few decades, a typical album is not prepared at the record company's expense since their contracts with the artist usually provides that the artist "shall be responsible for, and shall pay, all recording costs."[28] In fairness it could be said that many albums never earn enough in royalties for the artist to reimburse the monies advanced by the label; thus, lawyers for that record company might argue that in relation to those particular sound recordings, the label did pay the recording costs. But this is a slippery slope since record company accounting practices enable most record companies to recoup these recording costs much earlier in time than the date on which they are officially repaid the advances from the artist's royalty account. Nevertheless, it should be noted that there is no statutory requirement that the commissioning party pay the commissioned party any consideration. This enables not-for-profit groups to accept donated services from artists and still own that artist's work if it was properly contracted for pursuant to a valid work for hire agreement.

There are a few court decisions in relation to pre-1978 recordings that favor the record companies' position including: *Fifty-Six Hope Rd. Music Ltd. v. UMG Recordings*.[29] In that decision the Federal District Court for the Second Circuit found that the particular Bob Marley recordings at issue were recorded for the benefit of the record company since the record company was found to have paid the recording costs, selected the producers, and had the right to accept or reject the master recordings.[30]

Most record contracts continue to use commissioning language such as "Company hereby engages the Artist to record and deliver . . . ." Nevertheless, these contracts also provide that "artists will engage all artists, producers, musicians and other personnel for the recording sessions hereunder." For much of the decades formed by the 1950's and 1960s, many record companies did control a significant portion of the recording process.[31] They chose the studios, which they frequently owned. They chose the producer, who was frequently under contract to that label. They chose songs to be recorded and they paid all costs associated with each project. However, this process had changed well before sound recordings received official copyright protection in 1972. Certainly by the time that the majority of the post-1978 sound recordings now likely subject to the thirty-five-year rule were created, most record companies decided to make the recording process the contractual and financial responsibility of the artist. I believe they will come to regret that decision when the courts render the first Copyright Reversion decisions.

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[28] *See supra* Part II.A.2.

[29] Fifty-Six Hope Rd. Music Ltd v. UMG Recordings, No. 08 Civ. 6143, 2010 U.S. Dist. LEXIS 94500 (S.D.N.Y. Sept. 10, 2010). Often referred to as the "Bob Marley" case.

[30] *Id.* at *24-27.

[31] *See generally* CONTINUUM ENCYCLOPEDIA OF POPULAR MUSIC OF THE WORLD: MEDIA INDUSTRY AND SOCIETY 641 (John Shepherd et al., eds., 2003); Eric Herbert, *How the Record Label Business Model Died and Why it's Changing Music Today*, EVOLVER.COM (Aug. 4, 2009), http://evolvor.com/2009/08/04/label-2-0-turns-the-classic-record-label-business-model-upside-down/.

2. Written Agreements Granting Rights

In order for a record company to successfully sustain its position that a sound recording is a work for hire, there must be a written agreement signed by the parties granting these rights.[32] A conventional recording agreement contains a clause, which is usually referred to as a "Grant of Rights" provision. It usually looks something like this:

> You (i.e., the artist) warrant, represent and agree that throughout the Territory, Company (i.e., the record company) is the sole, exclusive and perpetual owner of all sound recordings delivered hereunder or otherwise recorded by You during the Term of this Agreement. Each sound recording made under this Agreement or during its Term, from the inception of its recording, will be considered a "work made for hire" for Company: if any such sound recording is determined not to be such a "work made for hire", it will be deemed transferred to Company by this Agreement, together with all rights and title in and to it.[33]

Since this "belt and suspenders (and elastic waist band)" clause is virtually non-negotiable and contained in almost every record deal, it would appear that the record company has a valuable trump card here.[34] However, fortunately for the artist, even a written and signed contract is not necessarily a bar to the artist's right to Copyright Reversion Under the Copyright Act of 1976, as the termination right seeks to circumvent the pitfalls of multiple copyright terms and clearly delineate a termination right for the benefit of authors and their heirs. Accordingly, unless a court determines that there is no Copyright Reversion because sound recordings are "works made for hire," the Copyright Reversions rights possessed by the authors of the sound recordings pursuant to § 203 are "inalienable," which means that they are incapable of being transferred or surrendered and cannot be assigned away or sold, with a few possible exceptions which will be discussed later in this article.[35]

3. The Work For Hire Definitions of Section 101

Section 101 of the Copyright Act of 1976 delineates what types of works by their nature are incontestably works for hire.[36] It is really a two part test: (1) was the work created by an employee within the scope of his or her employment, and; (2) if not, is it (a) one of the nine enumerated work-for-hire classes of works and (b) is there a signed writing between the parties acknowledging the work for hire relationship?[37] Included on this list of nine enumerated categories of works are motion pictures and many other categories of media.[38] Not included on this list are songs and sound recordings. Since the term "sound recordings" is not explicitly contained in the enumerated categories list, record company lawyers will need to find other language in that section to justify their claim that sound recordings are indeed works for hire. The two classes of works qualifying for "work for hire" treatment which they are most likely to

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[32] *See* 17 U.S.C. § 101 (2011).
[33] *See supra* text accompanying note 23.
[34] Of note, these clauses rarely, if ever, appear in music publishing agreements.
[35] *See* 17 U.S.C. § 203 (2011).
[36] 17 U.S.C. § 101.
[37] *Id.*
[38] *Id.*

choose are: (1) a contribution to a "collective work" which is defined as a work, "such as a periodical issue, anthology, or encyclopedia in which a number of contributors, constituting separate and independent works in themselves are assembled into a collective whole"; or (2) as a "compilation" which is defined as a work "formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works."[39]

There are a number of distinctions between the typical definitions for compilations and collective works and sound recordings. First, most sound recordings are the creative product of one individual artist (e.g. James Taylor) or a group of artists working together as a cohesive group (e.g. Aerosmith…well maybe not always so "cohesive"). Whereas the examples of collective works and compilations described in the Copyright Act generally suggest a group of many authors working individually, like contributors to an encyclopedia.[40] Another factor that weighs against the position of record companies is their standard business practice of releasing and selling individual tracks as so-called "singles." Therefore, it will be difficult for record companies to argue that these works were specifically commissioned to be part of a collective work or compilation.

Record companies might attempt to claim that the sound recordings should qualify as works for hire since they were specially commissioned for use in an audiovisual work.[41] I believe this argument will fail for several reasons: (1) the audiovisual recordings contemplated by record contracts, with a few exceptions, were not specifically commissioned as audiovisual works, they were commissioned as sound recordings; (2) most audiovisual recordings in standard record deals are envisioned as promotional vehicles to stimulate sales of sound recordings and (3) because sound recordings are by their definition something other than a audiovisual work,[42] the two are per se mutually exclusive which means that an audiovisual work cannot encompass a purely audio recording.

Record companies may also try to take the position that the failure to include "sound recordings" in the definition of what constitutes a work for hire was a legislative oversight, but this is simply not the case. Congress worked on this legislation for fifteen years and heard testimony from numerous individuals and trade groups. Most telling is the fact that right in the middle of these deliberations, Congress passed the 1971 Sound Recordings Act, which granted federal copyright protection to sound recordings.[43] Consequently, the failure to include the term "sound recordings" in the works for hire definitions of the Copyright Act under 17 U.S.C. Section 101 was, in my estimation, clearly a deliberate decision.

Lawyers for the record companies are likely to take the position that the creation of an album involves "collecting" and "assembling" tracks, which they "selected, coordinated or arranged." Some record companies believe that the collection process (i.e. the selection and sequencing of an album) is itself an act of authorship and therefore can be commissioned to an independent contractor such as an artist or producer. Therefore they argue that all contributions to the album, including both the individual sound recordings and the selection and sequencing of them into the album, are "works made for hire" even if the label itself had nothing to do with the

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[39] *Id.*
[40] *See id.*
[41] *See id.*
[42] *See id.*
[43] *See* Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

selection and sequencing process. I don't agree. However, in limited situations, for certain albums by certain artists, they could be correct. For example, the recent *Now That's What I Call Music 79* album might fit this description. This recording contained multiple tracks and each by a different artist (e.g., Adele, Lady Gaga and LMFAO). Since these tracks were already bona-fide hits they were "pre-existing" and were separately subject to copyright protection. The tracks were then presumably selected, collected and assembled by an employee of Universal (…and I'll give them the benefit of the doubt and assume that a modicum of creativity was involved in this process). Additionally, there is a Second Circuit decision that seems to support the record companies' position on this issue. In *Bryant v. Media Right Prods., Inc.*, the court held that the songs, which were included on those albums that were the subject of the dispute, were "preexisting materials" that resulted in a compilation due to the original way in which the materials were selected and arranged.[44] The *Bryant* case addressed how statutory damages may be computed for compilations but did not consider the sweeping effect this ruling might have on the separate and distinct issue of Copyright Reversions.[45]

Despite some indicia which might be favorably construed in the record companies' favor, I'm still not certain that they will win this argument. I believe the courts will need to examine what was the intention of the parties at the moment when each of these recordings was created. If each separate track was not created as a work for hire at its' inception, I think it's unlikely they would later become works for hire simply because they were bundled into a compilation album.

Nevertheless, the types of compilation albums that I just described are not typical. The vast majority of the post-1978 albums that might be subject to Copyright Reversion were recorded entirely by one group or a solo artist. As previously stated, the artist selected the tracks on these albums, as well as the sequencing of those tracks. The artist also was responsible for the payment of all recording costs, hired and paid the producers, and selected and paid the studio musicians, background vocalists and mixers. Only one party was responsible for the actual creation, direction, assembling and control over the making of most post-1978 sound recording, and in my estimation that party was clearly not the record company.

4. The Satellite Home Viewer Improvement Act of 1999[46] Debacle

Apparently some RIAA members were not feeling quite so bullish in relation to their position that sound recordings would be determined to be compilations or collective works because in 1999 their lobbyists inserted the term "sound recordings" into the definition of what could be considered as a work for hire.[47] Unfortunately, the organizations in Washington who should have been protecting the rights of music artists were asleep at the switch and this "technical amendment," to use the RIAA's understated description of this cataclysmic change, which had nothing whatsoever to do with satellite transmissions and everything to do with depriving musicians of their Copyright Reversion rights was passed and signed into law by a generally artist-friendly President Clinton.[48]

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[44] Bryant v. Media Right Prods., Inc., 603 F.3d 135, 141 (2d Cir. 2010).

[45] *Id.* at 144.

[46] Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501A-521, tit. I (1999) (repealed 2000).

[47] Steve Gordon, *The Comprehensive Guide to Reclaiming Old Masters*, ENT. ART SPORTS L. BLOG (Sept. 5, 2011, 12:22 PM), http://nysbar.com/blogs/EASL/2011/09/the_comprehensive_guide_to_rec.html.

[48] *Id.*; Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S.C. L. REV. 375, 375–76 (2002). The "amendment" was inserted, or hidden depending on your point-of-view, into the Satellite Home

I'm proud to say that I was part of the group that worked vigorously to repeal this amendment. I can't tell you how shocked I was to hear Congressperson after Congressperson and Senator after Senator tell me "I thought that the RIAA was the artists' spokesperson on the hill." And while it's true that the interests of labels and musicians can sometimes align, this was one of the many examples where they did not.

There were several tireless champions for repeal of this amendment including Congressman Howard Berman (D-CA) and recording artists Don Henley and Sheryl Crow.[49] But a real game-changing moment came when Congresswoman Mary Bono (R-CA) decided to support the repeal efforts[50] because she came to recognize the deleterious effect, which her initial vote supporting this legislation would have on the value and control of the sound recordings in the estate of her late husband Sonny Bono.

In 2000, both sides in this issue agreed to legislation, removing the word "sound recording" from the previously enumerated list of work for hire categories under Section 101 (earning it the moniker of "The Millennial Flip-Flop").[51] The parties also reset the odometer back to zero by agreeing that neither the amendment nor the repeal thereof could be construed in the future as evidence for or against either party's position in relation to whether a sound recording constituted a work for hire.[52]

III. WHO IS AN AUTHOR?

According to U.S. law, the copyright "vests initially in the author or authors of the work."[53] Since the authors are the only ones entitled to copyright protection, it begs a very important question, "Who is the author?" Curiously, the Copyright Act of 1976 does not provide a specific definition as to who qualifies to be considered an author for copyright protection purposes.

As we know, record companies are expected to claim that they are the authors of certain sound recordings that were made at their expense. One possible tactic that they might use is the statute of limitations. I believe some labels might argue that purported copyright claimants (i.e. the artists who recorded the work) had a three-year window from the date of the label's initial copyright claim, occurring upon registration with the Copyright Office, to contest the label's copyright claim. Failure to do so would cause the artists to be precluded from exercising their Copyright Reversion rights later as a result of the statute of limitations.[54] For the past several decades, record companies have usually filed the "SR" form with the Copyright Office declaring themselves as the authors of the sound recording. In my nearly four decades as a music lawyer, I can't remember one instance where this form was ever shown to the artist for their approval or even where a copy was given to them after it was filed. It is long standing case law and Copyright Office policy that the information contained on these forms helps to establish the

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Viewer Improvement section of the Intellectual Property and Communications Omnibus Reform Act, which was then attached to the 1,174-page federal appropriations bill. *See* Bill Holland, "*Work-for-Hire" Law Rattles Proponents of Artists' Rights*, BILLBOARD, Jan. 15, 2000, at 1.

[49] *See* Bill Holland, *Steps Taken Towards Reversal of New Law*, BILLBOARD, July 29, 2000, at 1.

[50] *See* Bill Holland, *Congress Congratulates Artists*, BILLBOARD, Sept. 30, 2000, at 1.

[51] *See* Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444 (2000); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 5.03[B][2][a] (2011).

[52] *See* Nimmer, *supra* note 51 at § 5.03[B][2][a].

[53] 17 U.S.C. § 201(a) (2011).

[54] *See* 17 U.S.C. § 507(b) (2011).

validity of the copyright and is not per se proof of authorship.[55] While these SR copyright forms would be used in support of the record companies' position on the work for hire issue, they would only be one factor and would clearly not be determinative factor. I believe the courts will see this tactic for what it really is—a strategy attempting to deprive artists of rights granted to them under the provisions of the Copyright Act—and they will refuse to find in record labels' favor on this issue.

Over the years courts have had to address authorship issues in many cases. These decisions as well as other scholarship on this subject, suggest the following factors would be considered in trying to answer this question.

(1) The creator of the work, which was independently created.[56]

(2) The party who registered the work with the U.S. copyright office (this confers to a rebuttable assumption that the information contained in the filing is valid) or shows other manifestations to be considered as an author.[57]

(3) The party who infused the work with degree of creativity.[58] However, there is no "bright line" test as to what constitutes an acceptable amount of creativity.

(4) The party who exercises some amount of personal autonomy over the creation of the work.[59]

(5) The party who manipulated tools (like a mixing board or computer program) which figured prominently in the creation of the work.[60]

(6) The party who originates the work (rather than the party who fixes it in a "tangible expression").[61] Originality = authorship.

It is abundantly clear that a songwriter who writes the music and a second songwriter who writes the lyrics are the authors of that song. In most instances, it is also abundantly clear that the featured vocalist and the featured musicians who create a sound recording are the authors of that sound recording. What about other contributors such as producers and studio musicians?

According to a statement contained on the RIAA website one of the reasons why artists should not exert their Copyright Reversion rights is as follows:

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[55] *See* 17 U.S.C. § 410(c) (2011); Nimmer, *supra* note 51 at § 12.11[B]. *See e.g.*, Durham Industries, Inc. v. Tomy Corp., 630 F.2d 905, 908 (2d Cir. 1980) (stating that "[i]t is clear . . . that a certificate of registration creates no irrebuttable presumption of copyright validity.").

[56] *See* Cmty. For Creative Non-Violence v. Reid, 490 U.S. at 737 (explaining that the author is generally the party who actually creates the work).

[57] *See supra* text accompanying note 55.

[58] *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884) (concluding that for art, the author is the man who creates or gives effect to the idea, fancy, or imagination).

[59] *See* Thomson v. Larson, 147 F.3d 195, 202–203 (2d Cir 1998); *See, e.g.*, Erickson v. Trinity Theatre, 13 F.3d 1061, 1071–72 (7th Cir 1994).

[60] *See* Diamond v. Gills, 357 F. Supp. 2d 1003 (E.D. Mich. 2005).

[61] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991).

> As Paul Goldstein, professor of law at Stanford University explained in his statement, as a collaborative work, if sound recordings were not considered a work made for hire, they would be tied up in endless disputes and negotiations over copyright ownership among any and all of the individuals who had any colorable claim of authorship.[62]

We can always count on the RIAA mother-ship to be looking out for the interests of their close friends in the artist community. Seriously speaking (…I say that in case you missed my attempt at irony in the last sentence), the RIAA raises a legitimate point here. In order to exert their Copyright Reversion rights, artists need to understand who the authors of these sound recordings are.

First of all, it's important to understand that it is entirely possible to have joint authorship of a work (and thus co-ownership of a work). According to statute this might occur where a sound recording was "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[63] It's also important to recognize that parties can be joint authors even where there is no contract or writing that memorializes this relationship and to be clear, this is very often the case.[64]

The following represents my point-of-view on how the usual contributors of the recording process might expect to be treated in relation to their claims of co-authorship.

A. Producers

As a practical rule, I believe record producers who actively participate in the creation of a sound recording are authors under the provisions of the 1976 Copyright Act. Unfortunately, there isn't a standard formula to determine who is a producer.[65] The following are a few of the most typical permutations.

> (1) Some producers are responsible for virtually every phase of the recording process including renting the studio/hiring the musicians/renting the outboard gear/hiring arrangers, copyists, engineers and mixers and most importantly, actually producing the tracks.
>
> (2) Some producers perform more like engineers and limit their contributions to the recording console.

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[62] News Release, *RIAA President Praises Congress for Hearing on 'Work for Hire'*, RIAA (May 25, 2000), *available at* http://www.riaa.com/index.php (search "President Praises Congress"; then follow the "RIAA President Praises Congress for Hearing on 'Work for Hire'" hyperlink).

[63] 17 U.S.C. § 101 (2011).

[64] *See* Childress v. Taylor, 945 F.2d 500 (2d Cir. 1991) (holding that "joint authorship can exist without any explicit discussion of this topic by the parties . . . .").

[65] *See generally* Dan Connor, *The Role of a Music Producer Explained*, TheStereoBus.com (Dec. 7, 2007), http://thestereobus.com/2007/12/07/the-role-of-a-music-producer-explained/; Lady Tha ProducHer, *The Misunderstanding of the Role of a Music Producer*, StudioNoise.com (Apr. 14, 2011), http://www.studionoize.com/2011/04/the-misunderstanding-of-the-role-of-a-music-producer/.

(3) Some producers are more important than the lead vocalists and act as the principal creative engine, engaging the vocalists and musicians to record a song, which the producer often wrote.[66]

Since a producer's contribution cannot be reduced to a rigid formula, there is no standardized test for gauging when his or her contribution rises to the level of being accorded an authorship credit. Precedent on this subject seems to suggest that "originality" which is the trigger point test for authorship is an extremely low bar that is easy to overcome.[67] However, I think it's safe to say that most producers involved in a typical post-1978 recording session will be determined to be authors of those sound recordings.

I believe one reliable factor that the courts could look to in determining whether a producer qualifies as an author is royalty payments. As a general rule, I think it's safe to say that the artist would not have given a producer a substantial portion of the artist's royalties unless that artist believed that their producer contributed in a substantive way to the recording process. Most producers are paid a royalty out of the so-called "all-in royalty," paid to artists by record companies.[68] Typically a producer would receive a 3% royalty out of the artist's 15% royalty, though numbers will vary for both the producer and the artist, the producer generally will receive approximately 20% to 25% of the royalty amounts payable to the artist. Since this percentage was typically negotiated and committed to a contract between the artist and producer, I believe this would be a reliable standard to use in determining what each party's percentage of authorship might be in the recaptured sound recording copyright.

B. Engineers/Mixers

As a general rule, I do not believe that the contributions of most engineers and mixers rise to the level of authorship in a sound recording. In a typical recording process the engineers and mixers are executing the creative vision of the artist and producer. But that's not always the case. There are so-called "superstar mixers and engineers" who are hired precisely because of their ability to enhance the final record with their unique creative input. For example, engineer Alan Parsons is credited with some of the sonic highlights of Pink Floyd's masterpiece "Dark Side of the Moon."[69] Often these superstar mixers and engineers will receive one or two royalty points in consideration for their services. I believe that as a general rule, if an engineer or mixer was valuable enough to have been granted a royalty, he or she should also be considered a co-author of the sound recording. Just as in the case of the producer, the ratio that the royalty an engineer or mixer receives bears to the artist's all-in royalty could be used to determine the percentage of co-authorship/co-ownership in the recaptured sound recording copyright. Nevertheless, this is just my opinion. The Copyright Act as currently written has no such

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[66] Steven Greenberg who created the ubiquitous pop song "Funkytown" is a perfect example of this latter category. I'm proud to say that my law firm, Lommen Abdo, filed the very first Termination Notice (*see infra* Part VI) with the U.S. Copyright Office on behalf of Steven Greenberg as the author of this sound recording.

[67] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991); The Trade-Mark Cases, 100 U.S. 82, 94 (1879).

[68] The "all-in royalty" is the artist's royalty rate and the producer's rate combined, the amount the artist keeps is called a "net royalty rate." *See* BOBBY BORG, THE MUSICIAN'S HANDBOOK 182 (2003).

[69] *See* Nick Mason, The Inside Out: A Personal History of Pink Floyd, 186 (2005).

financial contribution test. The sole test of authorship is still whether the individual created an original work fixed in a tangible medium.[70]

C. Studio Musicians/Back-up Vocalists

It's also my opinion that studio musicians and back-up vocalists are generally not entitled to be credited as co-authors of a sound recording. Typically these "hired guns" are being asked to execute, sing or play parts, which were written and arranged by others. Of course, there are aberrational examples where a studio musician's solo was an extraordinary addition to a work (e.g., perhaps Jimmy Page's long rumored early studio work with The Kinks on "You Really Got Me") or where a back-up vocalist had substantial creative impact on the final creative product (e.g. Martha Wash's memorable refrain "Everybody Dance Now" in the C+C Music Factory's song "Gonna Make You Sweat").

Studio musicians and back-up vocalists often sign a written declaration in which they have assigned all right, title and interest in their performance to the artist or producer as a work for hire. This article takes the position that the Copyright Reversion rights of artists supersede the provisions any work for hire contracts, which artists may have signed with their record companies. Therefore, it might appear to be inconsistent to assume that the work for hire documents which studio musicians signed with featured artists are not similarly terminable. However, in this latter case, I think a much stronger argument can be made in support of the proposition that an employer-employee relationship exists as "studio musicians" and "back up vocalists," by the nature of the profession, have a clear and precise understanding of their role and the purpose of their engagement. If so, the featured artist would be deemed to own the work product of a studio musician or background vocalist on a work for hire basis. However, it is still possible that even if an employer-employee relationship is found not to exist between the featured artist and side artists, a court might find that the side artists are independent contractors commissioned by the featured artist to help create contributions to a collective work, therefore rendering their contributions to be work made for hire.[71]

Another factor that would seem to support the fact that side musicians are truly employees is the fact that they are often hired pursuant to a union agreement. Establishing employer-employee relationships is a predicate under the rules of the National Labor Relations Board in order to qualify for antitrust exemptions conferred by collective bargaining agreements.[72] Under the provisions of the current American Federation of Musicians (AFM) and the American Federation of Television and Radio Artists (AFTRA) union agreements, back up players and vocalists render services as workers for hire to the record labels.[73]

Even the unions themselves seem disinclined to make the argument that their members deserve authorship status. In its' *Position on "Work Made For Hire" and Section 101 of the Copyright Act* issued in 2000, AFTRA stated:

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[70] *See* 17 U.S.C. § 101 (2011).

[71] *See* discussion on the elements of a work for hire *supra* Part II.

[72] *See* Brown v. Pro Football, 50 F.3d 1041, 1054–55 (D.C. Cir. 1995).

[73] Samples of these agreements can be found online. AFTRA Agency Forms and Contracts, http://www.aftra.org/agencyformsandcontracts.htm; AFM Contracts, http://www.afmpittsburgh.com/c04b-contracts.html#contracts.

> Hilary Rosen, President of the Recording Industry Association of America, has argued that sound recordings should be works made for hire because otherwise 'every creative participant on the album would be a co-author under the copyright law.' That simply is not the practice in the industry and it is not accurate under the copyright law. Side musicians and background singers, the non-featured performers, traditionally have been considered employees when performing on sound recordings and fall within the first prong of the work made for hire definition under the criteria set forth by the Supreme Court in Community for Creative Non-Violence. v. Reid, 430 U.S. 730.[74]

In her testimony on the work for hire legislation in 2000, (now former) Register of Copyrights Mary Beth Peters made note of this situation where the same recording could have contributions from featured musicians and side musicians, each of whom have a different set of rights under the Copyright Act.[75] Ms. Peters stated that the result "would be that the sound recording would be a joint work that is in part a work made for hire and in part a work of individual authors."[76]

To deal with a similar issue related to digital music royalty streams collected and paid by SoundExchange, the unions (AFM and AFTRA) worked out an agreement whereby studio musicians and background vocalists would be paid a share of the total pool. As a result, studio musicians and background vocalists now receive 5% of the 100% of income collected by SoundExchange.[77] I believe a similar compromise with the unions can and should be reached to avoid needless internecine artist-against-artist litigation here.

D. Executive Producers/Investors

Individuals and entities that solely provide the capital used to finance the making of sound recordings should not qualify as authors for Copyright Reversion purposes.

E. Loan-Out Companies

Most artists enter into a recording agreement with record companies directly as individuals. Less frequently the artist will enter into these agreements through a so-called "loan-out company" or "furnishing companies," which is typically an entity wholly owned by the artist and empowered to "loan-out" the recording services of that artist in order to fulfill the obligations of the agreement.[78] The rationale behind the creation of these entities was to create a

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[74] American Federation of Television and Radio Artists, *Position on "Work Made for Hire" and Section 101 of the Copyright Act*. *See also* Bill Holland, *Work-For-Hire Provision Sparks Artist Furor, Demand for Change*, BILLBOARD, June 22, 2000, at 5.

[75] *See Sound Recordings as Work Made for Hire: Hearing Before the S. Comm. on Courts and Intellectual Property*, 106th Cong. 2 (2000) (statement of Marybeth Peters, Register of Copyright) *available at* http://commdocs.house.gov/committees/judiciary/hju65223.000/hju65223_0f.htm.

[76] *Id.*

[77] *See Policies and Procedures*, SOUNDEXCHANGE, http://soundexchange.com/policies-and-procedures/ (last visited Mar. 20, 2012) (outlining the royalty distribution overview in Section 5).

[78] *See* NIGEL PARKER, MUSIC BUSINESS: INFRASTRUCTURE, PRACTICE AND LAW 157 (2004).

certain layer of insulation from liability for the artists and to give them some possible tax advantages.[79]

In order to take advantage of Copyright Reversion, the original grant must be "signed by the author."[80] This could present a dilemma for those artists who entered into recording agreements utilizing a loan-out company, but I don't believe that it will. Loan-out companies by their very nature control the creative work product of the artist who owns them. Additionally, record companies almost always require the artist to sign a so-called "inducement letter" or guarantee which personally binds the artist to adhere to the provisions of the recording agreement and includes language such as: "I agree to be bound by the Agreement to the extent it relates to me; thereby join in the warranties, representations, agreements and grant of rights made therein; and I agree not to take any action which is or may in any way be inconsistent with company's rights and privileges thereunder. I agree to perform all the terms and provisions of the Agreement and any extensions or renewals thereof."

Factors to be considered in determining if artists were in fact "employees" of their own furnishing companies might include: (1) does the loan-out company pay a salary to the artist; (2) does it issue W-4 forms for tax purposes and (3) does it engage the services of the producer and side artists.[81]

As of this time there is no established precedent on whether courts will allow artists who control their work through loan-out companies to exert their Copyright Reversion rights. One possibility is that artists may have to terminate their own loan-out agreements, causing the artist to be in breach of the loan-out company's obligations and artist's guarantees. Because these companies are merely a legal entity owned and controlled by the artist and are otherwise the artist's alter ego, it is my hope and belief that the courts will determine that an artist and his or her loan-out company are one and the same for the purpose of Copyright Reversion.

IV. WHO MAY TERMINATE?

A. Authors and Their Successors

The person who controls the right to terminate under the Copyright Act of 1976 depends on whether the authors exercised their termination rights before they died. If the author survives to the vesting date, the first date on which a Termination Notice can be legally served, then the author's Copyright Reversion rights will vest upon the author's service of a Termination Notice on the original grantee to the work (e.g., the record company which has controlled the sound recording or the music publisher which has controlled the song).[82] If the author serves the Termination Notice in a timely fashion but dies before the effective date of termination occurs, then the author's estate and not his or her "statutory successors" receives the reversion benefit, in other words, the author's will controls.[83]

However, if the author fails to serve a Termination Notice during the author's lifetime, the surviving spouse and/or descendants will control the Copyright Reversion rights regardless of

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[79] *See id.*

[80] *See* 17 U.S.C. § 203(a) (2011).

[81] *See* discussion *supra* Part II.A.

[82] *See* 17 U.S.C. §§ 203(a)(3)–(4), 304(c)(3)–(4) (2011). Vesting dates and Termination Notices are covered more in depth below. *See infra* Parts V, VI.

[83] *See* 17 U.S.C. §§ 203(b)(3), 304(c)(6)(C). Statutory successors include the author's surviving spouse, children or grandchildren, if any. *See* 17 U.S.C. §§ 203(a)(2), 304(c)(2).

whether or not the author had disinherited certain statutory successors under the provisions of the author's will.[84] This is exactly what happened to some of the songs of legendary jazz superstar Miles Davis upon his death in 1991. Because he died before serving a Termination Notice in relation to some of his most iconic post-1978 songs, the Copyright Reversion rights vested with his children, two of whom had not been included in his will, and by-passed the wishes Davis had expressed in his will to share his estate with his brother and sister.[85]

If the author died without serving a Termination Notice, the Copyright Reversion rights pass entirely to the surviving spouse if the author has left no surviving children or grandchildren.[86] If the author has left surviving children or grandchildren, the surviving spouse owns one half of the Copyright Reversion interest and the remaining one-half interest would then be equally divided among the children, or in the case of a deceased child, the children of that deceased child.[87] If there is no surviving spouse, the children own the entire Copyright Reversion interest.[88] And in the event that there is no surviving spouse or children or grandchildren then the author's executor, administrator, personal representative or trustee shall own the author's Copyright Reversion interests.[89]

It's important to note that although the Copyright Reversion rights are not recaptured until the termination date specified in the Termination Notice, the class of those who may claim as recipients of the Copyright Reversion rights is determined as of the date when the Termination Notice is served.[90]

B. Works by Joint Authors

Pursuant to § 304 of the Copyright Act, for pre-January 1, 1978 works that were created by joint authors, either author, or their respective successors, can terminate the share of the work created by that particular author.[91]

Pursuant to Section 203 of the Copyright Act, for post-January 1, 1978 works that were created by joint authors, a majority of the joint authors, or their respective successors, are required to terminate.[92] This means that in the unlikely event that there are only two songwriters and one wants to exert their Copyright Reversion rights and the other does not—the author seeking termination may not proceed. There is tremendous potential here for a logistics nightmare once the right to terminate passes to an author's successors. If one of these joint authors died, the rights pass to the heirs as described in above. Let's consider a hypothetical involving joint authors in which one joint author is living and one joint author is deceased. In this situation, where the spouse and children hold the deceased joint author's interest, there would

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[84] *See* 17 U.S.C. §§ 203(a)(2), 304(c)(2).

[85] *See* Lloyd J. Jassin, *Copyright Termination is an Author Right: Use it or Lose it*, COPYLAW.ORG (Mar. 28, 2010), http://www.copylaw.org/2010/03/copyright-alert-notice-of-termination.html.

[86] 17 U.S.C. §§ 203(a)(2)(A), 304(c)(2)(A).

[87] 17 U.S.C. §§ 203(a)(2)(B)–(C), 304(a)(2)(B)–(C).

[88] 17 U.S.C. §§ 203(a)(2)(B), 304(c)(2)(B).

[89] 17 U.S.C. §§ 203(a)(2)(D), 304(c)(2)(D).

[90] 17 U.S.C. §§ 203(b)(2), 304(c)(6)(B).

[91] 17 U.S.C. § 304(c)(1).

[92] 17 U.S.C. § 203(a)(1).

need to be a majority of that particular co-author's legal successors' interests in favor of termination,[93] as well as the other joint owner in order to exert Copyright Reversion rights.

Recently, former Village People singer Victor Willis sought to terminate the rights to his share of thirty-three songs that he had written, including the perennial best-seller "Y.M.C.A.."[94] The music publisher who controlled this iconic composition claimed that Willis should be prevented from doing terminating because Willis was a co-author and needed the approval of his remaining co-authors.[95] The Southern District of California disagreed, holding that a joint author who separately transfers his copyright interest could unilaterally terminate that grant and that anything to the contrary would conflict with the purpose of the Copyright Act.[96] This case also addressed the percentage of ownership that an author might successfully reclaim. The publisher here sought to have the court limit Willis' ownership share of "Y.M.C.A." to the percentage the parties agreed would compensate for the transfer, which the agreements set at a range from 12% to 20%.[97] The court rejected this argument and stated that Willis would get back the share that he transferred regardless of the compensation.[98] If this decision stands on appeal, it might prevent record companies, in certain instances, from arguing that a particular recording artist cannot seek Copyright Reversion without being joined in such action by the producers of that recording or others whom are contended to be joint authors.

V. WHEN CAN THE TERMINATION OCCUR?

If your eyes have not glazed over by now, I'm flattered. But this next section is likely to put you to sleep faster than a fistful of Ambient.

A. Pre-1978 Sound Recordings

As previously stated, sound recordings did not gain federal copyright protection until the enactment of the 1971 Sound Recording Act.[99] Therefore for pre-February 15, 1972 it should be noted that: (1) these sound recordings are currently protected by state copyright and unfair competition laws that contain no right to terminate grants of copyright and (2) there is legislation being considered in the Congress that would retroactively grant federal copyright protection to pre-February 15, 1972 sound recordings but this legislation has not yet been passed into law.[100]

Under the provisions of § 304 of the Copyright Act the period for exerting Copyright Reversion rights for sound recordings made between January 2, 1972 and December 31, 1977 will be effective at any time during the time period which begins fifty-six years after the copyright was originally secured (e.g., 1972 plus 56 years = 2028), until the 61st year the

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[93] A majority of the deceased co-author's interest would require both a spouse holding a 50% interest and at least one child who holds a legal interest.

[94] Scorpio Music S.A. v. Willis, No. 11cv1557 BTM(RBB), 2012 U.S. Dist. LEXIS 63858 (S.D. Cal. May 7, 2012).

[95] *Id.* at *3–4.

[96] *Id.* at *6, *11.

[97] *Id.* at *13.

[98] *Id.* at *13–14. Furthermore, the court stated that absent an agreement to the contrary, joint authors share equally in the work, so assuming there were three joint authors, Willis would have a 1/3 undivided interested in the copyright. *Id.* at 14–15.

[99] *See supra* text accompanying note 13.

[100] *See* Sound Recording Simplification Act, H.R. 2933, 112th Cong. (2011).

copyright was originally secured (i.e., 1972 plus 61 years = 2033).[101] This is called "the five-year window."[102] It is important to note that this five-year window is triggered from the date which the copyright was originally secured, regardless of the date which any rights related to the work might have been granted.[103]

A Termination Notice must be served no sooner than ten years and no later than two years from the effective date of termination.[104] Let's use the David Bowie album *Aladdin Sane* as an example. This album was released on April 13, 1973 and the copyright was recorded on April 20, 1973. Thus its five-year window period would run from April 20, 2029 until April 20, 2034. Consequently, the authors, whom I will presume are artist David Bowie and producer Ken Scott, could serve a Termination Notice between April 20, 2019 (i.e., 10 years from the start of the five year window which begins in 2009 and April 20, 2027 (i.e., 2 years before the end of that period). Assuming that the authors properly served their termination notice on BMG Music, or their successor-in-interest, on April 20, 2019 and properly filed it with the Copyright Office within the five-year window, David Bowie and Ken Scott would recapture the sound recording copyright to *Aladdin Sane* on April 20, 2029. However, the previous example provides for the optimum (the earliest) period during which the authors can exert their rights, and authors are free to terminate anytime within the five-year period. Thus the same authors could still serve their Termination Notice anytime between April 20, 2024 (i.e. 10 years from the end of the five year window which ends April 20, 2034) and April 20, 2032 (i.e. 2 years from the end of that period). In this scenario Bowie and Scott would recapture the copyright to the *Aladdin Sane* sound recording as late as April 20, 2034.

B. Pre-1978 Songs

The original renewal term of copyright for pre-1978 songs was twenty-eight years.[105] This was extended by nineteen years in 1978,[106] and another twenty years in 1998.[107] Added together, these songs have 95 years of copyright protection, the twenty-eight year initial term, the twenty-eight year first renewal term, the nineteen-year 1978 extension, and the twenty-year 1998 extension.

The author or author's rightful successors have a few opportunities to exert their Copyright Reversion rights in the following two options.

(1) Similar to the computation of the time period for pre-1978 sound recordings,[108] the effective date for a termination of compositional copyrights is from the fifty-sixth year to the sixty-first year from the date the copyright was originally secured.[109] This time let's use the song "California Dreamin" written by John and Michelle Phillips and copyrighted

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[101] 17 U.S.C. § 304(c)(3).

[102] To make this whole process more confounding there are two other "five-year windows" which have a slightly different method of calculation. *See infra* Part V.B.

[103] 17 U.S.C. § 304(c)(3).

[104] 17 U.S.C. § 304(c)(4)(A).

[105] Copyright Act of 1909, ch. 320, 23 Stat. 1075, 17 U.S.C. § 24 (repealed 1978).

[106] 17 U.S.C. § 302(c) (1976) (amended 1998).

[107] Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (amending 17 U.S.C. § 302 (1976)).

[108] *See supra* Part V.A.

[109] 17 U.S.C. § 304(c)(3).

on November 29, 1965. In this case the termination could be filed in the five-year window from November 29, 2021 until November 29, 2026. Once again the termination notice would need to be filed no sooner than 10 years and no later than 2 years from the effective date of termination. Thus, either Michelle Phillips or the legal heirs of John Phillips, as John died in 2001, could serve the current copyright holder on November 29, 2011 and recapture any rights that he or she does not already possess as early as November 29, 2021.

(2) If the author, or the author's legal successors, failed to file as provided in the first five-year window,[110] there is a second bite at the apple that takes place during a second five-year window beginning on the seventy-fifth anniversary from when the copyright was originally secured.[111] But this second five-year window pertains solely to copyrights obtained between January 1, 1923 and October 26, 1939.[112] Since this group of songs is unlikely to figure in the song catalogs of most parties interested in this article I will not devote any more time to this particular category.

C. Post-1978 Sound Recordings and Songs

I'd love to tell you that the rules that govern pre-1978 Copyright Reversion rights are identical to those that govern post-1978 Copyright Reversion rules. I'd love to tell you that but unfortunately there are a few significant differences. Pursuant to § 203 of the Copyright Act for both sound recordings and songs created after January 1, 1978, the five-year window opens thirty-five years from the date on which the grant occurred and closes forty years after said date, or if the grant covers the right of publication of the work, the period begins either thirty-five years after the date of publication or forty years after the date of execution, whichever term ends earlier.[113]

Let's say (hypothetically speaking) that the recording agreement for Michael Jackson's iconic *Thriller* album was signed in 1979 but was not commercially released until 1982. In this case the five-year window begins in 2017 (thirty-five years after the November 30, 1982 release date) because this is earlier than forty years after the deal was signed, which would have warranted a 2019 commencement date. Therefore, the Termination Notice can be served no earlier than 2007 and no later than 2015 if the author, or in this case Michael Jackson's statutory heirs, wishes to obtain his Copyright Reversion rights at the earliest possible opportunity. But do not lose sight of the fact that the Jackson heirs still have additional time here. Since the five-year window does not close until 2022, the Jackson heirs can provide termination notices between 2011 and 2020 if they choose to wait until the last possible moment.

D. Sound Recordings With Pre-1978 Grants But Released Post-1978

One area of confusion involves sound recordings where the grants were signed prior to 1978 but the commercial release date did not occur until after January 1, 1978. For example, CBS Records released the classic *London Calling* album by The Clash in the United States in

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[110] As outlined *supra* Part V.B.1.
[111] 17 U.S.C. § 304(d)(2).
[112] *See* 17 U.S.C. § 304(d).
[113] 17 U.S.C. § 203(a)(3) (2011).

January of 1980. Since it was the band's third studio album released post-1978, it was probably contracted for when they signed their recording agreement (probably pre-1978). The Copyright Office recently considered these so-called "gap grant" cases.[114] The issue is whether these grants can be terminated under the provisions of § 203, the scope of which currently applies only to grants made after January 1, 1978. The Copyright Office has agreed to accept the filing of Termination Notices for gap grant cases pursuant to § 203, pending a ruling by the court.[115] Therefore, I would strongly urge any authors who find themselves with this pre-1978/post-1978 timeline to file the appropriate Termination Notices (in fact I would file both § 203 and § 304 Termination Notices just to err on the side of safety) and let the courts decide how to deal with this issue in the future.

E. Use it or Lose it

The filing periods are fixed by statute and cannot be altered. If a Termination Notice has not been properly filed before the five-year filing window closes, the Copyright Reversion rights will be lost, with the only exception of those compositional copyrights obtained between January 1, 1923 and October 26, 1939, as mentioned above. This means that the current holder of these rights will retain them until the copyright term expires. In other words authors must understand that this is a "use it or lose it" proposition.

VI. TERMINATION NOTICES

Section V addressed when Termination Notices must be sent. This section covers the information that must be contained in these notices and to whom they should be sent.

A. Content of Pre-1978 Termination Notices Pursuant to Section 304

> (1) The names of every grantee (person and/or entity) or their successors-in-interest whose rights are being terminated.[116]
>
> (2) The address to which the Termination Notice is being served after making a reasonable investigation.[117] For the purposes of Copyright Reversion, a "reasonable investigation" for songs would include checking the websites of the performing rights organizations (i.e. ASCAP, BMI, and SESAC), the Harry Fox Agency and the U.S. Copyright Office in Washington, DC.[118] It might prove to be more difficult to locate the individuals and companies who are the current owners of sound recordings. Therefore, a "reasonable investigation" in this category would probably include a thorough Internet search including sites like Wikipedia and Allmusic.com.

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[114] *See* U.S. Copyright Office, Analysis of Gap Grants under the Termination Provisions of Title 17, at 1 (2010).

[115] *See* Copyright, General Provisions, 37 C.F.R. § 201.10 (2011); *see generally* Gap in Termination Provisions, 76 Fed. Reg. 32316 (June 6, 2011) (containing general information on the problem of gap grants and the reasoning behind the final rule as codified in 37 C.F.R. pt. 201).

[116] 37 C.F.R. § 201.10(b)(1)(ii). Section 304 states that the Termination Notice will comply with the requirements the Register of Copyrights prescribes by regulation. 17 U.S.C. § 304(c)(4)(B).

[117] 37 C.F.R. § 201.10(b)(1)(ii), (d)(1).

[118] 37 C.F.R. § 201.10(d)(3).

(3) The name of the songs or sound recording to which the notice applies,[119] if the work is an album, name the titles of each track.

(4) Indicate whether you are under § 304(c), allowing terminations between the fifty-sixth and the sixty-first year from the date the copyright was initially secured, or under § 304(d), which applies to compositions for which the copyrights were obtained between January 1, 1923 and October 26, 1939 and where the author failed to serve a Termination Notice during the first five-year window.[120] As previously stated, this latter group can be terminated between the seventy-fifth and eightieth year from the date the copyright was initially secured.[121]

(5) The names and addresses of one of the authors,[122] if joint authors—either may terminate their share of the work. In cases where persons other than the author signed the original grant of rights, a list of surviving individuals who signed the grant must be included.[123] Where the author is deceased, a list of survivors should be added and include: the author's surviving spouse, all surviving children, and the surviving children of any deceased child of the author.[124]

(6) The date of copyright.[125]

(7) The filing registration number from the U.S. Copyright Office.[126]

(8) The termination date.[127]

(9) The date and title of the agreement that memorializes the original grant of rights,[128] such as a co-publishing agreement.

(10) If the rights being terminated are subject to § 304(d), include a statement that the Copyright Reversion rights under § 304(c) had not been previously asserted.[129]

(11) Termination Notices must include an actual handwritten signature of the author(s) or legal successors, with a statement describing their relationship to the author.[130] The author's name and address should be printed on the Termination Notice.[131]

B. Content of Post-1978 Termination Notice Pursuant to Section 203

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[119] 37 C.F.R. § 201.10(b)(1)(iii).
[120] 37 C.F.R. § 201.10(b)(1)(i).
[121] *see supra* Part V.B.
[122] 37 C.F.R. § 201.10(b)(iii).
[123] 37 C.F.R. § 201.10(b)(vii).
[124] *Id.*
[125] 37 C.F.R. § 201.10(b)(iii).
[126] *Id.*
[127] 37 C.F.R. § 201.10(b)(v). *See supra* Part V.
[128] 37 C.F.R. § 201.10(b)(iv).
[129] 37 C.F.R. § 201.10(b)(vi).
[130] 37 C.F.R. § 201.10(c)(1)–(2).
[131] 37 C.F.R. § 201.10(c)(5).

(1) The names of every grantee (person and/or entity) or their successors-in-interest whose rights are being terminated.[132]

(2) The address to which the Termination Notice is being served after making a reasonable investigation.[133] For the purposes of Copyright Reversion, a "reasonable investigation" for songs would include checking the websites of the performing rights organizations (i.e. ASCAP, BMI, and SESAC), the Harry Fox Agency and the U.S. Copyright Office in Washington, DC.[134] It might prove to be more difficult to locate the individuals and companies who are the current owners of sound recordings. Therefore, a "reasonable investigation" in this category would probably include a thorough Internet search including sites like Wikipedia and Allmusic.com.

(3) The name of the songs or sound recording to which the notice applies,[135] if the work is an album, name the titles of each track.

(4) Indicate that you are filing under § 203,[136] which allows termination between the thirty-fifth and fortieth year from the date the grant occurred, unless the grant includes a right of publication where the termination date must occur as previously stated or between the fortieth and forty-fifth year from the date of the grant's execution—whichever is first in time.

(5) The names and addresses of one of the authors, if joint authors—a majority of the authors must agree to file the Termination Notice.[137] In cases where persons other than the author signed the original grant of rights there must be a list of surviving individuals who signed it.[138] Where the author is deceased, a list of survivors including: the author's surviving spouse, all surviving children, and the surviving children of any deceased child of the author, should be attached.[139]

(6) The date of the execution of the grant of rights.[140] If the grant includes a right of publication the date of publication must also be included.[141]

(7) The filing registration number from the U.S. Copyright Office.[142]
(8) The termination date.[143]

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[132] 37 C.F.R. § 201.10(b)(2)(ii).
[133] 37 C.F.R. § 201.10(b)(2)(ii), (d)(2).
[134] 37 C.F.R. § 201.10(d)(3).
[135] 37 C.F.R. § 201.10(b)(2)(iv).
[136] 37 C.F.R. § 201.10(b)(2)(i).
[137] 37 C.F.R. § 201.10(b)(2)(iv).
[138] 37 C.F.R. § 201.10(b)(2)(vii).
[139] *Id.*
[140] 37 C.F.R. § 201.10(b)(2)(iii).
[141] *Id.*
[142] 37 C.F.R. § 201.10(b)(2)(iv).
[143] 37 C.F.R. § 201.10(b)(2)(vi).

(9) The date and title of the agreement that memorializes the original grant of rights,[144] such as a co-publishing agreement.

(10) Termination Notices must include an actual hand written signature of the author(s) or legal successors, with a statement describing their relationship to the author.[145] The author's name and address should also be printed on the Termination Notice.[146]

C. Incomplete or Unavailable: Information in relation to Termination Notices

The information contained in the Termination Notice must be "a complete and unambiguous statement of facts."[147] It is important to remember that the information required to appear in the Termination Notice must actually be contained in the body of the notice itself, without reference to any document other than that which contains the grant being terminated. Harmless or inadvertent errors will not cause a termination notice to be considered invalid provided that the filers have been truthful and has made a good faith effort to ascertain the facts.[148]

Some of the information required by the Termination Notice will be difficult, even impossible to attain. This lack of information should not result in a failure to file a Termination Notice. Even if the author doesn't know how to reach the entity that currently controls the rights to the author's work, I would recommend pressing forward and filing a Termination Notice with the Copyright Office. In those sections for which the author was unable to obtain the required information, I would indicate specifically what due diligence activities were undertaken. I would also suggest that the filer state: "the information supplied was accurate to the best of the filer's knowledge and belief." This may not lead to a flawless Copyright Reversion but I believe that a court will consider it a reasonable placeholder pending the formal notification of the current rights holder.

D. To Whom Should the Termination Notice be Sent?

The termination notice must be sent in a timely fashion to:

(1) The grantee, or their legal successor-in-interest when the original grantee no longer controls the rights, of the sound recording and/or the compositional copyrights which the author seeks to recapture.[149]

(2) A complete and exact duplicate of the Termination Notice served above, with either the actual signatures or reproductions of the actual signatures, shall be filed with the Copyright Office as follows:

U.S. Copyright Office

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[144] 37 C.F.R. § 201.10(b)(2)(v).
[145] 37 C.F.R. § 201.10(c)(3).
[146] 37 C.F.R. § 201.10(c)(5).
[147] 37 C.F.R. § 201.10(b)(3).
[148] 37 C.F.R. § 201.10(e).
[149] 37 C.F.R. § 201.10(d)(1).

101 Independence Avenue
Washington DC 20559-6000.

It is only necessary to file one copy in the Copyright Office in those instances where separate copies of the Termination Notice was served upon several individuals or entities.[150]

(3) The Copyright Office filing should be accompanied by the following:

(a) A basic filing fee of $105 in addition to a fee of $30 for each group of 10 or fewer titles.[151] At the present time, payment can only be made by check or money order and cannot be done on-line.

(b) Although not required, I would strongly suggest that all Termination Notices be sent by certified, registered, or other express mail service. A statement indicating the date and manner in which the Termination Notice was served should be included in the Termination Notice.

It should be noted the Copyright Office accepts recordation without prejudice to the rights of any parties who might claim that the Termination Notice was improperly served.[152] In other words the author cannot assume that their filing is insulated from attack by the current copyright holder simply because the Copyright Office accepted the filing of the Termination Notice. Nevertheless, the filing and recording of a Termination Notice with the Copyright Office is an absolute condition precedent for Copyright Reversion to take effect.[153]

VII. NEGOTIATION RIGHTS

The grantee on whom the Termination Notice has been properly served has a unique right to negotiate with the author during the period of time from the service of Termination Notice until the date on which the Copyright Reversion takes effect. In fact the author is prohibited from entering into an agreement with a third party until the actual date on which Copyright Reversion occurs.[154] This gives the current rights holder a distinct advantage over all other music publishers and record companies.[155] However, this exception may work to both parties' benefit. Remember, Congress sought to protect against unremunerative transfers given the likely unequal bargaining power of authors and the impossibility of determining a work's value until after it has been exploited.[156] Once the author and the music publisher or record label have the benefit of time and experience under their belts, the market value of the asset at issue becomes clear. At that point, the parties can review an extensive earnings history and future potential based on past success. It

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[150] 37 C.F.R. § 201.10(f)(1)(i).
[151] 37 C.F.R. § 201.3(c)(15) (2011).
[152] 37 C.F.R. § 201.10(f)(6).
[153] *See* 17 U.S.C. §§ 203(a)(4), 304(c)(4) (2011).
[154] *See* 17 U.S.C. §§ 203(b)(4), 304(c)(6)(D).
[155] *See id.* (allowing agreements between the grantee and the persons seeking termination once the notice of termination is served).
[156] H.R. Rep. No. 94-1476 (1976).

will also be apparent whether the music publisher or record label was asleep-at-the-till during the prior years or diligent in adding value to the work and maximizing the revenue for all concerned.

Either way, it is difficult to hide behind the passage of time. If the parties have enjoyed success together, there might be little reason to remove the asset from the music publisher's or record company's watch. Thus, the specter of Copyright Reversions may simply stimulate a renegotiation of the prior grant of rights including an advance and more favorable financial terms, greater approval rights regarding the work's exploitation, or consideration of other areas of concern for the author or heirs. Alternatively, Copyright Reversion may be the long overdue remedy needed to move the work to a new publisher or record label willing to breathe life into an otherwise stagnant asset. It appears that there is nothing contained in the statute that would prevent the author from entering into an agreement with third parties during this time, provided that such agreement would not become operative until the effective termination date and further provided that the author refrains from accepting any consideration before said effective date.[157]

VIII. RIGHTS NOT AFFECTED BY TERMINATION

There are several important categories of rights, which are not effected by a successful Copyright Reversion.

A. Work For Hire

If a work was truly created on a work for hire basis, then no Copyright Reversion can occur.[158]

B. Trademarks

Sections 203 and 304 of the Copyright Act do not provide for the recapture of any trademarks that might be associated with the Copyright Reversion rights. The same would apply to so-called "publicity rights" (e.g., name and likeness rights). Fortunately, most music publishing agreements and recording agreements allow the artist to retain their trademarks and rights of publicity. However, there are bound to be situations in the future where an author will recapture their Copyright Reversion rights but not the use of certain trademarks associated with those sound recordings. In those instances it is assumed that the parties will be forced to negotiate in their mutual best interests.

C. Foreign Rights

The statutes that are the subject of this article do not allow for the recapture of any foreign rights.[159] However, if a record deal was made with a record company based outside of the United States but included America as one of the contractual territories, it might be possible for the author to do a Copyright Reversion strictly in relation to the U.S. rights. This is not based on statutory language or legislative history. It might also be possible for an artist who is not an

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[157] *See also* Bourne Co. v. MPL Communications, Inc., 675 F. Supp. 859, 865 (S.D.N.Y 1987) (suggesting it is permissible to negotiation a grant with a third party if it is not effective prior to termination).

[158] *See supra* Part II.B.3.

[159] *See* 17 U.S.C. §§ 203(b)(5), 304(c)(6)(E).

American citizen to complete a Copyright Reversion in relation to a master recording that was released in the country. This is an area of the law which is likely to be tested often as the information about Copyright Reversion possibilities reaches artists in the United Kingdom and other foreign territories who have previously entered into so-called "worldwide" record deals.

D. Derivative Works

A derivative work is a new copyrightable work, which contains "one or more preexisting copyrightable works such as a translation, musical arrangement . . . or any other form in which a work may be recast, transformed or adapted."[160] For example, when someone uses the music to an existing copyrighted composition and creates a new set of parody lyrics, the end result is a derivative work. This is exactly what occurred when "Weird Al" Yankovic created a parody of The Knack's monster hit *My Sharona* entitled *My Bologna*. Another example would occur when a newly created copyrighted song and master (e.g. Eminem's *Stan*) contains a previously copyrighted song and master (e.g. Dido's *Thank You*). This practice, commonly called "sampling," requires the approval of copyright holders of the song and sound recording, assuming that the new sound recording includes a portion of the original sound recording, which the new author seeks to interpolate.

Typically, the owner of the pre-existing work would receive an ownership interest in the new copyright (i.e. the derivative work) as Dido, her co-writer Paul Herman, and her record label Arista Records received in the creation of *Stan*. As you might imagine, this creates some complications when the author of the pre-existing copyright seeks Copyright Reversion for a song and/or sound recording now contained in a derivative work. Sections 203(b)(1) and 304(c)(6) provided that notwithstanding the termination of rights, an authorized derivative work may continue to be utilized under the terms of the grant even after termination; however, this privilege does not extend to the preparation of other derivative works based on the copyrighted work covered by the termination granted.[161] Since *Thank You* was created before the date on which the authors of *Stan* might decide to exert their Copyright Reversion rights, the derivative work may still be exploited by the terminated grantee under the terms of the original grant.[162] However, any income received by the owners of the sampled song (i.e. Dido and Herman) and master recording (i.e. Arista) as a result of its use in the derivative work, shall be paid directly to the authors of those works, Dido and presumably her producer in relation to the master recording and Dido and Herman in relation to the composition, once the termination is effective and the recapture period begins.

E. Licenses

Any licenses granted by the entity which owned the work prior to its recapture by an author, shall continue to remain in full force and effect. Just as importantly, any monies payable in relation to these licenses – even after the author's Copyright Reversion rights have been perfected – shall be payable to the original grantee.[163] For example, the publishers of the song

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[160] 17 U.S.C. § 101 (2011).

[161] *See* 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A).

[162] *See Id.*

[163] *See, e.g.*, Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985); Woods v. Bourne, 60 F. 3d 978 (2d Cir. 1995).

Footloose granted a synch license to Paramount Pictures, the producers of the eponymously named movie, to use this song. If the authors of *Footloose*, Kenny Loggins and Dean Pitchford, eventually recapture the Copyright Reversion rights to this song, Paramount's right to use the song *Footloose* in relation to the movie shall remain unaffected. For the sake of clarity, Paramount will still be obligated to pay Loggins and Pitchford their appropriate share of income which was subject to the original licenses (e.g. the appropriate share of mechanical royalties on all soundtrack album sales) even after the authors have exerted Copyright Reversion rights.

Since all sound recordings are considered derivative works of the songs which they embody,[164] a record label will continue to have the right to distribute copies of an album that contains compositions which are the subject of Copyright Reversions provided that those compositions were subject to a mechanical license which was granted to the label prior to the termination date of the compositions.[165]

If faced with the loss of certain rights to Copyright Reversion, it's possible that certain grantees might seek to take advantage of the situation described above. For example, Universal's publishing's division might grant in 2012 to the Universal record label division (both of which are owned by Vivendi SA) a 30-year mechanical license for a song that was headed for Copyright Reversion in 2018. Such a tactic might enable the publishing division to continue to receive mechanical royalty payments for an additional 12 years after the songwriter had recaptured the copyright to that song.

F. Exceptions

1. Revoke and Re-grant

As previously stated, the Copyright Reversion rights are inalienable which means they cannot be assigned away by the author.[166] However, there is an exception to this otherwise unvoidable rule.[167] Let's say that a song entitled *I Miss You* was written by my father (Andrew Donnelly) in 1970 which means that it would be subject to pre-1978 rules. For the sake of this hypothetical, Andrew dies after January 1, 1978 but before the start of the recapture term, which would begin in 2026 if the termination notice was served on the earliest eligible date in 2016. Furthermore, let's say that the music publisher which was the copyright holder for this song convinced my mother, brother, and I (the only legal heirs of Andrew) to execute a new agreement in relation to the income we would be entitled to receive from *I Miss You* prior to the date on which we would recapture the Copyright Reversion rights. If we, as the lawful heirs, followed this scenario then we would have obliterated our Copyright Reversion rights to this song. This practice that is sometimes called a "revoke and re-grant" can be an unsavory technique that some unscrupulous companies use in order to retain their rights for the full length of the copyright.

"Revoke and re-grant" can also be used in a very legitimate fashion to provide a songwriter or recording artist with the opportunity to renegotiate the terms of his or her deal with the music publisher or record company early without having to wait for the termination window

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[164] The definition of a derivative work in § 101 includes a sound recording, thus a sound recording is a work based on a preexisting work (the musical composition itself). *See* 17 U.S.C. § 101 (2011).

[165] *See* 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A).

[166] *See* 17 U.S.C. §§ 203(a)(5), 304(c)(5).

[167] *See* Milne v. Stephen Slesinger, Inc., 430 F.3d 1036 (9th Cir. 2005), *cert. denied*, 548 U.S. 904 (2006).

to open. Authors who decide to pursue such negotiations should only do so if they are extremely knowledgeable in the area of Copyright Reversions or are represented by an attorney who is.

2. Wills

If the author serves the Termination Notice in a timely fashion but dies before the effective date of the Termination Notice, then the author's estate and not his statutory successors get the benefit of Copyright Reversion rights.[168] Copyright Reversion rights cannot be exercised if the document that made that transfer was the author's last will and testament.[169]

IX. THE FINAL PHASE OF COPYRIGHT REVERSION

A. Negotiating a New Deal

Once the Termination Notices have been properly served the final countdown begins. As discussed above, the existing rights holder has the unique opportunity to negotiate with the author for a new deal.[170] I suspect that for many authors, and particularly heirs who are likely to be unfamiliar with music publishing or the record business, this will be an appealing choice, especially if the existing terms can be made considerably more favorable to the authors or their heirs. Also, if the existing relationship is running smoothly, mutually beneficial, and highly profitable, it makes little sense to break stride and interrupt business-as-usual or the flow of revenue.

The author can also negotiate a new deal with a third party publisher or record company provided that said new deal does not become effective until after the termination date.[171] With the advent of full service rights management companies, including companies that offer more favorable splits to authors and their heirs (given the changing business models and the lower cost incurred by record companies to manufacture and disseminate finished goods), there are many viable alternatives. However, it might be possible for the authors to accept some money from third parties prior to the termination date if it was in the form of a loan. But these are untested waters and authors should proceed only with great caution (and lots of great legal advice).

If a new deal is not constructed and the existing rights holder chooses not to mount a legal challenge to the Copyright Reversion, the rights will revert on the termination date indicated in the Termination Notice.[172] Interestingly, these rights will revert to all of the original authors—not just the authors who filed the Termination Notice.[173] This could lead to the unintended result that the current featured artist might actually wind up with a smaller share of the royalty income stream than he or she was receiving before Copyright Reversion. This could potentially occur if the courts decide to include individuals who do not receive royalties under the terms of the original recording deal (e.g. side artists or sound engineers) in the group of authors. Even given this risk, I believe most artists will still want to proceed with Copyright Reversion because it will ultimately take control of their sound recording masters out of the

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[168] *See* 17 U.S.C. §§ 203(b)(3), 304(c)(6)(C).

[169] *See* 17 U.S.C. §§ 203(a), 304(c) (stating that only works that have been transferred by the author, otherwise than by will, are subject to termination).

[170] *See* 17 U.S.C. §§ 203(b)(4), 304(c)(6)(D).

[171] *See supra* note 157 and accompanying text.

[172] *See* 17 U.S.C. §§ 203(b), 304(c)(6).

[173] *See id.*

hands of record labels and allow them to make all future decisions regarding the marketing, promotion, publicity, sale or licensing of these works.

B. Rights Administration

When a song is licensed for use in a movie or advertisement it generally requires a master recording license for the sound recording and a synchronization license for the underlying song. Typically this means dealing with two separate entities, the record company that controls the sound recording and the music publisher that controls the song. The opportunity to recapture both sets of right means that singer/songwriters like Billy Joel will be in the very advantageous position of being able to offer "one-stop shopping" to those interested in licensing his work. But artists need to remember that their record companies and publishing companies have been providing valuable services including:

(1) Exploiting the work by soliciting potential users.

(2) Negotiating and drafting licensing and other agreements.

(3) Collecting royalties from every territory around the world.

(4) Accounting and paying these royalties to the many co-writers, producers and other parties.

(5) Protecting the works against illegal users and copyright infringements.

All of these activities will now become the responsibility of the artists and their representatives.

X. CONCLUSION

In my estimation Copyright Reversion is not just a ticking time bomb, it is a mega-ton nuclear weapon that could destroy the major record labels, as we know them today. Consider all of the truly memorable albums that you have in your record collection or iTunes library that were recorded after January 1, 1978. If there is a final non-appealable judgment in the artists' favor, those albums will gradually revert to the ownership of the authors who recorded them. Each year a significant number of big selling albums like Michael Jackson's *Thriller* or Nirvana's *Nevermind* will disappear from the vaults of record companies who have distributed and sold them for decades. Since so-called "catalog sales" represent half of the profits for most record labels, a decision in the artists' favor could be a death knell for companies like Sony, Warner and Universal.

I personally would hate to see that occur. I am genuinely proud of my nearly forty-year association with the music business and while it needs to change in order to survive, it doesn't need to cannibalize its most important elements. Record labels have been an indispensible partner in the building of artists' careers since the inception of the modern music industry. Many artists who still earn a good living today should give a meaningful portion of the credit for their success to the labels, which developed, marketed and promoted his or her music.

A. Solutions

Some of my colleagues favor a mutually acceptable legislative solution to this problem. I think this is unlikely given the fact that the Republicans and Democrats in Congress today are so politically polarized and mired in legislative gridlock. I believe the only viable solution is a new business paradigm which is much more favorable to artists whose albums are available for Copyright Reversion. For example, I think a settlement could be fashioned which would allow both sides to walk away from the court room craps table where there can be only one winner and one loser. Instead artists who so choose can opt-in to an amended recording agreement which might include: (1) co-ownership of master recordings; (2) elimination of all un-recouped artist balances; (2) a 50/50 split of all record revenues, with very few deductions; (3) the ability of the artist to purchase CD's for sale at his or her live gigs for the actual cost of those hard goods; (4) a 75/25 split in the artist favor on all synch uses in return for extending the re-recording prohibition and (5) granting the artist sole creative control over any future exploitation of his or her recordings and album artwork. I believe that there are many artists who would agree to such terms after these terms had been properly negotiated and vetted by their union representatives and others whom they trust. Artists who would prefer to take their chances in litigation would be free to do so, but the labels would have no obligation to allow them to opt in at a later point in time if the initial decisions on Copyright Reversions are not favorable to the artists' position.

That's what I hope will happen. What I think will happen is something else. I think that record labels will continue to subscribe to the theory that they can wear artists down through relentless pursuit of expensive litigation. I think that the labels will make artist friendly deals with their superstar artists, like The Eagles and Bon Jovi, and roll the dice with all of the rest. Then, once the final Supreme Court decision is rendered—several years from now—and it favors the artists' position (as I believe it will), record labels as we know them today will morph into companies which do little more than distribute music to the handful of retailers still selling hard goods. And business school students will be left to ponder the question "what caused the record companies to fail?"

I sincerely hope that day never comes.[174]

[174]