

## **Limitations of the 1999 Work-For-Hire Amendment: Courts Should Not Consider Sound Recordings to Be Works-For-Hire When Artists’ Termination Rights Begin Vesting in Year 2013**

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PREFACE: 1999 WORK-FOR-HIRE AMENDMENT ELIMINATES IMPORTANT TERMINATION RIGHTS FOR ARTISTS

The legal issue that is the subject of this Note was once nothing more than a curious topic of debate among attorneys who represent recording artists. When I began researching the topic in June of 1998, several artists' attorneys explained the problems with language customarily inserted in record contracts by record companies claiming that the artists' sound recordings are "work made for hire." Most artists' attorneys have always disagreed with this work-for-hire language, believing it to be a misguided interpretation of the law, but they have always known that the contractual language could not legally bind their clients.<sup>1</sup> Instead, the issue of whether a sound recording is a work-for-hire has been considered a question of statutory interpretation that courts would one day decide in favor of artists.<sup>2</sup>

Until November 29, 1999, artists' attorneys had rested on the assumption that the issue whether sound recordings are works-for-hire would be decided by courts around year 2013. Beginning in that year, the so-called "right of termination" would

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\*1. As explained in Part I, *infra*, "work-for-hire clauses have no effect regarding whether the objective work-for-hire requirements are met; courts instead look to the actual relationship between the parties."

\*2. The 92d Congress in 1971 expressly deferred to the parties involved (and ultimately the courts) on the question of whether sound recordings would be works-for-hire. See H.R. REP. NO. 92-487 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1570 ("The bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.").

have entitled artists to reclaim their copyrights after proving that their sound recordings are not works-for-hire under the 1976 Copyright Act.<sup>3</sup> Congress, however, eliminated artists' termination rights with a recent Copyright Act amendment expanding the definition of "work made for hire" to include sound recordings.<sup>4</sup> The artists' rights to reclaim valuable streams of royalty revenue generated by their sound recordings was the result of years of negotiations between private interests, a number of Copyright Office studies, and careful consideration by the 94th Congress in 1976;<sup>5</sup> Congress eliminated these rights with the stroke of a pen in 1999.

If Congress had not suddenly intervened, courts would have found that artists' sound recordings are not works-for-hire in accordance with equitable principles,<sup>6</sup> legal precedent,<sup>7</sup> and congressional policy underlying the 1976 Copyright Act.<sup>8</sup> A United States District Court recently reached this conclusion. On March 5, 1999, the court in *Ballas v. Tedesco* held that "sound recordings are not a work-for-hire under the second part of the statute because they do not fit within any of the nine enumerated categories."<sup>9</sup> Unfortunately, Congress passed the 1999 amendment without considering equitable principles, legal precedent, or the uniquely intricate compromise underlying the 1976 legislation.

The work-for-hire amendment passed without hearings or debate<sup>10</sup> on November 29, 1999, the last day Congress was in

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\*3. As explained in Part I, *infra*, "works-for-hire are not subject to this right of termination . . . Unfettered by the right of termination, a record company's ownership of a work-for-hire copyright endures for the life of the copyright, which is sixty to eighty-five years longer than the company's ownership of a copyright terminated thirty-five years after assignment."

\*4. This amendment, hereinafter called the "work-for-hire amendment," reads in its entirety: "WORK MADE FOR HIRE - Section 101 of title 17, United States Code, is amended in the definition relating to work for hire in paragraph (2) by inserting 'as a sound recording,' after 'audiovisual work.'" Intellectual Property and Communications Omnibus Reform Act of 1999, S.1948, tit. I, sec. 1101(d) (1999), *incorporated in and passed as*, Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501 (1999).

\*5. As explained in Part III, *infra*, "the 1976 copyright legislation was the result of many years of negotiations and compromises between private interests that Congress directly adopted in drafting the Copyright Act."

\*6. *See infra* Part III.

\*7. *See infra* Part II.

\*8. *See infra* Part IV.

\*9. *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999).

\*10. The relevant legislative history reads in its entirety:

Section 1011(e) [sic (section 1011(d) contains the amendment)] makes a technical and clarifying change to the definition of 'work made for hire' in section 101 Copyright Act. Sound recordings have been registered in the Copyright Office as works made for hire since being protected in their own right. This clarifying amendment

session, in an appendix to an appropriations bill of over 1,000 pages.<sup>\*11</sup> The amendment is one sentence found within the appendix in a title regarding satellite transmission of copyrighted television content.<sup>\*12</sup>

The section in which the work-for-hire amendment appears bears the label "Technical Amendments"<sup>\*13</sup> and the legislative history calls it a "clarifying change."<sup>\*14</sup> These characterizations belie the significance of the amendment and explain why no debate occurred—technical amendments usually correct spelling, punctuation, or numbering without changing the substantive meaning of the law.<sup>\*15</sup> If Congress had held hearings on the subject, artists would have informed Congress that the work-for-hire amendment was not a mere technical amendment, but instead a significant piece of legislation with major consequences—namely the elimination of artists' termination rights.<sup>\*16</sup> Before "clarifying" previous legislation Congress also should have considered that a United States District Court had reached the exact opposite conclusion in interpreting the same legislation just six months earlier.<sup>\*17</sup>

Shortly after Congress enacted the work-for-hire amendment, lobbyists working for record companies, the Recording Industry Association of America ("RIAA"), maintained that the work-for-hire amendment was merely a clarification of existing law, and that "in everybody's view this was a technical issue."<sup>\*18</sup> The presi-

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shall not be deemed to imply that any sound recording or any other work would not otherwise qualify as a work made for hire in the absence of the amendment made by this subsection.

H.R. CONF. REP. NO. 106-464, at 105-06 (1999). Discussion of the work-for-hire amendment in the Congressional Record went no further than to adopt the Conference Report. See 145 CONG. REC. S14,836 (daily ed. Nov. 18, 1999); 145 CONG. REC. S14,712 (daily ed. Nov. 17, 1999); 145 CONG. REC. H11,769, H11,811-18 (daily ed. Nov. 9, 1999).

\*11. See Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501 (1999).

\*12. See Satellite Home Viewer Improvement Act, S.1948, tit. I. (1999), *incorporated in and passed as*, Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501 (1999).

\*13. Intellectual Property and Communications Omnibus Reform Act of 1999, S.1948, tit. I, sec. 1101(d) (1999), *incorporated in and passed as*, Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501 (1999).

\*14. H.R. CONF. REP. NO. 106-464, at 105 (1999).

\*15. See Geoffrey Hull, *Work-for-Hire Controversy: Copyright Act Amendment Seen As Blow to Artists' Sound Recording Rights*, ENT. L. & FIN., Jan. 2000, at 1, 4.

\*16. See Edward M. Cramer, *Copyright Amendment Should Be Repealed*, BILLBOARD, Jan. 22, 2000, at 8, 122; Bill Holland et al., *Artists, Representatives Speak Out On New Amendment*, BILLBOARD, Jan. 22, 2000, at 123; Bill Holland, *Works-For-Hire Provision Sparks Artist Furor, Demand For Change*, BILLBOARD, Jan. 22, 2000, at 5, 122.

\*17. See *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999).

\*18. Bill Holland, *Acts' Reps Decry C'right Clause*, BILLBOARD, Jan. 15, 2000, at 1, 75.

dent of the RIAA, Hilary Rosen, has since softened the RIAA's position in a letter to members of the House Subcommittee on Intellectual Property.<sup>\*19</sup> Rosen urged the members to hold hearings on the issue in order to hear the concerns of artists.<sup>\*20</sup>

While Congress appears to have been unaware of the detrimental impact that the work-for-hire amendment would have on artists, the RIAA must have understood the amendment's significance for record companies.<sup>\*21</sup> *Billboard* reports that "the RIAA has tried to attach the item to various copyright bills for several years."<sup>\*22</sup> Further, *Billboard* reports that "[the amendment] was not requested by any member of Congress. Instead, it was apparently inserted into a final conference report of the Satellite bill by a congressional staffer at the request of the RIAA."<sup>\*23</sup>

As a result of these events, Congress is reconsidering the work-for-hire amendment. Representative Howard Coble, Chairman of the House Subcommittee on Intellectual Property, and other House members have called for hearings to review the amendment and its impact on recording artists.<sup>\*24</sup> Though Representative Coble told *Billboard* that the artist community may be "overreacting," he then said "I may be wrong, and if I'm convinced of that, we can go back to the drawing board."<sup>\*25</sup> Another important participant in the development of copyright law, the Register of Copyrights, Marybeth Peters, expressed concern "that [the work-for-hire amendment] was suggested in the middle of the night . . . obviously . . . without input from performers."<sup>\*26</sup> Peters added that "I have also been asked if this is a technical amendment. The answer is no."<sup>\*27</sup>

Regardless of whether Congress repeals the work-for-hire amendment, artists still have a good argument that the amendment affects only those sound recordings created after November 29, 1999. The Supreme Court has held that all acts of Congress

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\*19. See Bill Holland, *Congress Faces Music Biz Issues*, BILLBOARD, Feb. 12, 2000, at 1, 66.

\*20. *Id.* at 66.

\*21. See Holland, *supra* note 18, at 75.

\*22. *Id.*

\*23. *Id.* According to *Billboard*, that staffer "has been hired by the RIAA as its new Washington lobbyist." Bill Holland, *Newsline*, BILLBOARD, Feb. 19, 2000, at 87; see also Judy Sarasohn, *Special Interests: Of Revolving Doors and Turntables*, WASH. POST, Feb. 17, 2000, at A29.

\*24. See Holland, *supra* note 18, at 75.

\*25. *Id.*

\*26. *Id.*

\*27. *Id.*

presumptively apply prospectively from the effective date of enactment,<sup>\*28</sup> especially acts “affecting contractual or property rights.”<sup>\*29</sup> Without explicit statutory language or legislative history manifesting retroactive intent, courts will decide cases using the law that existed at the time the facts of each particular case occurred.<sup>\*30</sup> Accordingly, in cases addressing whether sound recordings created before November 29, 1999 are works-for-hire, courts will ignore the work-for-hire amendment because it applies only to sound recordings created after November 29, 1999.<sup>\*31</sup>

Given the prospective application of legislation, the work-for-hire amendment does not render moot this Note’s analysis and conclusions. This Note’s conclusion that courts should not consider sound recordings to be works-for-hire remains applicable to the many valuable sound recordings created between January 1, 1978 and November 29, 1999. Additionally, the fact that Congress clarified the definition of “work made for hire” in 1999 adds support to the premise of this Note’s argument—that the work-for-hire definition was previously unclear, and therefore open for judicial interpretation.<sup>\*32</sup>

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\*28. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994).

\*29. *Id.* at 271.

\*30. See *id.* at 265-66, 270.

\*31. See *Hull*, *supra* note \*15, at 4.

\*32. Courts are very hesitant to infer the intent of an earlier Congress from legislation by a later Congress claiming to clarify the earlier Congress’s intent, see *Cippollone v. Liggett Group, Inc.*, 505 U.S. 504, 520 (1992), and therefore a court would be within its power to disagree with the 106th Congress’s interpretation of the 1976 Copyright Act. This Note does not go so far as to suggest that the 1999 amendment itself proves that sound recordings were not works-for-hire before November 29, 1999, but instead makes the proposition that sound recordings are not works-for-hire based on the equitable principles, legal precedent, and policies that aid interpretation of the 1976 Act..

2000]

*RIGHT OF TERMINATION*

1027

March 24, 2000

## I. INTRODUCTION

Undiscovered musical artists frequently sign recording contracts, and subsequently reach high levels of success as recording artists without sharing substantially in the profits generated by their success.<sup>1</sup> Certainly, record companies deserve a large share of the profits that artists' works generate because the companies risk huge investments in unknown artists' careers.<sup>2</sup> To offset the financial risk, record companies require artists to assign ownership of their sound recording copyrights<sup>3</sup> to the record company in exchange for a "record deal."<sup>4</sup>

The 1976 Copyright Act allows artists to recapture their copyrights thirty-five years after a contractual assignment by "termination" of the assignment.<sup>5</sup> If exercised, the right of termination causes all rights in the work to revert to the artist or his heirs.<sup>6</sup> Congress intended the right of termination to be a safeguard for new artists who assign their copyrights at a time when they cannot know the future value of their work, and their bar-

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1. See DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 114-15 (1997). According to Passman, a typical new artist's royalty rate yields \$0.96 on a \$10.98 cassette. After Passman's estimated recording and promotional costs are deducted, the artist earns only \$0.12 per cassette on 500,000 units sold. See also Joseph B. Anderson, *The Work Made for Hire Doctrine and California Recording Contracts: A Recipe for Disaster*, 17 HASTINGS COMM. & ENT. L.J. 587, 593-94 (1995).

2. See *Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585, 587 (Tenn. Ct. App. 1980) (noting that if a record does not succeed, the record company bears the loss from the costs of producing, manufacturing, promoting, and marketing the record); SIDNEY SHEMEL & M. WILLIAM KRASILOVSKY, *THIS BUSINESS OF MUSIC* 12 (6th ed. 1990).

3. Sound recording copyrights are a federally recognized property right in an artist's creative output embodied on a record. See 17 U.S.C. § 102(a)(7) (1994); SHEMEL & KRASILOVSKY, *supra* note 2, at 39 (defining the sound recording); *id.* at 133 (defining the copyright). Although many types of non-musical sound recordings can be copyrighted, the term "sound recording" when used in this Note refers to a musical sound recording. The artist's instrumental and vocal rendering of a musical composition is the subject matter of a sound recording copyright. The copyright in the underlying musical composition—that is the musical notes and lyrics on the sound recording—is a separate work with a separate copyright. See 17 U.S.C. § 102(a)(2); SHEMEL & KRASILOVSKY, *supra* note 2, at 39. A music publishing company usually owns the composition copyright under an assignment from its composer, see SHEMEL & KRASILOVSKY, *supra* note 2, at 176, or as a result of a work-for-hire agreement signed by the composer, see Anderson, *supra* note 1, at 588, 592. Work-for-hire clauses in music publishing contracts may be unenforceable, but that question is beyond the scope of this Note.

4. See SHEMEL & KRASILOVSKY, *supra* note 2, at 3, 12-13 (describing the exchange known as a "record deal").

5. See 17 U.S.C. § 203(a)(3) (1994).

6. See *id.* § 203(b).

gaining power is limited.<sup>7</sup> The right of termination gives these artists a chance to negotiate a second sale of their copyrights at a time when they have greater bargaining power and greater knowledge of the value of their work.<sup>8</sup>

Because works-for-hire are not subject to this right of termination,<sup>9</sup> record companies prefer that their ownership of sound recording copyrights be by work-for-hire rather than by assignment.<sup>10</sup> Unfettered by the right of termination, a record company's ownership of a work-for-hire copyright endures for the life of the copyright, which is sixty to eighty-five years longer than the company's ownership of a copyright terminated thirty-five years after assignment.<sup>11</sup>

The work-for-hire exception applies to two types of situations in which an artist creates copyrightable works at the direction of another. First, the work of an employee created within the scope of employment is a work-for-hire.<sup>12</sup> Second, an independent

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7. See *Mills Music v. Snyder*, 469 U.S. 153, 172-73 (1985); H.R. REP. NO. 94-1476, at 124 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5740; STAFF OF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 53-54 (Comm. Print 1961), reprinted in 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 1976) [hereinafter REGISTER'S REPORT] ("The primary purpose of this provision was to protect the author and his family against unprofitable or improvident disposition of the copyright.").

8. The reclaimed copyright "was intended to revert to [the author or his heirs] so that they could negotiate new contracts for the further exploitation of the work." REGISTER'S REPORT, *supra* note 7, at 53. "There are no doubt many assignments that give the author less than his fair share of the revenue actually derived from his work. Some provision to permit authors to renegotiate their disadvantageous assignments seems desirable." *Id.* at 54.

9. See 17 U.S.C. § 203(a). According to the Copyright Act of 1976, ownership of a copyright "vests initially in the author or authors of a work," but "in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author." *Id.* § 201(a)-(b). If the employing or commissioning party is the author and concomitant owner of the copyright, then there is no copyright assignment to be terminated. See *PASSMAN*, *supra* note 1, at 288-89.

10. See *Works-Made-For-Hire—Practical Perspectives A Roundtable Discussion*, 14 COLUM.-VLA J.L. & ARTS 507, 509 (1990) [hereinafter *Roundtable Discussion*] (statement of Irwin Karp, discussion moderator).

11. The life of a work-for-hire copyright is 95 years from the date of publication or 120 years from the date of creation, whichever period expires first. See 17 U.S.C. § 302(c) (1994 & Supp. IV 1998), as amended by Copyrights—Term Extension and Music Licensing Exemption Act, Pub. L. No. 105-298, tit. I, sec. 102(b)(3), 112 Stat. 2827, 2827 (1998). In most situations, publication occurs shortly after creation, meaning that the company's ownership of a work-for-hire copyright endures for sixty years longer than the company's ownership of an assigned copyright, which terminates thirty-five years after assignment.

12. See 17 U.S.C. § 101(1) (1994) (definition of "work made for hire"). This Note will refer to the first work-for-hire exception as the "employment prong." Whether a person is an employee depends on many factors derived from the common law of agency. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989); *Aymes v. Bonelli*, 980

contractor's work is a work-for-hire if the parties agree in writing that the work is a work-for-hire, and the work is ordered or commissioned for one of nine specific uses.<sup>13</sup>

Recording artists' works are not works-for-hire because the typical artist is not a record company employee<sup>14</sup> and sound recordings are not one of the types of commissioned works eligible for work-for-hire status.<sup>15</sup> Nonetheless, record contracts frequently include clauses stating that the artist is a record company employee and/or that all the artist's work is commissioned as work-for-hire.<sup>16</sup> The law clearly indicates that these work-for-hire clauses have no effect regarding whether the objective work-for-hire requirements are met; courts instead look to the actual relationship between the parties.<sup>17</sup>

While artists may currently dispute the record companies' assertion of work-for-hire status, the companies still own the artists' copyrights. If the artists successfully challenge work-for-hire status, however, the companies' ownership would be by as-

F.2d 857, 860 (2d Cir. 1992); *Marco v. Accent Publ'g Co.*, 969 F.2d 1547, 1550 (3d Cir. 1992).

13. See 17 U.S.C. § 101(2) (definition of "work made for hire"):

[A] work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

*Id.* This Note will refer to the second work-for-hire exception as the "commissioned works prong."

14. See *infra* Part II.A.

15. See *infra* Part II.B.

16. See Anderson, *supra* note 1, at 588, 592. A representative work-for-hire clause states:

Artist hereby acknowledges and agrees that the Artwork created by Artist [hereunder is] work made for hire in that (i) it is prepared within the scope of Company's employment of Artist hereunder and/or (ii) it constitutes a work specifically ordered by Company for use as a contribution to a collective work.

1 COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 1995, at 39 para. 6(a) (PLI 1995) [hereinafter ENTERTAINMENT INDUSTRY 1995] (sample recording agreement); see also SHEMEL & KRASILOVSKY, *supra* note 2, at 654 para. 8 (sample recording agreement stating "that [artist] acknowledge[s] that your performances in the sound recordings hereunder were made for hire within the scope of your employment and that [company is] to be considered the author for purposes of copyrights").

17. See *Eliscu v. T.B. Harms Corp.*, 151 U.S.P.Q. 603, 603-04 (N.Y. Sup. Ct. 1966) (holding that the contractual phrase "we engage and employ you" does not make artist an employee); 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 11.02[A][2] (1998) [hereinafter NIMMER]; Robert A. Kreiss, *Scope of Employment and Being an Employee Under the Work-Made-For-Hire Provision of the Copyright Law: Applying the Common-Law Agency Tests*, 40 U. KAN. L. REV. 119, 146 (1991) (noting that the Copyright Act, and not the contract, determines whether a work is "made for hire").

signment rather than by work-for-hire.<sup>18</sup> Artists' rights to terminate these copyright assignments will begin vesting in year 2013, thirty-five years after the first assignments were made under the revised Copyright Act.<sup>19</sup> Accordingly, the issue of enforceability of work-for-hire clauses will ripen in 2013, because artists attempting to exercise their rights of termination must prove that record companies own their work by virtue of terminable assignments instead of by work-for-hire doctrine.<sup>20</sup>

Artists will argue that the record company/recording artist relationship<sup>21</sup> does not give rise to a work-for-hire copyright under the employment prong and the use of the sound recording does not give rise to a work-for-hire copyright under the commissioned works prong. Moreover, artists will argue that a finding that the inalienable right of termination could be contractually circumvented by superficial work-for-hire language would violate statutory policy.<sup>22</sup> If work-for-hire clauses are unenforceable, then record companies are not permanent copyright owners, but merely holders of copyright assignments subject to termination beginning in year 2013. Litigation between record companies and artists concerning valuable streams of copyright royalty revenue could arise as early as 2003, the beginning of a ten year period during which artists must serve notice of their intent to terminate.<sup>23</sup>

Part II of this Note applies the employment prong and commissioned works prong of work-for-hire doctrine to the company/artist relationship to show that recording artists' works are

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18. See *Greenwich Film Prods. v. DRG Records, Inc.*, 25 U.S.P.Q.2d 1435, 1437-38 (S.D.N.Y. 1992); *Frost Belt Int'l Recording Enters., Inc. v. Cold Chillin' Records*, 758 F. Supp. 131, 136-37 (S.D.N.Y. 1990); 1 NIMMER, *supra* note 17, § 5.03[B][1][b][ii] text accompanying nn.98.1 & 99; 1 WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 380 n.89 (1994).

19. See William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread from Authors*, 14 CARDOZO ARTS & ENT. L.J. 661, 681 (1996). Termination rights are applicable to assignments made after January 1, 1978. See 17 U.S.C. § 203(a) (1994).

20. See *Roundtable Discussion*, *supra* note 10, at 538 (statement of Stanley Rothenberg, Esq., author and practitioner in the field of copyright, that "[work-for-hire] issues will only come up at the time that the writer asserts his reversion, which presently means it won't come up for another twenty-five years at least").

21. This Note will refer to this relationship as the "company/artist relationship."

22. "Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant." 17 U.S.C. § 203(a)(5). "To give full effect to the primary purpose of the reversionary provision would seem to require that the renewal right be made unassignable in advance." REGISTER'S REPORT, *supra* note 7, at 53-54.

23. See 17 U.S.C. § 203(a)(4)(A).

not properly works-for-hire within the meaning of the statute.<sup>24</sup> Part III of this Note examines the language within the typical recording contract and demonstrates that some contractual provisions contradict the record companies' position that artists' works are works-for-hire. Part IV examines the unique legislative history and congressional policies behind the work-for-hire and right of termination provisions. This legislative history buttresses the conclusion that artists' works are not works-for-hire. Part V determines that record companies are likely to lose lawsuits brought by artists beginning in 2013, and concludes that renegotiation of the artist's royalty rate would best effectuate the interests of both parties.

## II. APPLYING WORK-FOR-HIRE DOCTRINE TO THE RECORDING ARTIST/RECORD COMPANY RELATIONSHIP

The 1976 Copyright Act divides laborers into two categories to determine whether their work is work-for-hire: employees and independent contractors.<sup>25</sup> Whether a laborer is an employee or an independent contractor is a threshold determination that directs a court to the appropriate subsection of the work-for-hire definition in 17 U.S.C. § 101 for consideration of other statutory requirements.<sup>26</sup> The finding that a laborer is an employee results in the conclusion that the copyright in the work of that laborer is a work-for-hire copyright.<sup>27</sup> The finding that a laborer is an independent contractor may result in the conclusion that the copyright is a

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24. This Note attempts to consider the effects of the most common characteristics of the company/artist relationship on the work-for-hire analysis. This Note's thesis may not be applicable to all company/artist relationships because these relationships vary greatly across companies, between different artists, and through time.

25. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 742-43, 750-51 (1989). The Supreme Court has eliminated a longstanding theory of interpretation that certain independent contractors could be considered statutory employees depending on the hiring party's degree of control over their work. See *id.* at 741-42. For a detailed discussion of the disagreeing interpretations of work-for-hire doctrine preceding *Reid*, see Anne Marie Hill, Note, *The "Work for Hire" Definition in the Copyright Act of 1976: Conflict Over Specially Ordered or Commissioned Works*, 74 CORNELL L. REV. 559, 571-86 (1989), and Mamie Deaton Lucas, Note, *Copyright, Independent Contractors, and the Work-For-Hire Doctrine: Community for Creative Non-Violence v. Reid*, 67 N.C. L. REV. 994, 1002-08 (1989).

26. See *Respect, Inc. v. Committee on the Status of Women*, 815 F. Supp. 1112, 1119 (N.D. Ill. 1993).

27. See 17 U.S.C. § 101(1) (definition of "work made for hire"); see also *infra* Part II.A.

work-for-hire copyright, provided additional statutory requirements are met.<sup>28</sup>

The finding that an artist's work is not a work-for-hire is the indispensable prerequisite to the artist's right to terminate because a work-for-hire is not subject to termination under the copyright law.<sup>29</sup> This Note separately considers and rejects the argument that the recording artist is a record company employee under the employment prong in 17 U.S.C. § 101(1), and the alternative argument that the recording artist is an independent contractor whose work meets the requirements of the commissioned works prong in 17 U.S.C. § 101(2).<sup>30</sup>

*A. Is the Recording Artist an Employee of the Record Company Under the Employment Prong of Work-For-Hire Doctrine in 17 U.S.C. § 101(1)?*

If a hired party<sup>31</sup> is an employee according to the common law of agency, then § 101(1) applies, and all the party's works created within the scope of employment are works-for-hire.<sup>32</sup> Whether a hired party is an employee rests on an examination of many factors set forth by the common law of agency and the Supreme Court.<sup>33</sup> No factor alone is determinative,<sup>34</sup> and courts weigh

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28. See 17 U.S.C. § 101(2) (definition of "work made for hire"); see also *infra* Part II.B.

29. See *supra* note 9.

30. In much work-for-hire litigation, the appropriate work-for-hire category is clear or uncontested. See, e.g., *Quintanilla v. Texas Television, Inc.*, 139 F.3d 494, 497-98 (5th Cir. 1998); *Lulirama Ltd. v. Axxcess Broad. Servs., Inc.*, 128 F.3d 872, 877 (5th Cir. 1997); *Hi-Tech Video Prods., Inc. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093, 1095 (6th Cir. 1995); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1492 (11th Cir. 1990); *Playboy Enters., Inc. v. Dumas*, 831 F. Supp. 295, 312 (S.D.N.Y. 1993). Because the company/artist situation has not yet been litigated, this Note examines both work-for-hire prongs, assuming both will be argued either in separate litigation or alternatively in the same case.

31. In accordance with judicial opinions and literature on the subject, this Note hereinafter uses the terms "hiring party" and "hired party" to define the parties to the potential work-for-hire relationship.

32. 17 U.S.C. § 101(1) (definition of "work made for hire"); *Reid*, 490 U.S. at 750-51.

33. The Supreme Court in *Reid* listed thirteen factors, mostly derived from the RESTATEMENT (SECOND) OF AGENCY § 220. *Reid*, 490 U.S. at 751-52 (listing (1) the hiring party's right to control the manner and means of production; (2) the skill required of the hired party; (3) the source of the hired party's instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional work; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) whether the hiring party provides employee benefits; and (13) the tax treatment of the hired party). Correctly

the factors differently depending on the circumstances of the case.<sup>35</sup>

### 1. Right to Control and Actual Control of Production

Factors that suggest the existence of an employment relationship include the hiring party's right to control and actual control over the hired party's work process.<sup>36</sup> Courts are more likely to classify recording artists with little creative control over their recordings as employees than artists with great creative control.<sup>37</sup> Established artists retain creative control over their albums, within certain contractual style parameters.<sup>38</sup> A new artist retains less creative control, although the artist may select the songs recorded, choose the producer, and make other creative decisions subject to record company approval.<sup>39</sup>

In practice, record companies give many artists—both established and unestablished—a “substantial voice” in selecting

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interpreting the *Reid* Court's list as non-exhaustive, the Third Circuit Court of Appeals added four more factors to the list. See *Marco v. Accent Publ'g Co.*, 969 F.2d 1547, 1550 (3d Cir. 1992) (adding (14) actual control over the details of the work; (15) the hired party's occupation; (16) local custom; and (17) the parties' understanding about the nature of their relationship); see also Kreiss, *supra* note 17, at 157-204 (considering the work-for-hire ramifications of all common law agency factors); Corey L. Wishner, Note, *Whose Work is it Anyway?: Revisiting Community for Creative Non-Violence v. Reid in Defining the Employer-Employee Relationship Under the “Work Made for Hire” Doctrine*, 12 HOFSTRA LAB. L.J. 393, 402-15 (1995) (examining the common law agency factors that have been applied in significant work-for-hire cases). This Note compiles similar employment prong factors into groups in order to attain a logical flow in the discussion.

34. See *Reid*, 490 U.S. at 752.

35. See, e.g., *Hi-Tech*, 58 F.3d at 1099; *Respect, Inc. v. Committee on the Status of Women*, 815 F. Supp. 1112, 1117-18 (N.D. Ill. 1993). The court in *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992), declared that a core group of factors should predominate the inquiry in all cases, but the Supreme Court has not adopted this approach. See *Respect*, 815 F. Supp. at 1118 n.11.

36. See *Marco*, 969 F.2d at 1550. Although actual control was not expressly listed in *Reid*, the Court considered it. See *id.* at 1550 n.4. Actual control often demonstrates right to control; thus the analyses of the two factors are virtually indistinguishable. See *Reid*, 490 U.S. at 750 n.17.

37. See *Marco*, 969 F.2d at 1552. In *Marco*, the hired photographer controlled camera settings, light, and film processing techniques. *Id.* at 1551-52. The hiring party's supervision and control of the subject matter and composition of photographic images did not give rise to an employment relationship. See *id.*

38. See *PASSMAN*, *supra* note 1, at 125-26.

39. See *SHEMEL & KRASILOVSKY*, *supra* note 2, at 3, 9; see, e.g., *ENTERTAINMENT INDUSTRY 1995*, *supra* note 16, at 30 para. 4(a) (sample recording agreement requiring the artist to submit the name of a record producer and the songs to be recorded for company approval); *id.* at 58 para. 18(a)-(b) (sample recording agreement giving the artist the right to approve singles).

the songs to be recorded.<sup>40</sup> Moreover, many artists exercise creative control by writing the compositions they record for their albums.<sup>41</sup> In fact, a record company often does not exercise many of its control rights because the company views its relationship with an artist as a “creative partnership,” in which confidence in and deference to the artist’s opinions promote relational goodwill.<sup>42</sup> Accordingly, both the contractual and the actual allocation of control in the company/artist relationship often weigh against finding that the artist is a record company employee.

The record producer’s degree of independence from the record company suggests that the company has little control over production. Since the late 1970s, much of sound recording production has been controlled by independent record producers who are given “carte blanche [control] as to supervision of sessions and post-production editing of tapes.”<sup>43</sup> Sometimes, artists even produce or co-produce their own recordings, suggesting that the artist has a great deal of control over the record.<sup>44</sup> When a court seeks to determine whether an employment relationship exists, the right-to-control factor favors self-produced or independently produced artists because creative control lies with the artist, or at least outside the hands of the record company.<sup>45</sup>

Although record companies often retain a right to approve the finished product, in weighing the right-to-control factor, courts are more concerned with control over detail decisions rather than

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40. SHEMEL & KRASILOVSKY, *supra* note 2, at 3, 9.

41. *See id.* at 9.

42. Katherine Woods, Esq., Director of Legal and Business Affairs, RCA Label Group, *Legal Problems in the Music Industry*, seminar conducted at Vanderbilt University School of Law (Feb. 25, 1999) (notes on file with author).

43. SHEMEL & KRASILOVSKY, *supra* note 2, at 49. Record producers “participate significantly in choosing appropriate musical material and in selecting and supervising arrangers, accompanists, studios, and engineers.” *Id.* at 50. A producer’s creative contribution would entitle him to a share of the copyright, *see* SHEMEL & KRASILOVSKY, *supra* note 2, at 40, but record companies require producers to sign work-for-hire agreements similar to those that artists sign, *see Roundtable Discussion, supra* note 10, at 526 (statement of Charles Sanders, representative of the National Music Publishers Association). Producers’ work-for-hire agreements, however, may be unenforceable for the same reasons that artists’ work-for-hire agreements may be unenforceable. Producers and artists may need to act together in order to terminate the assignment of a copyright in a joint work according to 17 U.S.C. § 203(a)(1). *See* Randy S. Frisch & Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 COLUM.-VLA J.L. & ARTS 211, 228 (1993).

44. *See* SHEMEL & KRASILOVSKY, *supra* note 2, at 12, 49.

45. *See* *Forward v. Thorogood*, 985 F.2d 604, 606-07 (1st Cir. 1993). Even though the hiring party told the hired band what songs to record, he made no artistic contribution because “[the hiring party] did not serve as the engineer at the sessions or direct the manner in which the songs were played or sung.” *Id.* at 607.

control over general objectives.<sup>46</sup> A company's right to approval is often found in a contractual requirement that an artist's work be "technically satisfactory," or the more stringent "commercially satisfactory."<sup>47</sup> The former requirement favors the artist because it requires only that the recording be of technical quality and clarity sufficient for reproduction.<sup>48</sup> Although the latter requirement allows the company to make the artist re-record songs that the company feels are commercially unacceptable, the right to accept or reject the finished product is much less significant than close supervision of creation and should not lead a court to conclude that an employment relationship exists.<sup>49</sup>

The Supreme Court has rejected the notion that a hired party can be an employee based on the control factor alone.<sup>50</sup> Con-

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46. See, e.g., *Hi-Tech Video Prods., Inc. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093, 1097 (6th Cir. 1995). The hiring party in *Hi-Tech* had control over "artistic objectives," but the court found that the importance of this fact was diminished by the "[high level] of the skill required of the [hired party], as well as the [hired party's] artistic contributions to the product." *Id.* Though the hiring party in another case did have a "limited kind of input to the [work]—for example, by suggesting revisions . . . [i]t was [the hired party] and not [the hiring party] who was responsible for the [work's] content and flavor." *Respect, Inc. v. Committee on the Status of Women*, 815 F. Supp. 1112, 1118 (N.D. Ill. 1993).

47. See *PASSMAN*, *supra* note 1, at 125.

48. See *Anderson*, *supra* note 1, at 597.

49. A hiring party's right to final approval does not make a hired party an employee. See *Lulirama Ltd. v. Axxess Broad. Servs., Inc.*, 128 F.3d 872, 874, 877 (5th Cir. 1997) (agreeing that the hired party was an independent contractor though there was a requirement that advertising jingles be approved by the hiring party); *Marco v. Accent Publ'g Co.*, 969 F.2d 1547, 1550-51 (3d Cir. 1992) (finding independent contractor status despite a hiring party's right to final approval of photographs). *But see Anderson*, *supra* note 1, at 597. In making the argument that artists should be entitled to minimum wage under California law, Professor Anderson suggests that the commercial satisfaction requirement is enough control to make the artist an employee under California labor law. See *id.* The result is arguably different under the common law of agency. Applying the common law, the Third Circuit Court of Appeals in *Marco v. Accent Publishing Co.* found that despite the hiring party's right to make a hired photographer reshoot unsatisfactory images, the hired photographer was not an employee. *Marco*, 969 F.2d at 1550-51.

50. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 741-43 (1989). An argument usually made by the hiring party after the work-for-hire control test fails is that a significant degree of control makes the hiring party joint author of the hired party's work (making it a "joint work"). See *id.* at 753; *Marco*, 969 F.2d at 1553; *Respect*, 815 F. Supp. at 1119. Joint authorship requires a "material" creative contribution, like that of a record producer. *SHEMEL & KRASILOVSKY*, *supra* note 2, at 194; *Quintanilla v. Texas Television, Inc.*, 139 F.3d 494, 499 n.24 (5th Cir. 1998); *Easter Seal Soc'y for Crippled Children & Adults, Inc. v. Playboy Enters., Inc.*, 815 F.2d 323, 337 (5th Cir. 1987); H.R. REP. NO. 94-1476, at 56 (1976), *reprinted in* 1976 U.S.C.A.N. 5659, 5669; see *supra* note 43. A record company's contributions are probably not sufficient for joint authorship, unless record company personnel produce the record. See *Forward v. Thorogood*, 985 F.2d 604, 607 (1st Cir. 1993); *SHEMEL & KRASILOVSKY*, *supra* note 2, at 194; *Frisch & Fortnow*, *supra* note 43, at 226-27. Regardless, joint ownership would be a vast improvement over work-for-hire because the artist would own half the copyright, thereby having the right to exploit the

control is just one factor to be weighed along with many others in determining whether an artist is a record company employee.<sup>51</sup>

## 2. Structure of Work and Compensation

Courts consider specific aspects of the structure of the artist's work and compensation to determine whether the hired party is an employee. These aspects include the hiring party's discretion over when and how long the hired party works, the hiring party's right to assign additional projects to the hired party, and the method of payment.<sup>52</sup> Unstructured work hours and lump-sum payment on a job-by-job basis suggest that the recording artist is an independent contractor, while periodic pay for projects assigned during normal work hours indicates that the recording artist is an employee.<sup>53</sup>

One factor suggesting that artists are not employees is the highly unpredictable duration of their relationships with record companies.<sup>54</sup> Likewise, an employment relationship is refuted by the artist's work hours, which are not standard and are scheduled at the artist's discretion.<sup>55</sup> Although record companies impose final album deadlines,<sup>56</sup> deadlines do not indicate employment because

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work and keep half of any profits earned by exploitation. See 17 U.S.C. § 201(a) (1994); *Easter Seal*, 815 F.2d at 337 (finding that even if the hiring party had successfully established joint ownership of video tapes filmed by an independent contractor, the independent contractor would have a unilateral right to exploit the tapes as a co-owner of the copyright); SHEMEL & KRASILOVSKY, *supra* note 2, at 260 (explaining that joint copyright owners must account to each other, which means they must equally share all royalties).

51. See *Marco*, 969 F.2d at 1551; *Easter Seal*, 815 F.2d at 335-36.

52. See *Reid*, 490 U.S. at 751.

53. See *Wishner*, *supra* note 33, at 407, 410-11.

54. The record company unilaterally decides whether to make another album with the artist at the end of each "option period." A new artist's record contract requires between six and ten option periods. See SHEMEL & KRASILOVSKY, *supra* note 2, at 3-6. An option period might last eighteen months, binding the artist to the company for a total of nine to fifteen years. See PASSMAN, *supra* note 1, at 121; SHEMEL & KRASILOVSKY, *supra* note 2, at 123 (stating that "[successful] artists tend to spend their entire career at one company"). However, the company/artist relationship ceases anytime the record company decides to release the artist. An artist's request for early release may be granted under certain conditions. See PASSMAN, *supra* note 1, at 129-30; see, e.g., ENTERTAINMENT INDUSTRY 1995, *supra* note 16, at 42 para. 7(a) (sample recording agreement).

55. The record contract sets forth the minimum number of records required of the artist per year, but does not require the artist to work any particular hours or on any schedule of completion. See SHEMEL & KRASILOVSKY, *supra* note 2, at 14-15; see, e.g., ENTERTAINMENT INDUSTRY 1995, *supra* note 16, at 30 para. 4(a) (sample recording agreement requiring the artist to "schedule and conduct recording sessions").

56. See, e.g., ENTERTAINMENT INDUSTRY 1995, *supra* note 16, at 21-22 para. 2(a), (c) (sample recording agreement setting forth number of albums and album delivery deadlines).

deadline restrictions are no different between independent contractors and employees.<sup>57</sup>

A hiring party's right to assign additional work favors the finding that the hired party is an employee.<sup>58</sup> In most record contracts, record companies reserve the right to assign work in the form of additional recordings or video performances. However, record contracts often limit these rights,<sup>59</sup> making them much narrower than the open-ended right to assign work that exists in many formal employment situations.

Record companies pay artists for their services by the job like independent contractors rather than employees.<sup>60</sup> Companies pay artists by the album in the form of recoupable advances or recording budgets.<sup>61</sup> Royalties paid to artists after record companies recoup the recording costs and advances<sup>62</sup> are not like employee wages. Instead, the royalty method of payment "generally weighs against finding a work-for-hire relationship."<sup>63</sup> Record companies do not pay artists benefits, provide workers' compensation or unemployment insurance, or withhold taxes and social security as they do for their true employees.<sup>64</sup> The failure to treat hired parties as employees for payroll purposes weighs significantly against finding an employment relationship, and is, in one court's opinion, a "virtual admission" that the hired party is not an employee.<sup>65</sup> The structure of the work relationship, evidenced by the

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57. The deadline for completion of Mr. Reid's sculpture did not affect the Supreme Court's finding that Mr. Reid was an independent contractor. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 753 (1989). The court in *Marco* directly stated that "deadlines do not alter an independent contractor's discretion over work hours." *Marco v. Accent Publ'g Co.*, 969 F.2d 1547, 1550 (3d Cir. 1992).

58. See *Marco*, 969 F.2d at 1551.

59. See, e.g., ENTERTAINMENT INDUSTRY 1995, *supra* note 16, at 58 para. 19 (sample recording agreement providing that the decision to make videos will be "mutual" between artist and company); 1 COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 1994, at 143-44 para. 3(a)-(b) (PLI 1994) [hereinafter ENTERTAINMENT INDUSTRY 1994] (sample recording agreement allowing the record company to request only one additional album per option period).

60. Mr. Reid was paid upon "completion of a specific job, a method by which independent contractors are often compensated." *Reid*, 490 U.S. at 753 (quoting *Holt v. Winpisinger*, 811 F.2d 1532, 1540 (D.C. Cir. 1987)).

61. See *PASSMAN*, *supra* note 1, at 111-12 (explaining recording funds and advances).

62. See *SHEMEL & KRASILOVSKY*, *supra* note 2, at 3-4 (explaining royalties and recoupment).

63. *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 555 (2d Cir. 1995).

64. See *Frisch & Fortnow*, *supra* note 43, at 219.

65. *Aymes v. Bonelli*, 980 F.2d 857, 862 (2d Cir. 1992). "The importance of [payroll treatment] is underscored by the fact that every case since *Reid* that has applied the test

absence of proper payroll treatment, a job-by-job payment structure, and unstructured, non-traditional work hours, indicates that the company/artist relationship is not an employment relationship.<sup>66</sup>

### 3. Financial and Logistical Responsibilities

Many courts consider a hired party to be an independent contractor if he provides his own tools and work facilities, and is responsible for hiring and paying assistants.<sup>67</sup> Although recording artists provide their own musical instruments and sheet music, the record company pays all recording and editing costs, pays for or provides a studio, and pays fees for accompanying musicians and engineers.<sup>68</sup> The company's absorption of these production expenses favors the finding of an employment relationship,<sup>69</sup> but some courts have found financial assistance an insignificant indicator of employment.<sup>70</sup> Moreover, many record contracts require the artist to select and secure contracts with the producer and other assistants, schedule recording sessions,<sup>71</sup> and pay the pro-

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has found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes." *Id.* at 863.

66. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 753 (1989).

67. See *id.* at 752-53.

68. See *SHEMEL & KRASILOVSKY*, *supra* note 2, at 3.

69. See RESTATEMENT (SECOND) OF AGENCY § 220(2) cmt. k (1958); *Wishner*, *supra* note 33, at 406. An argument favoring artists is that successful artists effectively bear their recording costs because record contracts allow record companies to recoup the entire recording budget against the artist's royalties. See *Anderson*, *supra* note 1, at 590-92 (explaining recoupment and how an artist ultimately pays for the cost of an album); *Frisch & Fortnow*, *supra* note 43, at 220; see, e.g., ENTERTAINMENT INDUSTRY 1994, *supra* note 59, at 150 para. 8(b) (sample recording agreement stating that the "[artist] shall be solely responsible for and shall pay all recording costs incurred in the production of masters"). The weakness of this argument is the fact that record companies risk large recording budgets and never recoup on records that do not produce any royalties. See *SHEMEL & KRASILOVSKY*, *supra* note 2, at 5; *Anderson*, *supra* note 1, at 591-92.

70. See *Forward v. Thorogood*, 985 F.2d 604, 606 (1st Cir. 1993). A hiring party booked and paid for a band's studio time, yet was not considered their employer. See *id.* Likewise, despite reimbursement of an author's costs to write a book, the resulting book was not considered a work-for-hire. See *Respect, Inc. v. Committee on the Status of Women*, 815 F. Supp. 1112, 1118 (N.D. Ill. 1993).

71. See *PASSMAN*, *supra* note 1, at 139; see, e.g., ENTERTAINMENT INDUSTRY 1995, *supra* note 16, at 30 para. 4(a)-(b) (sample recording agreement stating that the "artist shall schedule and conduct recording sessions . . . [and] engage artists, producers, musicians, recording studios and other personnel and facilities for the recording sessions"); ENTERTAINMENT INDUSTRY 1994, *supra* note 59, at 151 para. 9 (sample recording agreement stating that "[e]ach master subject hereto shall be produced by a producer selected by [artist] and approved by [company]").

ducer's royalties.<sup>72</sup> That the artist bears significant financial and logistical responsibilities favors the finding that the artist is not a record company employee.<sup>73</sup>

#### 4. General Nature of the Transaction

If the hired party's activities constitute a distinct skill or occupation of a type that the hiring party does not normally hire employees to perform, then a court is more likely to consider the hired party to be an independent contractor instead of an employee.<sup>74</sup> Artists are highly skilled members of a distinct occupation;<sup>75</sup> their skill set is defined, like the skills of architects and photographers, which distinguishes them from assembly line workers and sales persons.<sup>76</sup> On the other hand, record companies hire artists as a regular matter of their business,<sup>77</sup> a fact that distinguishes *Community for Creative Non-Violence v. Reid*, in which the Supreme Court found a sculptor to be an independent contractor of a charity because the sculpting engagement was a one-time occurrence and not part of the charity's regular business.<sup>78</sup>

The parties' beliefs as to the character of their relationship can inform a court's determination about whether a hired party is an employee under the law of agency.<sup>79</sup> From the ostensible structure of the company/artist relationship, a court can infer that the

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72. Artists usually get an "all-in" royalty, which means that the producer's share of royalties are included in the artist's share and the artist is contractually liable to the producer. See PASSMAN, *supra* note 1, at 110, 139; see, e.g., ENTERTAINMENT INDUSTRY 1994, *supra* note 59, at 151 para. 9 (sample recording agreement stating that the "[artist] shall be solely responsible for and shall pay all monies becoming payable to such producer").

73. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752-53 (1989).

74. See *Marco v. Accent Publ'g Co.*, 969 F.2d 1547, 1551 (3d Cir. 1992).

75. See *Hilton Int'l Co. v. NLRB*, 690 F.2d 318, 322 (2d Cir. 1982) (finding hotel band musicians to be members of a distinct and highly skilled occupation).

76. See *Aymes v. Bonelli*, 980 F.2d 857, 862 (2d Cir. 1992) (noting that other courts have held "architects, photographers, graphic artists, drafters, and indeed computer programmers to be highly-skilled independent contractors"). To be an independent contractor, an artist's skill need not be that of an expert in the field; rather only an ordinary degree of skill is necessary. See *Marco*, 969 F.2d at 1551. A court should examine the "skill necessary to perform the work" instead of the hired party's individual level of expertise. *Aymes*, 980 F.2d at 862.

77. See PASSMAN, *supra* note 1, at 83-85 (explaining that a record company's business centers around selling recorded performances of artists).

78. *Reid*, 490 U.S. at 752-53. Cf. *Marco*, 969 F.2d at 1552 (distinguishing *Reid* because unlike the hiring party in *Reid*, the hiring party in *Marco* was in a regular business, which indicated employment).

79. See *Marco*, 969 F.2d at 1550; Wishner, *supra* note 33, at 408.

parties do not believe they are in an employment relationship.<sup>80</sup> Contractual disclaimers denying any agency or employment relationship and record companies' refusal to treat artists as employees for tax and benefits purposes support this inference.<sup>81</sup>

5. Conclusion: The Recording Artist Is Not an Employee of the Record Company Under the Employment Prong of Work-For-Hire Doctrine in 17 U.S.C. § 101(1)

In reviewing the common law factors, a court would find that record companies treat artists much differently than internal company employees such as receptionists and bookkeepers. Because the courts have adopted a common law rule for determination of the existence or absence of an employment relationship, artists can find support in any decision finding that a hired party is not an employee under the common law agency test.<sup>82</sup> One such strikingly analogous case is *Hilton International Co. v. NLRB*, in which the Second Circuit Court of Appeals found that members of a musical band were not employees of a hotel that hired them for long-term engagements.<sup>83</sup> Like a recording artist, the bandleader scheduled rehearsal and vacation times, selected the musicians, instruments and sheet music, repertoire, style, and tempo, and contracted for a lump-sum payment.<sup>84</sup> Also, the hotel musicians were not subject to the same personnel rules and grievance procedures as were the formal hotel employees.<sup>85</sup> Like a record company, the hotel paid the side musicians and controlled the size of the band, the general type of music, and the location of the band's

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80. Objective observations are useful evidence of the parties' beliefs. See Kreiss, *supra* note 17, at 148-49.

81. See *id.* at 149-50, 173.

82. See *id.* at 136-41, 141 n.81 (noting the common law roots of the agency test). Besides the Copyright Act, many federal statutes use the common law agency test to determine when employment relationships exist, including ERISA, Federal Rules of Evidence, and Internal Revenue Code. See *id.* at 137. Courts have recognized the inter-statutory application of the common law agency test by citing *Reid* in non-copyright contexts. See, e.g., *Mayeske v. International Ass'n of Fire Fighters*, 905 F.2d 1548, 1553-54 (D.C. Cir. 1990); *Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1101-03 (5th Cir. 1990); *Boren v. Sable*, 887 F.2d 1032, 1038 (10th Cir. 1989).

83. *Hilton Int'l Co. v. NLRB*, 690 F.2d 318, 321-22 (2d Cir. 1982). Although having nothing to do with copyright or work-for-hire, the *Hilton* case was cited in *Reid* for its treatment of the common law agency factors. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751, 751 nn.18-19, 752 n.27 (1989).

84. See *Hilton*, 690 F.2d at 321-22.

85. See *id.* at 321.

performances.<sup>86</sup> Nonetheless, these circumstances did not constitute “significant authority” over the musicians’ manner of performance, and the court therefore found that the musicians were not employees.<sup>87</sup>

The close similarity between the hotel/band relationship in *Hilton* and the company/artist relationship suggests that artists are not employees under the employment prong of work-for-hire doctrine. Like the band in *Hilton*, recording artists have both contractual and actual control over their songs and performances. As in *Hilton*, record companies do not pay benefits, and artists bear many financial and logistical responsibilities. In light of the *Hilton* decision, record companies bear a high burden in proving that artists are employees.<sup>88</sup> One prominent copyright scholar broadly states that “parties who hire outsiders are unlikely to be deemed authors under the employee prong of the work-made-for-hire definition.”<sup>89</sup> If a recording artist is not a record company employee according to the common law agency factors, then he is an independent contractor,<sup>90</sup> which implicates the commissioned works prong of work-for-hire doctrine as the next step in the analysis to determine whether an artist’s work is work-for-hire.

*B. Is a Sound Recording Eligible for Work-For-Hire Status Under the Commissioned Works Prong of Work-For-Hire Doctrine in 17 U.S.C. § 101(2)?*

Whereas an employee’s work is always work-for-hire, an independent contractor’s work is not work-for-hire unless the work is commissioned in accordance with the two requirements of 17 U.S.C. § 101(2).<sup>91</sup> First, the independent contractor and the commissioning party must both sign<sup>92</sup> an express agreement<sup>93</sup> stating

86. See *id.* Further indicia of employment present in *Hilton*, but not present in the company/artist relationship, such as payroll tax withholdings, failed to persuade the *Hilton* court that the musicians were hotel employees. *Id.* at 322-23.

87. *Id.* at 321.

88. See *Kreiss*, *supra* note 17, at 148.

89. *Id.*

90. See *supra* notes 25-26 and accompanying text.

91. 17 U.S.C. § 101(2) (1994) (definition of “work made for hire”).

92. See *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 412 (7th Cir. 1992) (finding a work-for-hire agreement invalid because it was signed by only one party).

93. See 17 U.S.C. § 101(2); *Respect, Inc. v. Committee on the Status of Women*, 815 F. Supp. 1112, 1119 (N.D. Ill. 1993); *Greenwich Film Prods. v. DRG Records, Inc.*, 25 U.S.P.Q.2d 1435, 1437 (S.D.N.Y. 1992) (finding that commissioned works are not works-for-hire without an express agreement, although the works in question fell within one of the nine enumerated categories). The writing must precede creation of the work. See *Schiller*,

that the commissioning party has specially ordered or commissioned the work as a work-for-hire,<sup>94</sup> a requirement that most record contracts satisfy.<sup>95</sup> Second, the commissioning party must specially order or commission the work for use as one of nine types of works eligible for work-for-hire status under 17 U.S.C. § 101(2).<sup>96</sup> Of the nine types, only four could possibly reference musical sound recordings.<sup>97</sup> Accordingly, artists' sound recordings are work-for-hire under the commissioned works prong if commissioned by record companies as part of a motion picture or other audiovisual work, as a compilation, as a contribution to a collective work, or as a supplementary work.<sup>98</sup>

### 1. As Part of a Motion Picture or Other Audiovisual Work

A typical artist's sound recording is not a work-for-hire by virtue of being commissioned as part of a motion picture or other audiovisual work.<sup>99</sup> According to the Copyright Act, motion pictures are part of a class called "audiovisual works," which are defined as "a series of related images . . . together with accompanying sounds, if any."<sup>100</sup> A sound recording is "a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work."<sup>101</sup>

969 F.2d at 412-13 (requiring that the work-for-hire agreement precede creation of the work in order to define ownership of intellectual property so that it is "readily marketable"); *Playboy Enters., Inc. v. Dumas*, 831 F. Supp. 295, 314-15 (S.D.N.Y. 1993). Record companies that attempt to acquire previously and independently created master recordings as works-for-hire are "overreaching." *PATRY, supra* note 18, at 380 n.89.

94. See *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 560 (2d Cir. 1995) (holding that the failure to use "work-for-hire" language falls short of the writing requirement). *But see* 1 *NIMMER, supra* note 17, § 5.03[B][2][b] nn.122.7 & 122.8 and accompanying text (holding that the magic words "work-for-hire" are not required if intent to invoke work-for-hire doctrine is abundantly clear).

95. See *supra* note 16 (containing exemplary work-for-hire clauses). Because most record contracts satisfy the first requirement, this Note focuses on the second requirement in analyzing whether an artist's work is work-for-hire under the Copyright Act.

96. See 1 *NIMMER, supra* note 17, § 5.03[B][2][a]; see, e.g., *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1492 (11th Cir. 1990) (finding that architectural works are not one of the nine types of independent contractors' works eligible for work-for-hire status).

97. Irrelevant categories for this Note's purposes are works commissioned "as a translation, as an instructional text, as a test, as answer material for a test, or as an atlas." 17 U.S.C. § 101(2) (1994) (definition of "work made for hire").

98. See *id.*

99. See *PASSMAN, supra* note 1, at 286. A soundtrack created under contract with a film production company is "clearly commissioned for a motion picture." *Greenwich Film Prods. v. DRG Records, Inc.*, 25 U.S.P.Q.2d 1435, 1436, 1437 (S.D.N.Y. 1992).

100. 17 U.S.C. § 101 (definitions of "motion pictures" and "audiovisual works").

101. *Id.* (definition of "sound recordings").

Because a sound recording is defined as something other than an audiovisual work, the two categories must be mutually exclusive. Audiovisual works, therefore, cannot encompass purely audio works.<sup>102</sup> Moreover, Congress separately listed “sound recordings” and “motion pictures and other audiovisual works” as categories of copyrightable subject matter in 17 U.S.C. § 102.<sup>103</sup> To hold that a sound recording could be an audiovisual work would create a redundancy in this neighboring clause of the Act.<sup>104</sup>

Record companies might argue that any sound recording could be used in a music video under the terms of most record contracts, and that this potential for use as part of an audiovisual work triggers the category. However, record contracts only assert the company’s right to make videos and usually expressly negate any specific intention to do so.<sup>105</sup> The absence of any specific intent to use sound recordings in music videos forecloses the record company’s right to claim that sound recordings are commissioned as part of audiovisual works.<sup>106</sup>

## 2. As a Compilation or a Contribution to a Collective Work

A typical artist’s sound recording is not a work-for-hire by virtue of being commissioned as a compilation unless the song or album is a collection of separately preexisting materials.<sup>107</sup> A song

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102. See *Lulirama Ltd. v. Axxcess Broad. Servs., Inc.*, 128 F.3d 872, 878 (5th Cir. 1997) (“That Congress chose to create these separate categories indicates that it recognized a distinction between audiovisual and purely audio works.”).

103. 17 U.S.C. § 102(a)(6)-(7).

104. Courts avoid statutory interpretations that would make neighboring clauses redundant. See *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 256 (1992) (O’Connor, J., concurring).

105. See, e.g., ENTERTAINMENT INDUSTRY 1995, *supra* note 16, at 58 para. 19(a) (sample recording agreement stating that “neither Company nor Artist is under any obligation whatsoever [to make videos]”).

106. Specific intention is probably required by the plain meaning of the statute, which states that a work is a work-for-hire if “specially ordered or commissioned *for use as . . .* an audiovisual work.” 17 U.S.C. § 101 (definition of “work made for hire”) (emphasis added). A court declined to hold that advertising jingles were commissioned as part of audiovisual works because the evidence did not indicate precisely which jingles were commissioned for use on television versus radio. See *Lulirama*, 128 F.3d at 878-79, 879 n.6. Even if a sound recording is clearly commissioned for both a video (audiovisual use) and a phonorecord (purely audio use), which use determines work-for-hire status is unclear. See *id.* at 879 n.6. The purpose of a video is to promote record sales, thus videos are merely by-products of commissioning sound recordings for pure audio uses. See Frisch & Fortnow, *supra* note 43, at 223.

107. The Copyright 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

is a fully integrated work rather than an assembled collection of separately preexisting materials; the parts of a song—such as voice and instrumental—are assembled to form a “unitary” whole.<sup>108</sup>

Likewise, though a record album consists of several individual sound recordings, it is nonetheless an integrated work—a package of songs unified by a common concept.<sup>109</sup> Indeed, under many record contracts, an artist must deliver record albums as a set of master tapes, “completed, fully edited, mixed, leadered and equalized . . . and ready for [the record company’s] manufacture of records.”<sup>110</sup> If the album’s sound recordings are considered a unitary whole, then the album cannot be a compilation, and the songs on the album cannot be contributions to a collective work.<sup>111</sup>

Even if each song on a record is deemed a separate work, a record album may lack the “minimal degree of creativity” necessary to support a compilation or a collective work copyright.<sup>112</sup> The creativity requirement is not met unless there is a discretionary selection and assembly of works from among a greater body of preexisting works.<sup>113</sup> Creativity may be present in an assemblage of some of an author’s works, but creativity is not present in an assemblage of all an author’s works because no selection process

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such a way that the resulting work as a whole constitutes an original work of authorship.” 17 U.S.C. § 101 (definition of “compilation”).

108. STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 68-69 (Comm. Print 1965), *reprinted in* 4 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 1976) [hereinafter COPYRIGHT LAW REVISION PART 6].

109. See Mike Milom, Esq., *Legal Problems in the Music Industry*, seminar conducted at Vanderbilt University School of Law (Jan. 28, 1999) (notes on file with author).

110. ENTERTAINMENT INDUSTRY 1994, *supra* note 59, at 188 para. 24(g) (sample recording agreement).

111. A song is not a contribution to a collective work unless a record album is a collective work. The Copyright 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 in themselves, are assembled into a collective whole.” 17 U.S.C. § 101 (definition of “collective work”). Collective works are a type of compilation whose contributions are individually copyrightable. See *id.* (definition of “compilation”); 1 NIMMER, *supra* note 17, § 3.02 text accompanying nn.10-11.

112. *Feist Publications, Inc. v. Rural Tel. Serv.*, 499 U.S. 340, 345 (1991). *Feist* requires minimal creativity of compilations explicitly and of collective works implicitly because collective works are a type of compilation. See 17 U.S.C. § 101 (definition of “compilation”).

113. See *Feist*, 499 U.S. at 345; 1 NIMMER, *supra* note 17, § 3.02 text accompanying nn.10-14. A collective work does not result “where relatively few separate elements have been brought together,” such as “three one-act plays.” H.R. REP. NO. 94-1476, at 122 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5737.

occurs.<sup>114</sup> An ordinary record album consists of all an artist's newest material recorded explicitly for that album, not an original selection of material from preexisting works,<sup>115</sup> and an album therefore lacks the requisite degree of creativity to garner compilation or collective work status.

### 3. As a Supplementary Work

A sound recording is not a work-for-hire by virtue of being commissioned as a supplementary work unless a song or album is a "secondary adjunct" to another author's work.<sup>116</sup> Record companies discourage sampling,<sup>117</sup> which is reproducing part of another artist's sound recording within one's own.<sup>118</sup> Without sampling or some other multiple artist configuration on a single album, an artist's sound recordings cannot be supplementary works. Sound recordings on an album comprised of various artists' songs are not supplementary works unless a single artist's songs predominate, making the other sound recordings "secondary."<sup>119</sup>

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114. See 1 NIMMER, *supra* note 17, § 3.02 text accompanying nn.13-14.

115. Most record contracts require albums of a single artist's previously unreleased recordings. See PASSMAN, *supra* note 1, at 125; see, e.g., ENTERTAINMENT INDUSTRY 1994, *supra* note 59, at 144 para. 3(c) (sample recording agreement stating that "[e]ach master delivered hereunder shall consist of [artist's] newly recorded studio performances"). A greatest hits album or an album consisting of several artists' work may be a collective work. See SHEMEL & KRASILOVSKY, *supra* note 2, at 193. Yet, record contracts do not explicitly commission sound recordings for these uses. See *supra* note 106 (explaining that without specific intent to make videos, sound recordings are probably not commissioned for use as part of audiovisual works, either).

116. A supplementary work is:

a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes.

17 U.S.C. § 101(2) (definition of "work made for hire").

117. See PASSMAN, *supra* note 1, at 296 (obtaining licenses to use samples, or "clearing" them, is a "major pain in the rear end"); see, e.g., ENTERTAINMENT INDUSTRY 1995, *supra* note 16, at 32 para. 4(d) (sample recording agreement imposing onerous burdens if the artist uses samples on an album).

118. See SHEMEL & KRASILOVSKY, *supra* note 2, at 47.

119. See 17 U.S.C. § 101(2) (definition of "work made for hire"). The secondary song would also have to be "for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work" in order to be considered a supplementary work. *Id.*

4. Conclusion: A Sound Recording Is Not Eligible for Work-For-Hire Status Under the Commissioned Works Prong of Work-For-Hire Doctrine in 17 U.S.C. § 101(2)

Because the categories of commissioned works eligible for work-for-hire status do not expressly include sound recordings and are narrowly defined, sound recordings are probably not eligible for work-for-hire status under the commissioned works prong of work-for-hire doctrine. Not only have several prominent copyright scholars concluded that artists' works are not works-for-hire under the commissioned works prong,<sup>120</sup> a United States District Court has recently agreed. On March 5, 1999, the court in *Ballas v. Tedesco* held that "sound recordings are not a work-for-hire under the second part of the statute because they do not fit within any of the nine enumerated categories."<sup>121</sup>

III. THE EFFECT OF COMMON RECORD CONTRACT CLAUSES ON THE WORK-FOR-HIRE DETERMINATION

In addition to the doctrinal analysis prescribed by the two prongs of work-for-hire doctrine, a court should consider that language in some record contracts undermines the argument that artists' works are works-for-hire. Certain grant-of-rights in contracts implicitly admits doubt about the enforceability of work-for-hire clauses by providing for an assignment in the alternative. Also, disclaimer language denying any employment relationship inherently contradicts any future claim by record companies that artists are employees.

A. Admission of Doubt in Grant-of-Rights Language

In addition to work-for-hire clauses, most record companies include in their contracts language providing for a copyright assignment in case work-for-hire clauses are unenforceable.<sup>122</sup> This

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120. See SHEMEL & KRASILOVSKY, *supra* note 2, at 193 (opining that record companies have no argument under the commissioned works prong of work-for-hire); Anderson, *supra* note 1, at 600 n.58 (concluding that sound recordings are not listed as commissioned works eligible for work-for-hire status).

121. *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999).

122. See, e.g., *Frost Belt Int'l Recording Enters., Inc. v. Cold Chillin' Records*, 758 F. Supp. 131, 137 (S.D.N.Y. 1990):

Each Master Recording made under this agreement or during its term, from the Inception of Recording, will be considered a 'work made for hire' for [the record company], if any such Master Recording is determined not to be a 'work made for hire' it

“belt and suspenders” language<sup>123</sup> probably ensures that record companies get at least an assignment of the artist’s copyrights if the work-for-hire clause does not produce work-for-hire ownership.<sup>124</sup> Even absent an express assignment provision, work-for-hire clauses probably constitute implied assignments because the parties’ intent to transfer ownership is evident from work-for-hire language.<sup>125</sup> A copyright assignment, whether express or implied, limits consideration of work-for-hire clause enforceability until artists could terminate the assignments thirty-five years later, which is why work-for-hire disputes will not arise until 2013.<sup>126</sup> Albeit legally acceptable, courts may consider use of the assignment provision as a safety net to be an admission of doubt about the enforceability of the work-for-hire clause.<sup>127</sup>

Most record contracts contain work-for-hire clauses, which characterize artists as employees and record albums as commissioned works, or simply state that all work created under the contract is work-for-hire.<sup>128</sup> However, courts unanimously hold that the objective tests set forth by § 101(1)—the employment prong—and the nine categories of works eligible for work-for-hire status under § 101(2)—the commissioned works prong—cannot be contractually overridden.<sup>129</sup> Nonetheless, artists who do not understand the law might assume that the contractual characterization of an employment relationship makes it legally binding. A false representation of an artist’s status by a record company, if honestly believed by the artist, could support a claim for fraud in the acquisition of copyrights.<sup>130</sup> Although record companies probably

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will be transferred to [the record company] by this agreement, together with all rights in it.

*Id.*

123. PATRY, *supra* note 18, at 380 n.89.

124. *See Greenwich Film Prods. v. DRG Records, Inc.*, 25 U.S.P.Q.2d 1435, 1437-38 (S.D.N.Y. 1992); *Frost Belt*, 758 F. Supp. at 136-37.

125. *See Kreiss, supra* note 17, at 149.

126. *See supra* note 20 and accompanying text.

127. *See Playboy Enters., Inc. v. Dumas*, 831 F. Supp. 295, 312 (S.D.N.Y. 1993). The court in *Playboy* found assignment language inconsistent with work-for-hire language because assignment and work-for-hire theories are inherently contradictory. *Id.* If the parties understand a work to be a work-for-hire, then the hiring party is the statutory author, which makes an assignment unnecessary. *See id.*

128. *See supra* note 16 (containing exemplary work-for-hire clauses).

129. *See supra* note 17 and accompanying text.

130. *See Rhoads v. Harvey Publications, Inc.*, 640 P.2d 198, 198-201 (Ariz. Ct. App. 1982). A publisher of comic books told a cartoonist that the cartoonist was an employee and that copyright law did not allow employees to get copyrights in work done for their employers. *See id.* at 199. The court refused to grant the publisher’s motion for summary judgment because the legally unsophisticated cartoonist may have had a right to rely on

do not intend to defraud artists, *Rhoads v. Harvey Publications, Inc.* suggests that the superficiality of contractual language describing artists as employees, which should be obvious to record companies that use it, is likely to provoke stern treatment by courts.<sup>131</sup>

### B. Inherent Contradiction in Disclaimers

Many record contracts contain disclaimers denying an employment or agency relationship between the record company and the artist;<sup>132</sup> these clauses are attempts to avoid respondeat superior tort liability. However, these clauses contradict the proposition that an employment relationship exists for work-for-hire purposes.<sup>133</sup> Although probably without legal effect,<sup>134</sup> this contradiction would at least undermine record companies' credibility in arguing that a work-for-hire copyright exists under the employment prong.<sup>135</sup> Moreover, treating artists as independent contractors for other legal purposes may estop record companies from arguing that artists are employees for work-for-hire purposes.<sup>136</sup>

To claim an artist as an employee for some purposes and not for others constitutes a legal injustice because the record company reaps the rewards of work-for-hire copyright ownership without paying employee benefits and withholding taxes.<sup>137</sup> The common law agency test should be applied consistently across

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representations of law made by the more sophisticated publisher. *See id.* at 201. Moreover, if a fiduciary relationship existed, the publisher may have been liable for failure to inform the cartoonist about his rights to retain copyrights in his work. *See id.* at 199.

131. *See id.*

132. One such contract contains a paragraph that states, "6(a) . . . [Artist's recordings are] prepared within the scope of Company's employment of Artist hereunder." ENTERTAINMENT INDUSTRY 1995, *supra* note 16, at 39 para. 6(a). A later paragraph in the same contract states "[n]othing contained herein shall constitute . . . either party the agent or employee of the other (except as set forth in paragraph 6(a) . . .)." *Id.* at 50 para. 14(a).

133. "Moral symmetry" exists if the agency law work-for-hire employer would be liable for the employee's acts. *Easter Seal Soc'y for Crippled Children & Adults, Inc. v. Playboy Enters., Inc.*, 815 F.2d 323, 335 (5th Cir. 1987).

134. As previously explained, whether an agency relationship exists is an objective question of common law, which cannot be contractually overridden, *see supra* note 17 and accompanying text, regardless of whether the context is tort liability or work-for-hire doctrine, *see supra* note 82.

135. *See Kreiss, supra* note 17, at 173.

136. *See id.* ("Principles of estoppel might prevent parties from adopting a position in a copyright case inconsistent with the position they adopted in a case under a different statute.")

137. *See* 1 NIMMER, *supra* note 17, § 5.03[A] text accompanying nn.11.6-11.9.

claims,<sup>138</sup> ensuring that an artist is not considered an employee for some purposes and not for others.<sup>139</sup>

#### IV. LEGISLATIVE HISTORY UNDERLYING WORK-FOR-HIRE AND RIGHT OF TERMINATION

The 1976 copyright legislation was the result of many years of negotiations and compromises between private interests that Congress directly adopted in drafting the Copyright Act.<sup>140</sup> The records of these negotiations are valuable aids to legislative interpretation.<sup>141</sup>

##### A. *The Intended Scope of Work-For-Hire Doctrine Does Not Include Sound Recordings*

The course of negotiations indicates that the scope of the work-for-hire definition, especially the scope of the commissioned works category, is limited so as not to include sound recordings. The Copyright Register first proposed a definition of “work-for-hire” based solely on the existence of an employment relationship, excluding all commissioned works.<sup>142</sup> Opposition from the book

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138. See *supra* note 82.

139. An artist should not be deemed a record company employee and his work should not be work-for-hire unless the record company withholds income and social security taxes and treats the artist as an employee for payroll purposes. See Kreiss, *supra* note 17, at 141. California law mandates that creators of works-for-hire be treated as employees for unemployment compensation and benefits purposes, regardless of the relationship between the parties, even if the works are specially commissioned. See Anderson, *supra* note 1, at 594 & n.25. Record companies' failure to comply with the law may provide a claim for rescission of California contracts on the grounds that they violate public policy. See *id.* at 599. Rescission may allow the artists to reclaim the copyrights in sound recordings tendered as consideration for the rescinded contracts. See *id.*

140. “The work-made-for-hire provisions of this bill represent a carefully balanced compromise . . .” H.R. REP. NO. 94-1476, at 121 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5736. The right of termination provision “reflects a practical compromise . . . recognizing the problems and legitimate needs of all interests involved.” *Id.* at 124. See generally Jessica D. Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857 (discussing the Copyright Act's unusual legislative history, the compromises, and proper methods of interpretation).

141. See Litman, *supra* note 140, at 879-83 (explaining that Congress acknowledged its lack of expertise, and therefore opted to supervise negotiations and then adopt compromises reached by industry representatives). “Ultimately, to understand the language of the 1976 Act, one must look to the understanding of the people who agreed on the compromises reflected in the statute.” *Id.* at 882.

142. See COPYRIGHT LAW REVISION PART 6, *supra* note 108, at 66; see also Hill, *supra* note 25, at 567-71 (assimilating the legislative history regarding the commissioned work categories).

publishing and motion picture industries caused the final definition to include a few classes of commissioned works.<sup>143</sup> Book publishers argued that because they contribute significant creative effort in compiling the works of freelance authors, Congress should classify the contributions to those compilations as works-for-hire.<sup>144</sup> Authors' representatives, however, advocated a narrow scope of commissioned works, because they feared that freelance authors lack the bargaining power to resist work-for-hire agreements.<sup>145</sup> Against this backdrop, courts should strictly construe the commissioned work categories as narrow accommodations of the concerns of the book and motion picture industries.<sup>146</sup>

The relationship between artists and record companies does not elicit the concerns that motivated Congress to establish the commissioned work categories. Unlike record companies, encyclopedia and textbook publishers contribute significant creative effort by compiling the works of many authors.<sup>147</sup> The level of effort required to compile sound recordings pales in comparison to that required for textbooks and encyclopedias, which are compiled by

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143. See COPYRIGHT LAW REVISION PART 6, *supra* note 108, at 66-67.

144. See *id.* at 67. Examples of works that should be works-for-hire were translations, maps, illustrations and appendices in books, contributions to dictionaries and encyclopedias, and parts of motion pictures. See *id.* On the other hand, the parties conceded that many commissioned works, such as serious music and choreography should not be works-for-hire. See *id.*

145. See *id.*

146. "Strict adherence to the language and structure of the Act is particularly appropriate" because the Act is "a carefully worked out compromise aimed at balancing legitimate interests." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 & n.14 (1989); see *Lulirama Ltd. v. Axxcess Broad. Servs., Inc.*, 128 F.3d 872, 877-78 (5th Cir. 1997) (strictly construing the commissioned works categories).

Sound recordings were not recognized as copyrightable subject matter until 1971, several years after the negotiations regarding categories of commissioned works concluded in 1966. See Copyrights—Sound Recordings, Pub. L. No. 92-140, 85 Stat. 391 (1971) (codified at 17 U.S.C. § 102(7) (1994)); Litman, *supra* note 140, at 867-68 (stating that the work-for-hire compromise adopted in the 1976 Act had been left unchanged since an initial draft ten years earlier). These circumstances negate any theory that the drafters actually contemplated including sound recordings in the categories of commissioned works. Instead of adding sound recordings to the list of commissioned works that could be works-for-hire, the 92d Congress in 1971 expressly deferred to the parties involved (and ultimately the courts) on the question of whether sound recordings would be works-for-hire. See H.R. REP. NO. 92-487 (1971), reprinted in 1971 U.S.C.C.A.N. 1566, 1570 ("The bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.").

147. See STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 5: 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS 149 (Comm. Print 1964), reprinted in 4 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 1976) [hereinafter COPYRIGHT LAW REVISION PART 5] (implying that a textbook, encyclopedia, or map publisher might acquire contributions from "seven thousand top specialists in various fields of science, industry, philosophy and literature").

coordinating thousands of scientists, authors, and artists.<sup>148</sup> Unfairness would result to textbook publishers if all the contributing authors had termination rights because reuse of their contributions in subsequent editions would require renegotiation on an infeasible scale.<sup>149</sup> On the other hand, termination is not unfair to a record company because a single album usually contains one or a few artists with whom the company would have to renegotiate.<sup>150</sup> Because Congress intended the commissioned works prong to accommodate works that require laborious compilation processes, which add substantial economic value to the compiled works,<sup>151</sup> sound recordings should not be included within the scope of commissioned works.

*B. Congressional Policy Behind the Copyright Act's Right of Termination Should Inform the Work-For-Hire Determination*

Because the most significant right controlled by the work-for-hire determination is the artist's right to terminate an assigned copyright,<sup>152</sup> courts should avoid finding a work-for-hire when that decision would controvert the purpose of the right of termination. Congress understood that new artists who have little bargaining power give up many copyrights on disadvantageous terms before the value of those copyrights becomes ascertainable.<sup>153</sup> Congress intended the right of termination to give these artists a chance to renegotiate royalties after their work enters the market and obtains definite value.<sup>154</sup>

After the 1976 Copyright Act, clauses attempting to contractually circumvent the right of termination became common, essentially boilerplate in most record contracts,<sup>155</sup> but these efforts

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148. *See id.* at 149-50.

149. *See id.* at 150.

150. *See supra* note 115 and accompanying text.

151. *See Litman, supra* note 140, at 890-91; *Roundtable Discussion, supra* note 10, at 542 (statement of Lois Wasoff of Prentice Hall that book publishers deserve work-for-hire copyright ownership because the compilation process is what creates the "economic value" of the work).

152. *See* 1 NIMMER, *supra* note 17, § 5.03[A].

153. The right of termination provision was "needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited." H.R. REP. NO. 94-1476, at 124 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5740; *see also* sources cited *supra* note 7.

154. *See supra* note 8.

155. *See* Anderson, *supra* note 1, at 593-94; *see, e.g.*, ENTERTAINMENT INDUSTRY 1995, *supra* note 16, at 38-39 para. 6(a) (sample recording agreement stating that the "[c]ompany is and shall be the exclusive owner in perpetuity throughout the universe . . . of all right,

were in vain.<sup>156</sup> To guarantee protection of artists with little bargaining power, Congress made the right of termination inalienable so that the future right could not be assigned at the same time as the initial copyright.<sup>157</sup> As work-for-hire is an alternative, although indirect, method of circumventing the right of termination,<sup>158</sup> record companies include work-for-hire clauses in their contracts in an attempt to eliminate the artist's right of termination.<sup>159</sup>

Courts should allow work-for-hire doctrine to circumvent the right of termination only when the doctrine does not defeat congressional policy behind the right of termination. Work-for-hire doctrine is aligned with right of termination policy in two situations. First, if the artist is an employee under § 101(1), and the company treats the artist as an employee for payroll purposes, then the company deserves full-term copyright ownership.<sup>160</sup> Second, if the artist is an independent contractor creating a commissioned work under § 101(2), and the commissioner adds significant economic value by a laborious compilation process, the artist's forfeiture of his termination rights is consistent with right of termination policy.<sup>161</sup> Neither of these situations describes the typical company/artist situation. Accordingly, a record company's work-for-hire ownership of sound recording copyrights violates congressional policy behind the right of termination.

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title and interest in and to all Video Songs, Masters and other recordings"); *see generally* 3 NIMMER, *supra* note 17, § 11.07.

156. The termination provisions of the Copyright Act provide that "[t]ermination may be affected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant." 17 U.S.C. § 203(a)(5) (1994).

157. *See supra* text accompanying notes 152-54.

158. *See* 3 NIMMER, *supra* note 17, § 11.02[A][2].

159. *See* Anderson, *supra* note 1, at 592; *Roundtable Discussion*, *supra* note 10, at 526 (statement of Charles Sanders, representative of the National Music Publishers Association).

160. *See supra* notes 137-39 and accompanying text. "If you establish a true employee relationship where the [hired party] is actually working as an employee within the scope of employment, then there is really no question of who the rights initially belong to." *Roundtable Discussion*, *supra* note 10, at 530 (statement of Irwin Karp, discussion moderator); *see* Anderson, *supra* note 1, at 594-601 (explaining that California law and public policy require hiring parties to provide employment benefits when claiming ownership of a person's works as works-for-hire under either the employment or commissioned works prong of the work-for-hire doctrine in § 101).

161. *See supra* notes 146-51 and accompanying text.

## V. CONCLUSION

Several copyright scholars and prominent entertainment attorneys doubt the enforceability of work-for-hire clauses in record contracts and expect that some artists will bring lawsuits against record companies in 2013.<sup>162</sup> While only wildly popular artists' sound recordings will have any value thirty-five years after release,<sup>163</sup> many recordings continue earning royalties over an extended period of time. The recordings of Elvis Presley, Ray Charles, Frank Sinatra, Perry Como, Bob Dylan, Pink Floyd, The Rolling Stones, Aretha Franklin, Hank Williams, and Patsy Cline are about thirty-five years old, yet remain popular with record buyers. In addition, licensing old recordings for use in movie and television soundtracks produces significant revenue. The Kingsmen's "Louie, Louie," Steppenwolf's "Born to be Wild," and "Green Onion" by Booker T and the MGs, for example, are heavily licensed for use in movies, television shows and commercials.<sup>164</sup> Prominent recordings created after January 1, 1978, by artists such as Billy Joel, Jimmy Buffet, James Taylor, The Eagles, Led Zeppelin, The Beach Boys, and Willie Nelson, will likely generate enough demand after 2013 to make copyright litigation worthwhile.

The argument that artists' works are not works-for-hire is strongly supported by legal doctrine, and the legislative policy underlying the right of termination forcefully supports the legal argument. Congress designed the right of termination to guarantee artists an opportunity to renegotiate their share of the profits that their art generates, regardless of the terms on which they initially parted with that art. Because work-for-hire doctrine eliminates this supposedly inalienable second negotiation, a direct tension exists between work-for-hire doctrine and the right of termination. Work-for-hire clauses in recording contracts circumvent the artist's right of termination without the reciprocal sacri-

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162. See SHEMEL & KRASILOVSKY, *supra* note 2, at 13; Anderson, *supra* note 1, at 599-600; *Roundtable Discussion*, *supra* note 10, at 527 (statement of Charles Sanders, representative of the National Music Publishers Association); Mike Milom, Esq., *Legal Problems in the Music Industry*, seminar conducted at Vanderbilt University School of Law (Jan. 28, 1999) (notes on file with author) (anticipating litigation in 2013). For a practitioner's perspective, see generally Frisch & Fortnow, *supra* note 43.

163. See *Roundtable Discussion*, *supra* note 10, at 509.

164. Interview with Mark Dougall, Esq., in Nashville, Tenn. (Feb. 28, 1999).

fices by the record company that congressional policy demands.<sup>165</sup> The forfeiture of termination rights as a result of work-for-hire doctrine contravenes congressional policy in the company/artist context because record companies do not treat artists as employees for payroll purposes<sup>166</sup> and do not add significant economic value to the artists' works by laborious compilation processes.<sup>167</sup>

Obviously favoring record companies are their wealth and resources for defending litigation. Threatened loss of copyrights in many valuable recordings in year 2013 and each year thereafter is a compelling reason to fight for favorable legal precedent, but artists likely to seek termination will have several practical advantages over record companies. Litigation will not be cost prohibitive if groups of artists share the costs by bringing class actions against their record companies.<sup>168</sup> Perhaps competing record companies or other interested parties would lend support in exchange for some rights in the reclaimed copyrights.<sup>169</sup> Moreover, recording artists can easily arouse sympathy for their cause because record companies have historically treated them unfairly.<sup>170</sup>

Even if artists can reclaim their copyrights, success would be hollow unless artists could continue selling records.<sup>171</sup> Ownership of copyrights gives artists no right to the physical master tapes of their original recordings.<sup>172</sup> Fortunately for artists, however, if record companies refuse to sell them the masters, artists

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165. According to Professor Nimmer, a purchaser of rights "may not exert greater bargaining power so as to require the author to agree to surrender his or her future right of termination," 3 NIMMER, *supra* note 17, § 11.07, yet this is precisely the result of work-for-hire in the company/artist relationship. See *supra* Part IV.B. The Roundtable participants acknowledge the importance of true bargaining in an agreement making a commissioned work a work-for-hire. See *Roundtable Discussion*, *supra* note 10, at 529-31, 541, 544, 545-46, 553-54; see also Marci A. Hamilton, Comment, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1306-11 (1987).

166. See *supra* Part IV.B.

167. See *supra* Part IV.B.

168. See Anderson, *supra* note 1, at 599-600.

169. Of course, these companies would want to make sure they are not potential future defendants on this issue before aiding the plaintiff's side. They might do this by renegotiating all their own deals before supporting a lawsuit against a competitor.

170. For a classic example of the unfair treatment of artists by record companies, see Patry, *supra* note 19, at 664-68.

171. Artists able to reclaim their copyrights might want to enter into a pressing and distribution agreement with another record company, under which the artist retains full copyright ownership and pays the record company for manufacture and distribution. See PASSMAN, *supra* note 1, at 200; SHEMEL & KRASILOVSKY, *supra* note 2, at 51.

172. 17 U.S.C. § 202 (1994). Even if an artist's work is deemed not to be work-for-hire and copyright ownership can be reclaimed, the artist does not have any right to a physical copy of the copyrighted work. See 1 NIMMER, *supra* note 17, § 5.03[A] n.12.

can mass-produce recordings from ordinary compact discs, which maintain near perfect fidelity to the original masters.<sup>173</sup>

Another impediment to exploitation of a reclaimed copyright is the fact that the scope of the reclaimed copyright only covers the right to reproduce the artist's own contributions to the recording; in many instances that may be only the lead vocal parts of the recording.<sup>174</sup> The record companies would likely continue to hold the copyrights in the performances by side musicians and producers' contributions. Of course, the artists who reclaim the copyrights in their works could prevent the record companies from exploiting their vocals, which would make the recordings effectively useless to either party. The parties could break this counter-productive deadlock by negotiating a price at which one party would sell his rights to the other—precisely the solution sought by right of termination policy.

Record companies should meet artists at the bargaining table because the outcome of litigation is potentially unfavorable to the companies. Renegotiation<sup>175</sup> of record deals is a favorable solution for both sides because litigation would sever a necessary relationship. Artists need record companies to produce, promote, and distribute their recordings. Artists would thus prefer to negotiate better deals with their current record companies than spend the time and resources required to shop around for new record deals. Obviously, a record company would prefer a smaller share of split profits rather than an end to a steady stream of income. Additionally, record companies draw new artists by having high profile artists on their roster, and a demonstration of loyalty and fairness to retired artists creates goodwill with the companies' up and coming stars. By renegotiating with artists, record companies can avoid setting precedent that would destabilize their way of contracting and threaten their ownership of valuable sound re-

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173. Digital recording technology ensures that compact discs maintain near perfect fidelity to their masters regardless of the number of copies made. See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys.*, 180 F.3d 1072, 1073-74 (9th Cir. 1999).

174. See Mike Milom, Esq., *Legal Problems in the Music Industry*, seminar conducted at Vanderbilt University School of Law (Feb. 15, 1999) (notes on file with author).

175. A renegotiation should eliminate the artist's right of termination in order to fully protect the record company. The artist should exercise his right of termination and then execute new assignments of his copyrights to the company. See 3 NIMMER, *supra* note 17, § 11.07 text accompanying nn.11-12 ("[Without] at least a moment when the [artist] is bound under neither the prior nor the new grant . . . there is not a new grant, but only a change in the terms of the old grant.").

ording copyrights subject to termination in year 2013 and beyond.

*Ryan Ashley Rafoth\**

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