Get Ready Cause Here They Come: A Look at Problems on the Horizon for Authorship and Termination Rights in Sound Recordings

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Get Ready Cause Here They Come: A Look at Problems on the Horizon for Authorship and Termination Rights in Sound Recordings

by

ABBOTT MARIE JONES*

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I. Introduction

In 2013, authors of sound recordings will have their first opportunity to exercise their right to terminate assignments made to record companies. Congress and the Supreme Court have yet to settle just who may claim authorship in sound recordings. Record companies have responded to this uncertainty by including language in standard recording contracts purporting to declare sound recordings made under the contract works made for hire, such that authorship would vest initially in the record company itself. If sound recordings fit within the scope of a work made for hire, these recording contracts would seal the deal that the record company is the author for copyright purposes. However, the contractual provisions alone will not be enough to confer work-for-hire status on sound recordings. Once again, record companies have anticipated this problem by also including standard language that, alternative to the work-for-hire status, assigns the rights in the sound recording to the record company in perpetuity. However, the termination right is not one that can be contractually waived, so these boiler plate provisions will only remain effective for thirty-five years, after which the true authors, the performers and producers, have the opportunity to terminate the assignment (or renegotiate the assignment).

This article is designed not only to expose the problems associated with the possibility that performers and producers will be able to terminate these assignments beginning in 2013, but also to propose some workable solutions. Part II will look at the origins of U.S. copyright law to set the stage for the underlying rationales for copyright protection. Part III will tackle the fundamental question of who is the author of a sound recording, including the problems of works made for hire and joint authorship. Part IV will propose solutions for what could be a fast-approaching maelstrom of litigation regarding rights in sound recordings. Hopefully, this article will serve as a catalyst for industry players as well as members of Congress to take the situation seriously and take the steps necessary to avoid the lockdown and disruption that could occur as a result of terminations and lengthy renegotiations.

II. Background and Historical Perspective

The United States Constitution provides Congress with the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive
Right to their respective Writings and Discoveries." The first copyright laws in the United States originated, in part, from an examination of and a borrowing from the English Statute of Anne and early state-enacted copyright statutes. As a direct result of the perceived weaknesses and underlying goals of those sources, the "Framers explicitly chose to place 'exclusive rights' in creative works into the hands of 'authors,' and simultaneously rejected publishers, disseminators, guilds, or industry as primary rights holders." As such, the framers acknowledged and memorialized one of the original purposes for creating copyright protection in the United States—to provide economic incentives for authors while preventing ownership of copyrights from vesting in the companies that owned the printing presses (or, in this case, the recording studios).

A. What is an Author?

Though the Constitution does not define "author," the United States Supreme Court has stepped up and defined the term as "he to whom anything owes its origin; originator; maker." The Supreme Court has also added that a "modicum" of originality must be shown to constitute authorship in a work. The definition seems straightforward enough, but in the context of sound recordings—as will be shown—the question of authorship is actually quite complex and uncertain.

B. Copyright Protection of Sound Recordings

Prior to 1971, musical compositions were protected by copyright, but sound recordings embodying those musical compositions were not. However, after ten years of discussion between Congress and

2. Marci A. Hamilton, Historical and Philosophical Underpinnings of the Copyright Clause, 5 BENJAMIN N. CARDOZO SCHOOL OF LAW OCCASIONAL PAPERS 4, 8 (1999); Copyright Act 1709, 1710, 8 Ann., c. 19 (Eng.); Act of May 31, 1790, 1 Stat. 124.
5. Feist Publ'ns, Inc. v. Rural Tel. Serv., 499 U.S. 340, 346 (1991) (citing The Trade-Mark Cases, 100 U.S. 82, 94 (1879) (holding that the Constitutional grant of copyright protection for "authors" for their "writings" requires independent creation and a minimum amount of creativity)).
6. 1 DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[A] (2007).
7. See id.
the record industry\textsuperscript{8} and amidst growing concerns over piracy and lost revenues, Congress passed the Sound Recordings Act of 1971 ("SRA").\textsuperscript{9} The SRA announced that "the copyrightable work comprised of the aggregation of sounds" is "clearly within the scope of ‘writings of an author’ capable of protection under the Constitution."\textsuperscript{10}

Because the primary motivation for enacting the SRA was to protect against the economic and creative harm caused by the pirating of records,\textsuperscript{11} the copyright protection granted for sound recordings only included rights of distribution and physical reproduction.\textsuperscript{12} In other words, the independent creation of even identical-sounding sound recordings, for example, does not constitute infringement of the copyrights in a sound recording, though such independent creation would constitute an infringement of other kinds of copyrightable works.\textsuperscript{13} In 1995, Congress added a public performance right for digital transmissions of sound recordings under the Digital Millennium Copyright Act of 1995 in an effort to maintain and strengthen the protections against piracy.\textsuperscript{14} Though Congress has made clear its intention that sound recordings be afforded copyright protections, the question remains as to who receives those copyright protections.

III. Who is the Author of a Sound Recording?

Perhaps in an effort to clarify who would receive copyrights in sound recordings after granting those protections, Congress did state that "performers, arrangers, and recording experts are needed to produce [a] finished creative work in the form of a distinctive sound

\begin{itemize}
\item \textsuperscript{8} See Hearings, supra note 3, at 79 (Prepared Statement of Hon. Marybeth Peters, Register of Copyrights).
\item \textsuperscript{11} Id. at 1567.
\item \textsuperscript{12} Id. at 1578.
\item \textsuperscript{13} See Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 398 (6th Cir. 2004) (stating that even though an artist would need a compulsory license to record the underlying musical composition, as long as the music was independently created, there would be no infringement of the sound recording); see generally John R. Kettle, III, Dancing to the Beat of a Different Drummer: Global Harmonization—and the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1041 (2002).
\end{itemize}
The Copyright Office has also stated that "generally, copyright protection extends to two elements in a sound recording: (1) the contribution of the performer(s) whose performance is captured and (2) the contribution of the person or persons responsible for capturing the sounds to make the final recording." Despite these somewhat helpful elaborations, the fact remains that the standard recording contract provides that sound recordings will be works made for hire, with authorship vesting in the record company. That notion seems wholly contrary to the original goals of American copyright law of providing an incentive for artists to create and granting those artists rights and protections from companies that own the presses or studios. However, because neither Congress nor the Supreme Court has provided a definitive scope for authorship of sound recordings, industry players continue to use the definition that most benefits them: works for hire is best for the record company, sole authorship is best for the performer, and joint-authorship is best for the producer. This multiplicity of self-serving viewpoints is exactly what could lead to heated battles over authorship and termination rights in 2013.

A. Sound Recordings as Works Made for Hire

As outlined above, neither Congress nor the Copyright Office has determined exactly which contributors might be considered authors in a sound recording; rather, Congress intentionally decided to leave such a determination to "the employment relationship and bargaining among the interests involved." This leaves the door open to the argument that sound recordings can be considered works made for hire. Examining the evolution of the works made for hire doctrine will put the sound recording authorship debate into context.

1. Development of the Works Made for Hire Doctrine

The Supreme Court first acknowledged the work made for hire idea in 1903, in Bleistein v. Donaldson Lithographing Co. Following on the heels of that landmark case, the work made for hire doctrine

18. Bleistein v. Donaldson Lithographing Co, 188 U.S. 239, 248 (1903) (holding that "[t]here was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things").
first appeared in legislation in the Copyright Act of 1909 (1909 Act). The work-for-hire provision of the 1909 Act defined "author" as including "an employer in the case of works made for hire," though the term "works made for hire" was not defined. After Congress passed the 1909 Act, courts began to construe broadly the work-for-hire provision, ultimately finding that any commissioned work would be a work made for hire, regardless of the employer/employee relationship.

In response to the expansive judicial reading of the 1909 Act, Congress provided a much more detailed definition of works made for hire and narrowed its scope in the Copyright Act of 1976 ("1976 Act"). Under section 101 of the 1976 Act, a work can be a work made for hire either (1) as a "work prepared by an employee within the scope of employment"; or (2) as "a work specially ordered or commissioned," provided that a written document signed by both parties designates it as a work made for hire and the work is one of the nine enumerated categories. The nine categories include works created: "as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas." According to the legislative history, the nine categories represent a compromise that "in effect, spells out those specific categories of commissioned works that can be considered 'works made for hire' under certain circumstances."

Concerned that sound recordings, because not specifically enumerated in the nine categories, would not be considered works for hire, the Recording Industry Association of America ("RIAA") began lobbying Congress to add sound recordings to the list. In 1999, Congress sneakily added a "technical amendment," buried deep

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20. Id.; see also Mary LaFrance, Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors, 50 EMORY L.J. 193, 194-95 (2001) [hereinafter LaFrance, Joint Authors].
21. LaFrance, Joint Authors, supra note 20, at 211-12.
within an unrelated section of the Intellectual Property Communications Omnibus Reform Act of 1999, which purported to add sound recordings to the enumerated categories eligible for work-for-hire status.\textsuperscript{26} Immediately, Congress was faced with harsh criticisms from recording artists and the media, including accusations that the amendment was the product of a conspiracy between Congress and the RIAA.\textsuperscript{27} A great deal of authority also decried the "technical amendment" as a drastic substantive change that deserved, at the very least, open public debate among potentially affected industry players.\textsuperscript{28} Congress quickly responded by agreeing to hear testimony from the RIAA, recording artists, and copyright experts, and within six months it repealed the so called "technical amendment."\textsuperscript{29} In so doing, Congress restored the works made for hire provision to its status quo ante, encompassing only employee works or contracted works within one of the nine originally enumerated categories.

2. Works Made for Hire: The Employment Provision

Under the first section of the works made for hire provision, a work can be deemed a work made for hire if an employee creates the work within the scope of his or her employment. The 1976 Act, however, does not specifically delineate what is meant by "employee" or "employment." The Supreme Court, in \textit{Community Creative Non-Violence v. Reid}, interpreted the terms in the 1976 Act to mean the "conventional master-servant relationship as understood by common-law agency doctrine."\textsuperscript{30} The Court also articulated thirteen factors for courts to use when determining the employment status of the parties involved.\textsuperscript{31} The United States Court of Appeals for the Second

\begin{itemize}
\item\textsuperscript{27} Peter J. Strand, \textit{What a Short Strange Trip It's Been: Sound Recordings and the Work Made for Hire Doctrine}, 18 ENT. & SPORTS L.J. 12 (2000).
\item\textsuperscript{28} \textit{Hearings, supra} note 3 at 22 (Prepared Statement of Rep. Howard H. Berman).
\item\textsuperscript{30} Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989).
\item\textsuperscript{31} \textit{Id.} at 751-52 (enumerating the factors as follows: "[the] hiring party's right to control the manner and means by which the product is accomplished . . . ; the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party;
Circuit, in *Aymes v. Bonelli*, simplified the thirteen-factor *Reid* test by carving out what it considered to be the five most significant elements: "(1) the hiring party’s right to control the manner and means of creating; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party." The *Reid* and *Aymes* cases and their progeny established that the typical recording artist signed to a record label is not an employee creating works within the scope of his or her employment; instead, recording artists are independent contractors for the purposes of the 1976 Act.

3. Works Made for Hire: The Specially Commissioned Provision

Under the second section of the works made for hire provision, a work can be deemed a work made for hire if it is commissioned and falls within one of the nine enumerated categories. Because artists generally will not be deemed employees for the purposes of the 1976 Act as described above, the record industry’s best argument that sound recordings should be works made for hire is that such sound recordings are specially ordered or commissioned works under the second prong of the works made for hire provision. Sound recordings, quite clearly, are not specifically enumerated as one of the works eligible for work-for-hire status, so the argument in favor of work-for-hire status hangs on whether sound recordings could fit the definition of one of the other enumerated categories of eligible works.

a. Judicial Interpretation: Sound Recordings Not Enumerated

It appears that courts have reached a consensus that sound recordings do not fit within the second prong of the works made for hire provision and so cannot be works made for hire unless an
employee prepared the works within the scope of his or her employment. The United States Court of Appeals for the Fifth Circuit first addressed the issue in 1997 in *Lulirama Ltd. v. Axcess Broadcasting Services*. In that case, the Fifth Circuit found that sound recordings are ineligible for work made for hire status when created by an independent contractor, because they are not included within any of the enumerated categories for commissioned works.

Two years later, the United States District Court for the District of New Jersey echoed the *Lulirama* holding in *Ballas v. Tedesco* by finding that a commissioned sound recording was not a work made for hire, because sound recordings are not among the nine enumerated categories. The United States District Court for the D.C. District followed suit when it rejected the argument that, because it was standard industry practice, a company owned a commissioned sound recording created by an independent contractor. That court cited both *Lulirama* and *Ballas* in concluding that a sound recording would only qualify as a work made for hire by satisfying the *Reid* test under the employment prong of the 1976 Act. These cases indicate that courts are unwilling to adopt a bright line rule that all sound recordings created under a recording contract can be works made for hire absent definitive legislative action—i.e., not mere “technical amendments”—to establish sound recordings as an enumerated category eligible for work-for-hire status.

b. Qualification under One of the Nine Categories

Though sound recordings are not explicitly enumerated in the list of eligible categories in the second prong of the works made for hire provision, some scholars and industry players argue that sound recordings could still qualify under one of the other enumerated categories. Some argue that sound recordings may be eligible under

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34. See, e.g., *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999) (stating that sound recordings cannot be works made for hire because sound recordings “do not fit within any of the nine enumerated categories”); *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999) (stating that sound recordings cannot be works for hire because “a sound recording does not fit within any of the nine categories”).


36. *Id.* at 877.


39. *Id.* at 64.

40. MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.03 (Matthew Bender & Co. ed., 2004) (stating that for a sound recording to qualify for
the category of contributions to a collective work.\textsuperscript{41} Section 101 of the 1976 Act defines a collective work as “a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works themselves, are assembled into a collective whole.”\textsuperscript{42} Generally albums are made of more than one song recording, so they could be considered collective works, and so they could qualify as works made for hire.\textsuperscript{43} Because albums probably do technically fit the definition of a collective work, this may be the strongest argument the recording industry has to establish sound recordings as works made for hire.

Some also argue that sound recordings could be eligible for works made for hire status under the compilation category.\textsuperscript{44} Section 101 of the 1976 Act defines a compilation as “a work formed by the collection and assembling of preexisting 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.”\textsuperscript{45} Because there are many elements of copyrightable expression found in sound recordings, they could plausibly be considered compilations.\textsuperscript{46} However, an album usually consists of an assortment of newly recorded material, not preexisting works.\textsuperscript{47} As such, most albums would not fit the definition of a compilation.

Still others argue that sound recordings may fit the definition of specially commissioned works made for hire under the audiovisual works category.\textsuperscript{48} Section 101 of the 1976 Act defines audiovisual works as “works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices

\textsuperscript{41} See Stephen Adams, Note, Copyright Issues for Sound Recordings of Volunteer Performers, 8 VAND. J. ENT. & TECH. L. 119, 143-44 (2005); Jaffe, supra note 33, at 165 (discussing Professor Goldstein’s argument that each song featured on an album could be considered a contribution to a collective work).


\textsuperscript{43} U.S. Copyright Office, Circular 56, Copyright Registration for Sound Recordings, July, 2008, at 3 (acknowledging that some sound recordings might fit the definition of a collective work).


\textsuperscript{45} 17 U.S.C. § 101.


\textsuperscript{47} Starshak, supra note 33, at 108.

\textsuperscript{48} See Strohm, supra note 44, at 146-50.
such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.\(^49\)

An audiovisual work must have a visual component, while sound recordings do not. Many albums, such as so-called “enhanced” CDs,\(^50\) may fit this definition because they incorporate visual images while playing the audio.\(^51\) However, if the sound recording is created independently and later incorporated with a visual component, as is generally the case with enhanced CDs, the resulting audiovisual work will be a derivative work and will thus not affect the characterization or works for hire status of the sound recording itself.\(^52\) Thus, audiovisual works and sound recordings are distinct categories of works. The intentional enumeration of specific and exclusive categories in the second prong of the works made for hire provision would be rendered meaningless if the category of “audiovisual works,” or any of the other specifically enumerated categories, could completely encompass the entirely separate realm of sound recordings as well.\(^53\)

4. Implications for Termination Rights

If Congress or the courts do determine that sound recordings can be works made for hire—either by including sound recordings within one of the already enumerated categories or by adding sound recordings to the list—there will be severe implications for termination rights. The author, and so the owner, of any copyright may transfer his or her rights “in whole or in part by any means of conveyance.”\(^54\) Furthermore, section 203 of the 1976 Act grants to authors the right to terminate any such conveyance and retain full rights in their work thirty-five years after the time of the transfer.\(^55\) The author’s right of termination cannot be waived, so any contractual provision purporting to divest the author of the right to


\(^{50}\) Donald Passman describes an enhanced CD as follows: “a normal album when played on your stereo. But when put into your computer, it’s magically transformed into (1) an audio album that can sound relatively lousy through one-inch computer speakers; and (2) a device that displays one or two mediocre-looking videos, copies or reviews, interviews, lyrics, and so forth.” DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 175 (2000).

\(^{51}\) Id.

\(^{52}\) See LaFrance, Sound Recordings, supra note 25, at 399.

\(^{53}\) Lulirama Ltd. v. Axcess Broad. Servs., Inc., 128 F.3d 872, 878 (5th Cir. 1997).


terminate his or her conveyance is void. 56 Once an assignment is terminated, the author(s) regains the full measure of copyrights and may assign those rights to someone else, such as a different record label. 57 Perhaps more importantly, the author may use the termination right as a bargaining chip to renegotiate with the original assignee for a new contract with more favorable terms. 58 After thirty-five years, the artist and his or her repertoire are more established, and so the artist will have greater bargaining power to renegotiate a more beneficial agreement upon termination of the initial assignment. Thus, the right to terminate the transfer of a copyright is arguably the most important right available to an author, especially a fledgling recording artist who has no leverage to bargain for more favorable terms in the initial recording contract. 59

With works made for hire, however, authorship would initially vest in the record company. Authorship under the work made for hire doctrine is determined not by finding the person who actually "originated" or created the work, but by examining the employment status of the parties involved. Because authorship in a sound recording would vest in the record company under the work made for hire doctrine, the artist would retain no copyrights in the sound recording. Most notably, this would eliminate the artist's ability to terminate, regain ownership of the copyrights, and exploit those copyrights to his or her advantage. 60

5. Works Made for Hire and International Perspectives

Although other countries do recognize the employer as the copyright owner when an employee creates a work within the scope of his or her employment, the United States remains one of the few countries to recognize the employer as the author of such a work. 61 The idea of employer authorship, as recognized in the U.S. works

56. Id.
58. Id.
59. LaFrance, Sound Recordings, supra note 25, at 377-78.
60. Id. at 378.
made for hire doctrine, is at odds with the idea of the author's moral rights to a work, as recognized by countries such as France and Germany.\(^{62}\) The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) was amended in 1928 to promote uniform international protections for the moral rights of authors of literary and artistic works.\(^{63}\) Despite the vastly different underpinnings of the economic-based U.S. works made for hire doctrine and the author-centered international moral rights doctrine, Congress has made efforts to comply with the spirit of the international copyright norms in the Berne Convention.\(^{64}\) At the very least, these efforts should be considered when determining what the scope of the works made for hire doctrine will be in U.S. copyright law.\(^{65}\)

6. **Arguments for Sound Recordings as Works Made for Hire**

Notwithstanding the uncertain status of authorship in sound recordings, it is standard industry practice for recording contracts to contain a clause that the sound recordings made under the record contract constitute works made for hire\(^{66}\) or, alternatively, that the artist transfers copyright ownership to the record company.\(^{67}\) Record companies also register the recordings tracks as works made for hire owned by the record company.\(^{68}\) Thus, it could be argued that the "technical amendment" in the Intellectual Property and Communications Omnibus Reform Act of 1999, adding sound recordings to the list of categories eligible for works for hire status,

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64. See 3 DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.02[C] (2007) (discussing congressional enactment of the Berne Convention Implementation Act).

65. See Berne Convention Article 6bis(1) (providing that “[i]ndependently of the author’s economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which shall be prejudicial to his honor or reputation.”).

66. See, e.g., *Hearings, supra* note 3 at 147 (Statement of Professor Marci A. Hamilton). Many artists who retain their rights in a sound recording also will register the recording as a work made for hire. Id. at 122-34. (Prepared Statement of Hillary Rosen, President and CEO of Recording Industry Association of America).

67. Id. at 203 (Statement of Jay Cooper, attorney for the Recording Artists Coalition); M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, *THIS BUSINESS OF MUSIC* 189 (10th ed. 2007).

68. Id.
really did just clarify and codify what had been standard industry practice for years. However, contractually designating or registering a sound recording as a work made for hire is not sufficient to make it a work made for hire under the 1976 Act.69 Only by satisfying the employment status tests or the specially commissioned categories tests can the work be a work made for hire.70

Some argue that for economic policy reasons, because record labels take the initial risk when they sign new artists, sound recordings should be considered works made for hire.71 The work-for-hire doctrine is arguably necessary to preserve the marketability of sound recordings and to avoid the disruption that would occur if artists could exercise a termination right.72 However, thirty-five years seems a sufficient amount of time for record companies to make a substantial return on their investments before the artist has the right to terminate or renegotiate the terms of the initial assignment.

Others argue for work-for-hire eligibility under a “chaos theory” because many individuals participate in the creation of a sound recording; as such, determining the authorship status—and the potential for rights of termination—of each contributor may be difficult, which may trap the true creators and the record labels in endless litigation.73 However, featured artists generally sign work-for-hire agreements with contributing musicians and artists,74 thereby eliminating the fear of record companies that they will be faced with multiple termination notices and the potential for competing sound recordings should some contributing artists grant rights to other companies. Furthermore, if sound recordings are considered joint works and not works for hire, record companies could contract with

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70. Id.
71. Id. at 125 (“Typically, less than 15% of all sound recordings released by major record companies will even make back their costs”).
72. Id. at 129 (Prepared Statement of Hilary Rosen, President and CEO of Recording Industry Association of America) (“Think about the disruption that would ensue if, 35 years after its creation, each of the multitudes of authors involved in each and every track of an album could reclaim copyright ownership of that track.”).
73. Id. at 180-81 (Prepared Statement of Michael Greene, President and CEO, National Academy Recording Arts & Sciences, Inc.); Id. at 129 (Statement of Hillary Rosen, President and CEO, Recording Industry Association of America); LaFrance, Sound Recordings, supra note 25, at 396-97.
74. Under the same policy rationale, featured artists who sign work-for-hire agreements with contributing musicians will not be protected against termination claims from these contributing artists either. Hearings, supra note 3, at 181 (Statement of Michael Greene, President and CEO, National Academy Recording Arts & Sciences, Inc.).
the featured artist or record producer such that only those parties would be able to terminate assignments on behalf of all joint authors to ensure that the record company will not be faced with multiple termination notices.

7. Arguments Against Sound Recordings as Works Made for Hire

The legislative history reveals that the codification of the works made for hire doctrine involved long years of debate among interested parties, wherein all of the proposed categories of eligible works were discussed at length. Noticeably, sound recordings were never debated as a potential category. This could be because sound recordings were not granted federal copyright protection until 1971, after the majority of the work-for-hire provision had been drafted in 1966. However, copyright protection for sound recordings had been discussed and the provisions enacted well in advance of the passage of the 1976 Act with its work-for-hire provision. Thus, Congress knew that sound recordings could potentially be added to the list of enumerated categories under the specially commissioned prong but chose not to take action to include them in the list.

One could argue that sound recordings are so similar to films, which can be specially commissioned works made for hire under the audiovisual category, that they too should be included as eligible for work-for-hire status. However, the production of films is often paid for by the film studio, which also hires a director and actors to create the film. Dissimilarly, a record, though paid for in advance by a record label, will ultimately be paid for out of the eventual royalties of the artist, who has control over the recording and production of the album. As such, there are key distinguishing factors that lead to the conclusion that sound recordings should not be deemed works made for hire like films, despite some similarities between the mediums.

Others argue that the Constitution gives Congress the power to grant authors exclusive rights in their creations, not corporate

77. See Jessica D. Litman, Copyright, Compromise and Legislative History, 72 CORNELL L. REV. 857, 867-68 (1987) (noting that the work-for-hire provision adopted by the 1976 Act had not been changed since its initial drafting in 1966).
79. Hearings, supra note 3, at 162 (Statement of recording artist Sheryl Crow).
80. Id.
entities. For example, copyright scholar Siva Vaidhyanathan has argued that the work-for-hire doctrine marks the "real death of the author." Similarly, law professor Marci Hamilton has said that "the work made for hire doctrine, which permits an employer or commissioner to be the 'author' for copyright purposes is at odds with the plain language of the [Copyright] Clause. It is, in reality, an end-run around the Framers' decision to place the power over creative works into the hands of those who created them." The main thrust of such arguments is that, should the work-for-hire doctrine become the norm instead of the exception, it would be unconstitutional.

At any rate, the time is ripe for Congress to open the floor for debate once again and invite the RIAA, recording artists, producers, and copyright experts to present arguments for and against the legitimate inclusion (or outright, definitive exclusion) of sound recordings in the work-for-hire category. Until Congress gives the final statutory word, it seems that courts and industry players will remain in limbo, only able to speculate as to the eventual interpretation of the work-for-hire doctrine in U.S. sound recordings.

B. Authorship If Sound Recordings Are Not Works Made for Hire

The main concern of copyright scholars, record companies, and artists is what rights the artists retain in a sound recording. In other words, the threshold question is whether authorship will vest in the record company under the work-for-hire doctrine. However, it seems likely under the current jurisprudence that sound recordings will not be considered works made for hire absent definitive congressional action to add them to the list of enumerated categories. Thus, perhaps the more pressing issue is which artists involved in the...
creation of a sound recording will be considered "authors" for copyright purposes. At first glance, it does not seem like an important point; however, as artists attempt to terminate or renegotiate assignments in a few years, courts will be flooded with litigation to determine the scope of authorship, work-for-hire status, and termination rights in sound recordings. The fact that authorship in sound recordings, if not works made for hire, is still uncertain only exacerbates the problem. Thus, if a clear understanding of authorship in sound recordings can be ascertained before the issue of works made for hire status must be decided, it seems that record companies can avoid some of the "chaos" associated with the potential for multiple termination notices for a single work.

1. Sole-authorship Theories

Some argue that sound recordings are absolutely not joint works, but that the featured artist is the only one who should be able to claim authorship status. For example, Sheryl Crow, a highly successful recording artist and vice president of the Recording Artist Coalition, believes that the featured artist should be considered the sole author of a sound recording.\(^8\) In support of her argument, Crow cited the process by which a featured artist will author a sound recording, like the captain of a ship making decisions, about accompanying musicians, directing engineering and production, and choosing songs that will appear on the album as well as the title.\(^8\) However, her argument for sole authorship completely ignores the fact that, generally, many people, including featured artists, producers, engineers, and background musicians, contribute creatively to the production of an album. Additionally, the sole authorship approach would create a disincentive for artists to collaborate and share ideas by giving only the featured artist a claim of authorship rights.

2. Joint-authorship Theories

Precisely because many contributors are involved in the creation of sound recordings, it seems that sound recordings should be considered joint works. Congress has acknowledged that "performers, arrangers, and recording experts are needed to produce [a] finished creative work in the form of a distinctive sound recording."\(^8\) The

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87. *Id.* at 163-67 (Prepared Statement of recording artist Sheryl Crow) (dismissing explicitly any claims of authorship by producers, musicians, and engineers).

88. *Id.*

Copyright Office has agreed with the argument that sound recordings should generally be considered joint works, comprised of multiple significant contributions of authorship. Though a sound recording might easily be categorized as a joint work, the question still remains as to which participants in its production will have viable claims of authorship in the resulting sound recording.

The language of the Copyright Act is not particularly elucidating. Section 101 of the 1976 Act defines a joint work as a "work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." The legislative history reveals that Congress used the word "inseparable" to describe situations where the components of the unitary whole have little or no meaning by themselves—like paragraphs in a novel—and the word "interdependent" to describe situations where the components could stand alone but achieve a greater effect when combined, like the lyrics and melody of a song. Committee reports stated:

[A] work is "joint" if the authors collaborated with each other, or if each of the authors prepared his or her contribution with the knowledge and intention that it would be merged with the contributions of other authors as "inseparable or interdependent parts of a unitary whole." The touchstone here is the intention, at the time the writing is done, that the parts be absorbed or combined into an integrated unit.

Thus, it seems like the Act requires either that contributors actually collaborate by working together or that contributors who work separately have the requisite intent to combine their contributions into a unitary whole. Though not explicit in the legislative history or the Act itself, the use of the word "authors" seems to suggest that each contribution to the unitary whole must be independently copyrightable. Sound recordings generally do involve inseparable and interdependent components contributed by multiple artists, though

90. *Hearings*, supra note 3, at 92-93 (Prepared Statement of Hon. Marybeth Peters, Register of Copyright). As detailed *infra* at Part IV, the Copyright Office has proposed that key contributors to the sound recording—those who contribute significant authorship—should be deemed joint authors of a work (though mere accompanying contributors could be classified as works made for hire).

91. 17 U.S.C. § 101 (2000). Section 201(a) provides that "[t]he authors of a joint work are [co-owners] of copyright in the work." Each author "obtains an undivided ownership in the whole of the joint work, including any portion thereof." *Nimmer*, supra note 6, at § 6.06[A].


not all of the artists' contributions may be deemed independently copyrightable works.

Because joint authorship, unlike joint works, is not defined in the copyright statute, there are many interpretations of the requirements for joint authorship. The Register of Copyrights has stated that independent copyrightability is required under the statutory standard of authorship and perhaps under the Constitution as well. The United States Court of Appeals for the Ninth Circuit, however, has determined that merely contributing independently copyrightable expression is not sufficient to claim joint authorship of a work, even if other factors, such as intent to merge the work into a unitary whole, are met. The court considered several factors in the determination of joint-authorship status: (1) "[the] author 'superintend[s]' the work by exercising control"; (2) "[the] putative coauthors make objective manifestations of a shared intent to be coauthors"; and (3) "the audience appeal of the work turns on both contributions and the share of each in its success cannot be appraised." For the Ninth Circuit, control is the key factor. The Ninth Circuit's decision is supported by the general policy of protecting authors and promoting the progress of the arts because "[p]rogress would be retarded rather than promoted if an author could not consult with others and adopt their . . . [input] without sacrificing sole ownership of the work."

Similarly, the United States Court of Appeals for the Second Circuit has interpreted joint authorship as requiring a mutual intent to share authorship as a prerequisite for a joint work. This interpretation is in part based upon the so-called Goldstein approach, which states that "[f]or a joint work to exist, each author must have intended to create a joint work at the time he made his contribution." The Goldstein approach also embodies the Ninth Circuit's rationale that "[a] collaborative contribution will not produce a joint work, and a contributor will not obtain a co-

95. Aalmuhammed v. Lee, 202 F.3d 1227, 1233-34 (9th Cir. 2000).
96. Id.
97. Id. at 1234-35 ("absence of control is strong evidence of the absence of coauthorship").
98. Id. at 1235.
99. Childress, 945 F.2d at 509.
100. 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 4.2.1.1 (3d ed. 2005 & Supp. 2007).
ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright.” The Second Circuit adopted the Goldstein approach because it seemed to be the majority rule, because it would prevent people from making “spurious claims” against a sole author, and because the court believed it to be the correct balance between copyright and contract law. The Second Circuit followed the Goldstein approach again in Thomson v. Larson. In making the determination that Thomson was not a joint author under the Goldstein rule, the court considered several objective factors: Larson had held himself out to third parties as being the sole author, the contract between Larson and the New York Theater Workshop listed him as the sole author and gave him rights over all changes, and Thomson was not listed as an author or co-author on the playbill. The Goldstein approach is in line with the notion that the Act’s use of the word “authors” in defining joint works suggests that each contribution must be independently copyrightable in order for a copyright ownership interest to vest in the contributor, though the Act and its legislative history do not seem to call for such a stringent standard.

The United States Court of Appeals for the Seventh Circuit has adopted the somewhat different Nimmer Approach, which simply requires more than a de minimis contribution for joint authorship status. Unlike the Second and Ninth Circuits, the Seventh Circuit has held that where two contributors intend to create an indivisible copyrightable work, each contributor will be a joint author even if the portion he or she contributed would not be independently copyrightable. Instead, the Seventh Circuit adopted a joint authorship test that requires (1) an intention to create a unitary work and (2) a more than de minimis contribution. By closely following

101. Id. at § 4.2.1.2.
102. Childress, 954 F.2d at 505-06.
103. Id. at 507.
104. Id.
106. Id. at 198, 202-05.
108. Id. at 658-59 (stating that it would be paradoxical not to allow anyone to claim a copyright in a finished, copyrightable work simply because no individual contribution was itself copyrightable).
109. Id. at 659 (adopting the Nimmer approach); see also NIMMER, supra note 6, at § 6.07; but see Erikson v. Trinity Theatre, Inc., 13 F.3d 1061, 1072 (7th Cir 1994) (adopting
the statutory definition of a “joint work” in the Copyright Act, the Nimmer approach creates a lower threshold of authorship, rewards more artists for their contributions, provides an incentive to collaborate, and prevents parties from taking advantage of others. This approach also furthers the fundamental copyright goals of promoting the arts and protecting authors “by rewarding all parties who labor together to unite idea with form.”

It could also be argued that this approach, by not requiring that each contribution is independently copyrightable, grants copyright protection to ideas, which the Act strictly forbids. However, upon reconsideration, one can see that this concern is unfounded; for it is not each component, but the finished unitary whole that is granted copyright protection, with each contributor merely retaining co-ownership interest in that final unitary work. The Nimmer approach protects contributors while still allowing parties to contract around the default rule of joint authorship through assignments of copyright interests or work-for-hire agreements. Thus, the Nimmer approach, as adopted by the Seventh Circuit, seems to be more statutorily favorable, as well as a better balance of copyright and contract interests.

3. Joint Works: Implications for Termination Rights

As explained above, the author, and so the owner, of any copyright may transfer his or her rights “in whole or in part by any means of conveyance.” Furthermore, section 203 of the 1976 Act grants to authors the right to terminate any such conveyance and retain full rights in their work thirty-five years after the time of the transfer. The author’s right of termination cannot be waived, so any contractual provision purporting to divest the author of the right to terminate his or her conveyance is void. Where the work is a joint work and two or more joint authors grant rights in the work, the

the Goldstein approach in finding that an actor was not a joint author because his suggestions were not copyrightable on their own).

110. Nimmer, supra note 6, at § 6.07[A][3].

111. 17 U.S.C. § 102(b) (2000) (denying copyright protection to “any idea,... concept, [or] principle,... regardless of the form in which it is described, explained, illustrated, or embodied in such work”).

112. Note that assignments of ownership made by contributing authors could, under the current legal standards, be considered subject to termination as well. However, the proposed solutions infra Part IV would ensure that key contributors would retain authorship rights without minor contributors retaining authorship rights as well.


114. Id. at § 203(a)(3).

115. Id. at § 203(a)(3).
termination will go into effect where a majority of the authors who executed the grant choose to terminate. However, if a joint author granted his rights in a separate conveyance, as record producers often do, such author may terminate individually and obtain non-exclusive rights in the work.

Once an assignment is terminated, the author(s) regain the full measure of copyrights and may assign those rights to someone else, such as a different record label. Perhaps more importantly, the author may use the termination right as a bargaining chip to renegotiate with the original assignee for a new contract with more favorable terms. Thus, the right to terminate the transfer of a copyright is arguably the most important right available to an author, especially a fledgling recording artist who has no leverage to bargain for more favorable terms in the initial recording contract.

If joint authors assigned copyrights to someone else, the record company for example, “termination of the grant may be effected by a majority of the authors who executed it.” Thus, if sound recordings are not deemed works made for hire, “the record company might be faced with a situation in which it can be held hostage to the demands of the individual artist who knows that he can deprive the [company] of the exclusive right to exploit the work simply by assigning his nonexclusive rights to another record company.” As such, it is in everyone’s best interest to determine the scope of joint authorship and termination rights in sound recordings before termination notices begin taking effect.

IV. Proposed Solutions

Copyright Register Marybeth Peters has stated that the Copyright Office “believes that those who contribute significant authorship to a sound recording should have the right to terminate.”

116. Id. at § 203(a)(1).
117. H.R. REP. NO. 94-1476, at 121 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736. If this author grants a new transfer of non-exclusive rights, he must make an accounting to the other authors of any profits earned and due to them.
118. Field, supra note 57, at 155.
119. Id. After thirty-five years, the artist and his repertoire are more established and so the artist will have greater bargaining power to renegotiate upon termination.
120. LaFrance, Sound Recordings, supra note 25, at 377-78.
123. Id. at 93.
Under her proposal, "significant authors" would be those "key contributors" who make major contributions of copyrightable expression, such as the featured artist or band. As such, the best definition of authorship in a sound recording might grant copyright protection to those who contribute significantly, the "key contributors," but not those who merely collaborate in some small way. Background musicians, therefore, would not be key contributors, though producers would be given special consideration on a case-by-case basis. Under the Peters Plan, contributions to sound recordings by background contributors could fit within the definition of works made for hire. However, there would be an exception to work-for-hire status for key contributors, who would retain authorship of the sound recording and would have an inalienable termination right in such sound recordings. Not only is this approach in line with the statutory language of the Copyright Act and standard music industry contracting practices, but also it would strike a balance between the two major theories of authorship in sound recordings: it would maintain the collaboration-encouraging effects of the Nimmer approach while also assuaging the concerns at the core of the Goldstein approach.

The Peters Plan assuages RIAA concerns, such as the potential for multiple terminations and re-licensing grants that would render record labels’ vaults unmarketable, however, it could also pit creator against creator by extending copyright benefits to some but not all of the contributing artists. It could also lead to a determination that an artist is a key contributor simply because of that artist’s relative

124. Id. As such, her approach is similar to the Goldstein approach as well as the rules promulgated in both the Second and Ninth Circuits.
125. Id. at 93-94; see, e.g., Morrill v. Smashing Pumpkins, 157 F. Supp. 2d 1120 (C.D. Cal. 2001) (recognizing music video as a joint work between the producer and the recording artist).
126. Hearings, supra note 3, at 93 (Prepared Statement of Marybeth Peters, Copyright Register).
127. Id.
128. 4 ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING & THE ARTS § 9:18 (3d ed. 2004 & Supp. 2007) (referring to U.S. Copyright Office Circular 56 ("Generally, copyright protection extends to two elements in a sound recording: (1) the contribution of the performer(s) whose performance is captured and (2) the contribution of the person or persons responsible for capturing and processing the sounds to make the final recording.")).
129. See supra Part III.B(2). The Goldstein approach is concerned with protecting true authors from spurious claims of small contributors who were not intended to be considered co-authors and who only contribute noncopyrightable elements to a work.
130. Hearings, supra note 3, at 132 (Statement of Hilary Rosen, President and CEO of Recording Industry Association of America).
notoriety and, thus, bargaining power. A more established singer would more likely be designated as one of the artists featured on a song, and so would be more likely to have authorship status. Consider the *Ulloa* case, a paradigm example of this problem where an unknown artist was found not to be a joint-author. However, many of these supporting artists are already paid as employees and so already fall within the work-for-hire doctrine anyway. At any rate, the Peters Plan is a good working model that should be debated in Congress and perhaps tempered with the more lenient Nimmer approach to joint authorship to strike the most equitable balance of interests.

Another approach that would not require any subjective, fact-based, case-by-case analysis of the significance of an artist's contribution would be to alter the language of section 203. A new section 203 could allow joint authors to designate one of the joint recording artists as the one with authority to terminate on behalf of all the joint authors. Alternatively, section 203 could provide that a majority of joint recording authors would be necessary to terminate an assignment, even if the grants were made in separate executions. This approach would require congressional modification of section 203 to make certain that there will not be multiple competing versions of a work or multiple notices of termination in a single work. This approach would also leave the authorship status of contributing parties to the contractual agreements between those parties, since there is no definitive legislative or judicial rule to guide the parties. As such, this approach honors contract policy and the bargaining of the parties; however, it also ignores the supposedly inalienable nature of termination rights and the notion that even without copyright law, authors do have some natural claim to their works. Perhaps a combination of the two proposed solutions would best solve the

131. *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409, 414-16 (S.D.N.Y. 2003) (finding that because a vocalist was not an employee under the *Reid* and *Aymes* tests and because there was no written agreement, the work was not a work made for hire).


134. Mark Jaffe, a lawyer with prior experience producing, licensing, and distributing sound recordings, has proposed a similar plan with the goal of assuaging record companies' fears about multiple terminations and competing sound recording distribution. Jaffe, *supra* note 33, 139 n.1, 195-96.

135. *Id.*

136. *Id.* at 196-97.
complicated problems involved if multiple joint authors are allowed to terminate and grant competing, non-exclusive assignments.

The fact remains that Congress needs to address the scope of authorship in sound recordings and establish firm standards for works for hire status before courts and industry players become entangled in litigation over termination rights. To strike the appropriate balance of interests, perhaps Congress should adopt a combination of the two proposed solutions to best solve the complicated problems involved if multiple joint authors are allowed to terminate and grant competing, non-exclusive assignments. Under the proposed amended section 203, key contributors to a sound recording would have the authority to designate one among them as the assignment terminator. Further, the key contributors would be able to contract with supporting contributors, such that any supporting contribution would be works made for hire. Thus, record companies would be free from the "chaos" of multiple claims for termination and duplicitous reassignments of rights to a recording. At the same time, key contributors would be protected from frivolous claims of authorship of minor contributors, who may try to seek termination and reassignment of a recording to the detriment of the true authors of a work. This approach also safeguards the artists' all important termination rights, by eliminating the possibility that all sound recordings will be eligible for work-for-hire status.

V. Conclusion

The abundance of scholarly works discussing the intermingling issues of authorship and termination rights, and the dearth of definitive guidance from Congress, signifies the gravity of the situation. In 2013, authors of sound recordings will have their first opportunity to exercise their right to terminate assignments made to record companies. Without a firm standard from Congress, industry players will not know how to react to those termination notices, and courts faced with the inevitable resulting litigation will be forced to speculate as to congressional intent. None of the proposed solutions is perfect; each has been presented as a means to point out the various arguments for and against considering sound recordings under works made for hire, sole authorship, and joint authorship theories. Ultimately, the onus rests with Congress to decide, after legitimate debate among all interested parties, whether to include sound recordings in the list of enumerated categories for commissioned works for hire. Until then, industry players should prepare for the possibility that an even stickier issue will arise—that of whether all
contributing artists have a claim to joint authorship status. If sound recordings are not to be considered works made for hire, the potential for multiple notices of termination from multiple joint authors only exacerbates the problem. Rest assured that all contributing artists with a potential claim of authorship in a sound recording will be back to claim that right in 2013, whether or not the music industry is ready for them.