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**CASE-BY-CASE:  
Most Sound Recording Copyright Assignments  
Should Be Terminable**

Brendan Sullivan

ABSTRACT

*Since becoming exercisable in 2013, termination of transfer rights under section 203 of the Copyright Act have had little impact on the music industry as a whole. Recent class-action lawsuits by recording artists have sought to change that. In the final substantive opinion on the matter, the Second Circuit expressed the necessity of evaluating termination and possible defenses on a case-by-case basis. It may not be the win recording artists were hoping for, but it leaves the door open for them to regain their copyrights; and, for the moment, puts to rest the claim that all sound recordings are works made for hire. This Article surveys the implications of case-by-case work made for hire determinations on the viability of sound recording reversion attempts by recording artists going forward. This Article also explores the variety of ways in which record labels have tried and will continue to try to stave off the termination attempts by artists. This Article concludes with suggestions to make section 203 more accessible to artists while also reducing risk for record labels and other assignees.*

ABSTRACT

Brendan Sullivan, J.D., 2024, University of Michigan, is a recent graduate currently preparing to take the February bar exam. All errors or omissions are his own. The author would like to thank his family for their unyielding support and love. The author would also like to thank the team at Entertainment Law Review for their insightful comments and professionalism. Lastly, to Professor Jessica Litman: it's a wrap! The path was paved with hundreds of half-baked questions and run-on sentences; so, here's one last one—thank you so much, for everything.

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## I. INTRODUCTION

As the end of 2023 neared, few Americans were unaware of the unrest in Hollywood. Members of the Writers Guild of America (WGA) and the Screen Actors Guild-American Federation of Television & Radio Artists (SAG-AFTRA) were on strike.<sup>1</sup> Creatives across the industry took to the streets to advocate for a better deal.<sup>2</sup> In boardrooms, their union representatives demanded it. Shows and films were delayed or cancelled altogether.<sup>3</sup>

Meanwhile, few in the general public were aware of the negotiations wrapping up in the music industry. Recording artists and two of the three major record labels had been in court for four years wrestling with even more foundational questions about their relationship. The dispute had been brewing

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1. Matt Stevens, *What to Know About the Actors’ Strike*, N.Y. TIMES (Sept. 24, 2023), <https://www.nytimes.com/article/actors-strike-why.html> [https://perma.cc/D9Q9-MYZ8]; see also Cliff Djajapranata, *Hollywood Strikes Explained by a Labor Negotiations Expert*, GEO. UNIV. (Aug. 23, 2023), <https://www.georgetown.edu/news/hollywood-strikes-explained-by-a-labor-negotiations-expert/> [https://perma.cc/3D5H-DZ74].
  2. Meg James et. al, *The Strikes Are Over, but Hollywood’s Lost Year Is a Tipping Point for the Industry*, L.A. TIMES (Nov. 9, 2023, 4:36 PM), <https://www.latimes.com/entertainment-arts/business/story/2023-11-09/actors-strike-sag-aftra-strike-ends-amptp-hollywood> [https://perma.cc/LTS6-6MTN].
  3. Alan Sepinwall, *20 TV Shows Canceled During the Hollywood Strikes*, ROLLING STONE (Oct. 11, 2023), <https://www.rollingstone.com/tv-movies/tv-movie-lists/20-tv-shows-canceled-hollywood-strikes-the-idol-the-great-streaming-1234851019/>; Sonaiya Kelley, *All the Major Movies and TV Shows Delayed by the Strikes*, L.A. TIMES (Oct. 23, 2023, 4:46 PM), <https://www.latimes.com/entertainment-arts/business/story/2023-09-19/tv-shows-movies-delayed-list-writers-strike-sag-aftra> [https://perma.cc/8VYV-68PU].

for a while.<sup>4</sup> Termination rights, which allow creators to reacquire their copyright rights, would theoretically apply to sound recordings beginning in 2013.<sup>5</sup>

Many, appreciating the implications, saw 2013 as the start of a significant shift in the recording industry.<sup>6</sup> Pro-artist advocates emphasized these rights' potential to rebalance the power differential between labels and artists.<sup>7</sup>

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4. *Moral Rights, Termination Rights, Resale Royalty, and Copyright Term: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 35 (2014) [hereinafter *Termination Rights Hearing*] at 86 (testimony of Public Knowledge) (“[termination] gives artists the ability to tear up their copyright transfers... This right has the potential to transform the recorded music business. . . . which has traditionally been plagued by the imbalance of power between the major record labels and artists.”); see Dylan Smith, *Dwight Yoakam Sues Warner Music Amid Copyright-Termination Dispute*, Digit. Music News (February 11, 2021), <https://www.digitalmusicnews.com/2021/02/11/dwight-yoakam-warner-music-lawsuit> [<https://perma.cc/GX7D-SX75>] (“[a]ccording to this master-rights complaint, however, Warner Music higher-ups, ‘having profited and benefitted off of Mr. Yoakam for 35 years . . . do not want their gravy train to end, and have therefore refused to acknowledge and accept’ the notices of termination”). See generally *Sound Recordings as Works Made for Hire: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 106th Cong. 2 (2000) (Statement of Marybeth Peters, The Register of Copyrights, U.S. Copyright Office) [hereinafter *Peters, Sound Recordings as Works Made for Hire*] (testifying as to conversations had with artists and label executives concerning termination and employment status).
  5. 17 U.S.C. § 203 applies to assignments made on or after January 1, 1978 after the passage, at minimum, of 35 years. January 1, 2013 would be the first possible date on which a termination notice could be served.
  6. See Jessica Johnson, Note & Comment, *Application of the Copyright Termination Provision to the Music Industry: Sound Recordings Should Constitute Works Made for Hire*, 67 U. MIA. L. REV. 661, 661 (2013) (hypothesizing that “2013 could change the music industry forever”); Frederic Choquette, *Artists and Their Masters: Conflict in 2013*, Music Bus. J. (Oct. 27, 2011), <http://www.thembj.org/2011/10/artists-and-their-masters-conflict-looming-in-2013> [<https://perma.cc/Z97V-ERZM>] (claiming that 17 U.S.C. § 203 “threatens to either redefine copyright law or allow artists to fully control what they believe to be rightfully theirs, and deliver a potentially fatal blow to record labels across America”); Devon Spencer, *Sound Recordings in 2013: A Legal Brief*, Music Bus. J. (Nov. 28, 2011), <http://www.thembj.org/2011/11/sound-recording-in-2013-a-legal-brief> [<https://perma.cc/J78S-S57Q>] (expressing that “[t]he Mayans were partially right when they predicted something drastic would happen at the end of 2012. Yet even if the mystery of the world coming to an end will remain, one thing seems clear: copyright laws in the United States may be changed forever”).
  7. *Termination Rights Hearing*, *supra* note 4, at 35 (statement of Casey Rae, Vice President for Policy and Education, Future of Music Coalition) (“[t]here is no question that termination rights, that musicians, songwriters, composers are eligible to terminate grants transferred after 35 years under Section 203. Unfortunately, this statutory right is often muddied by major labels that want us to believe that sound recordings are somehow not part of the provisions that Congress laid out in 1976.”); *id.* at 18 (statement of Rick Carnes, Songwriters Guild of America) (“Congress has recognized that the value of musical works cannot be adequately determined at the time of their creation, and thereby, fairness and morality dictate that there must be a right of termination for creators.”).

Approaching the end of the decade, not much had changed. Termination rights are difficult to navigate and vindicate for creators across industries.<sup>8</sup> Particularly for sound recordings, the actual number of notices filed with the Copyright Office has been notably low in relation to the total number of possibly terminable works.<sup>9</sup> Artists who attempted the slog of meeting the rights' requirements, or could pay counsel fees to do so, received silence for their efforts. Record labels often disregard termination notices—sometimes continuing to exploit the works in the market past the effective date of termination.<sup>10</sup> If an artist is able and willing to sink more resources into the process, they can seek a declaratory judgment that their exercise of termination was valid or initiate an infringement suit against the assignee. However, recording artists are at a distinct disadvantage when seeking to assert their rights individually. As a result, some artists resorted to joint legal action.

On February 5<sup>th</sup>, 2019, class action lawsuits were filed against the two largest major record labels.<sup>11</sup> One lawsuit, against Sony Music Entertainment (SME), is currently on hiatus while the parties negotiate a settlement.<sup>12</sup> The

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8. The practical/technical difficulties of exercising termination and the requisite expertise necessary to overcome those difficulties remain the biggest obstacles for the average artist. See Chase A. Brennick, *Termination Rights in the Music Industry: Revolutionary or Ripe for Reform?*, 93 N.Y.U.L. REV. 786 (2018) for a lucid, if pessimistic, overview of the practical viability of termination rights. William Patry predicted these rights would be difficult to exercise as early as 1997. See William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 922 (1997) (noting that “by requiring authors to jump through hoops even more formidable than those renewal presented . . . in practice, the termination right has become virtually meaningless”).
  9. 9832 notices have been filed, representing less than 5% of all possibly terminable sound recordings between 1977 and 2020 (nearly 150,000 registrations). See Joshua Yuvaraj et al., *US Copyright Termination Notices 1977–2020: Introducing New Datasets*, 19 J. OF EMPIRICAL LEGAL STUD. 250, 272 (2022).
  10. See Dylan Smith, *Dwight Yoakam Sues Warner Music Amid Copyright-Termination Dispute*, DIGIT. MUSIC NEWS (February 11, 2021), <https://www.digitalmusicnews.com/2021/02/11/dwight-yoakam-warner-music-lawsuit> [<https://perma.cc/GX7D-SX75>]; see also Plaintiff's Complaint (*Waite* Complaint) at 13–14, *Sobol v. UMG Recordings, Inc.*, No. 1:19-cv-01091 (S.D.N.Y. Feb. 05, 2019) [hereinafter “*Waite* Docket”], ECF No. 1 (alleging that “[named plaintiffs] and hundreds of other recording artists, have served Notices of Termination upon UMG pursuant to the provisions set forth in 17 U.S.C. § 203, but UMG has routinely and systematically refused to honor them”); Plaintiff's Complaint (*Johansen* Complaint) at 2, *Johansen v. Sony Music Entertainment Inc.*, No. 1:19-cv-01094-ER (S.D.N.Y. Feb. 07, 2019) [hereinafter “*Johansen* Docket”], ECF No. 5 (alleging that “[named plaintiffs] and hundreds of other recording artists, have served Notices of Termination upon Sony pursuant to the provisions set forth in 17 U.S.C. 17 U.S.C. § 203, but Sony has routinely and systematically refused to honor them”).
  11. See generally *Johansen v. Sony Music Entertainment Inc.*, 2020 WL 1529442 (S.D.N.Y.); *Waite v. UMG Recordings, Inc.* (*Waite I*), 450 F. Supp. 3d 430 (S.D.N.Y. 2020).
  12. Litigation has been stayed and the parties have been on leave to negotiate a settlement since January 25, 2021. See Order to Stay Litigation, *Johansen* Docket (Jan. 25, 2021),

other, *Waite v. UMG Recordings*, just settled.<sup>13</sup> In both cases, the named plaintiffs brought claims alleging that the labels' continued use of the recordings past the effective date of termination constituted infringement, and sought declaratory judgments on the validity of their termination notices.<sup>14</sup> Recording artists in the *Waite* dispute, however, sought a far bigger prize – categorical determinations that the sound recordings they created were not works made for hire.<sup>15</sup> But in the final substantive opinion on the matter, the court denied class certification on the question—expressing the view that each sound recording should be examined on a case-by-case basis.<sup>16</sup>

*Waite* remains the furthest a court has gone on the issues thus far. If the future of recording artist rights vindication is to occur individually, the reasoning of the court and the parties is worth examining and contextualizing. This Article attempts to do so while adding to the growing body of scholarship on termination and recording artists. Part II of this Article provides context and background for how termination rights work and came to be. Part III of this Article attempts to exhaustively address the issues relating to sound recording termination as they applied in the *Waite* litigation and individual cases going forward. These include: works made for hire under either section 101(1) or 101(2), co-ownership through joint authorship, notice validity, and the issues loan-out corporations present. Modest suggestions to improve access to section 203 occur throughout. Part IV of this Article presents additional suggestions. Part V concludes.

## II. KISS THIS WORLD GOODBYE – OVERVIEW OF TERMINATION RIGHTS

### A. *Reversion & the 1976 Act*

Creators, as economic actors, produce expressive works. After producing an expressive work, the creator must decide whether and how to exploit the value contained within. Bringing the work to market carries substantial risk.<sup>17</sup> These risks can be mitigated or reduced by a large reserve of resources

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ECF No. 141. As of April 6, 2024, the parties have informally concluded settlement negotiations.

13. See generally *Waite* Docket.

14. See Plaintiff's Second Amended Complaint at 16, *Waite* Docket (S.D.N.Y. Sep. 2, 2020), ECF No. 45; *Johansen* Complaint, *supra* note 10, at 13–14.

15. See Plaintiff's Second Amended Complaint, *supra* note 14, at 4.

16. Judge Kaplan rejected artist-plaintiffs' contention that sound recordings were categorically not works made for hire, concluding instead that the work made for hire exception's applicability to sound recordings was an individualized factual determination. See *Waite v. UMG Recordings, Inc. (Waite IV)*, 2023 WL 1069690 (S.D.N.Y. Jan. 27, 2023).

17. A non-exhaustive list includes the following: the risk that costs through creating the work and subsequently reproducing and delivering it to market as a good will outweigh whatever return; the risk that coordinating the creative output's delivery into and through the market requires more knowledge, experience, or cultivated relationships

and transactional capacity. It is unlikely the creator possesses these qualities. Instead then, the creator engages with an entity that does. Entities specializing in directing the process through which protected creative expression is reproduced as copies in relevant markets are staple participants in creative industries.

The creator lacks the ability compensate this entity for the associated costs of bringing the work to market, so something else must be offered. A portion of the return generated at market is offered, but that is likely not enough inducement. There is no guarantee exploiting the work will be profitable. The value associated copies may generate is uncertain, meaning the value of the work and claims to it are as well.<sup>18</sup> Nevertheless, beyond reducing their return rate to near-zero, the creator has little left to offer but the work itself. The breadth, length, and permanence of the claim affect its value, and are subject to bargaining. The risk for the creator is that they divest themselves completely and permanently of title for a return worth far less than the true exploitable value of the work.

This exchange relies on the creator having exclusive rights to the work and possessing the ability to alienate those rights. The U.S. copyright system enables such transactions. It also sets the absolute maximum creators may offer in these transactions. If a creator can wholly and permanently dispossess themselves of their works, systemic disparities in bargaining power across a creative industry may dictate that as the starting point for negotiations. Historically, the ability of a creator to dispossess themselves – assign – their works has been limited by length.

Creators were permitted to regain their exclusive rights under the 1909 Act. Reversion – the re-vesting of exclusive rights in the original rightsholder – had always been available in some form.<sup>19</sup> The 1909 Copyright Act affirmed this practice by allocating the renewal interest to the author or their specified beneficiaries.<sup>20</sup> The allocation was motivated by a concern for authors under-compensated by their initial assignment in the event the work remained valuable by the end of the 28-year term.<sup>21</sup>

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than available; and lastly, the risk that even if every element of its delivery to market was maximally efficient, losses will occur due to low demand.

18. Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the “Inalienable” Right to Terminate*, 62 FLA. L. REV. 1329, 1345 (2010).
19. *Id.* at 1342 (noting the availability of reversion stretches back to 18th Century England under the Statue of Anne, which allocated the renewal interest in the author rather than any assignee).
20. An Act to Amend and Consolidate the Acts Respecting Copyright, Pub. L. No. 60-349, § 23, 35 Stat. 1075 (1909); *see also* Loren, *supra* note 18, at 1343.
21. *See* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION STUDY 31: RENEWAL OF COPYRIGHT 121 (1961) (“It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal

However, by midcentury, the Supreme Court had curtailed the effectiveness of renewal-based recapture by upholding agreements which assigned the renewal term in advance.<sup>22</sup> The court did not find Judge Frank's blistering dissent at the appellate level convincing.<sup>23</sup> Beyond flagging legislative history contradicting advanced assignment, Judge Frank also found it worth highlighting the disparity in bargaining power between the parties.<sup>24</sup> Conversely, the Supreme Court found it critical that authors retain "the freedom to dispose of their property [which was] possessed by others."<sup>25</sup>

The termination provisions embodied in sections 203 and 304(c) of the 1976 Copyright Act were a direct response to that decision.<sup>26</sup> It is worth noting that the policy rationale behind each section differs slightly. Section 304(c), beyond addressing the issue of advance renewal term assignments, responds to the 19-year term extensions granted by the 1976 Act.<sup>27</sup> Section 203, on the

term.") (quoting H.R. Rep. No. 2222, at 14 (1909)).

22. See generally *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943). See also *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 185 (1985) (White, J., dissenting) (noting that "[t]his right of renewal was intended to allow an author who had underestimated the value of his creation at the outset to reap some of the rewards of its eventual success. That purpose, however, was substantially thwarted by this Court's decision in [*Fred Fisher Music Co.*]").

It is worth noting, however, that renewal would vest in the author's beneficiaries instead of the assignee if the author died during the initial term of protection.

23. See *Fred Fisher Music Co.*, 318 U.S. at 655 (concluding, after examining the legislative history, "[t]he report cannot be tortured. . . into an expression of a legislative purpose to nullify agreements by authors to assign their renewal interests.") (referencing H.R. Rep. No. 2222 (1909)). See also *supra* note 21 for the report Justice Frankfurter was addressing.
24. *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F.2d 949, 955–56 (2d Cir. 1942) ("This is a case where (a) the defendant was an author, one of a class of persons notoriously inexperienced in business . . . in desperate financial straits, while the plaintiff was a successful and experienced publisher; (b) the property contracted for was of such a character that . . . 'neither party could know even approximately the value,' . . . and (c) the consideration was a very small sum.").
25. See *Fred Fisher Music Co.*, 318 U.S. at 657.
26. See *Mills Music, Inc.*, 469 U.S. at 172 (explaining that "[t]he principal purpose . . . was to provide added benefits to authors. The . . . concept of a termination right itself, w[as] . . . obviously intended to make the rewards for the creativity of authors more substantial. More particularly, the termination right was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product").
27. Prior to the implementation of 304(c), authors would not have been aware that the renewal term would be extended. Regardless of whether they had assigned their renewal terms without reservation, neither party would have contemplated the full length, or value, of the assignment. Viewing the extended term as a new estate, the architects of the 1976 Act felt that authors were the proper party for the interest to vest. See also H.R. REP. NO. 94–1476, pt. 2, at 140 (1976) (Conf. Rep.) (noting that the "the extended term represents a completely new property right, and there are strong



other hand, applies to works that are not subject to a renewal requirement. Section 203 is now the primary mechanism through which the Copyright Act protects authors against “unremunerative transfers.”<sup>28</sup>

The 1976 Act was the result of extended negotiation and compromise by representatives of authors, composers, book and music publishers, and film studios.<sup>29</sup> Provisions surrounding termination and works made for hire were the subject of particularly pitched negotiations by these parties.<sup>30</sup> Recording artist and recording industry representatives were absent from the table.<sup>31</sup> The compromises of the parties present at the negotiations are embodied within the language of sections 203, 304(c), 201, and the section 101 employment definitions.<sup>32</sup> The legislative history further reveals Congress’s intent to defer to the

reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution an opportunity to share in it”).

28. *Id.* at 124.
29. The official legislative history is long, comprising more than 30 studies, three reports issued by the Register of Copyrights, four panel discussions issued as committee prints, six series of subcommittee hearings, 18 committee reports, and the introduction of at least 19 general revision bills over a period of more than 20 years. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 865 (1987).
30. *See generally id.* at 888–94 for an extended overview of the pitched negotiations and tenuous interest balancing regarding reversionary rights and work made for hire status.
31. The substantive provisions of the work made for hire compromise were reached in 1965. Meanwhile, sound recordings were not afforded any form of federal copyright protection until 1972 through the Sound Recording Act of 1971. *See id.* at 901; *see also* Copyright Law Revision, Hearings before the Subcommittee No. 3 of the House Judiciary Committee, 89th Congress, 1st Session on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, Part 3, August 4, 5, 11, 12, 18, 19, 26; September 1 & 2, 1965, 1455 (1966) [hereinafter *1965 House Hearings Part 3*] (Supplemental Statement by The American Textbook Publishers Institute) (referencing general consensus on the work made for hire provisions by way of a “letter dated April 6, 1965, addressed to the Register of Copyrights and signed by counsel for the following organizations: American Book Publishers Council, Inc.; American Guild of Authors & Composers; American Society of Composers, Authors & Publishers; American Textbook Publishers Institute; The Authors League of America, Inc.; Composers & Lyricists Guild of America, Inc.; Music Publishers’ Protective Association, Inc.; and Music Publishers Association of the United States”). Record labels and recording artists were not represented in these discussions.
32. Authors’ representatives sought to replace the renewal provisions with either an outright limitation on the duration of any transfer or an inalienable automatic reversion. Publishers and motion picture companies opposed both proposals. The Register advanced a number of alternative proposals that satisfied no one. After protracted negotiations, industry representatives met one another half-way. Subject to the revised definition of works made for hire, which were not subject to termination, the parties agreed on a provision permitting authors to terminate transfers. *Id.* at 891 (summarizing statements made by industry representatives and the testimony of Abraham Kaminstein in the *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before the Subcomm. on Courts, Civ. Liberties, and the Admin. of Just. of the House Judiciary Comm.*, 89th Cong., 65 (1965) (statement of Abraham Kaminstein, Register of Copyrights)).

negotiations of industry representatives.<sup>33</sup> Examining the understandings of the parties present during negotiations can aid in the interpretation of relevant statutory language.<sup>34</sup> Further, strict textual application of these sections to new circumstances may unfairly prejudice parties who were not included in these negotiations or whose interests were not contemplated.<sup>35</sup> Strict textual application of 17 U.S.C. § 101(2) reads the compromise-driven work made for hire exceptions far beyond the applications contemplated by the parties present during negotiations. Strict textual application of the 17 U.S.C. § 203(a) work made for hire exception practically alienates termination rights for a broad swath of recording artists – an outcome far beyond the scope of negotiations. The policy considerations animating particular parties’ advocacy for certain concessions might also be irrelevant in other contexts.<sup>36</sup> Overall, the application of the work made for hire and termination provisions should be guided by the context heading into 1976, and the understandings of the parties whose negotiations were determinative of the language.

#### B. *Mechanics of Section 203*

Section 203 applies to assignments or licenses executed by the author on or after January 1, 1978.<sup>37</sup> As a result, it is more commonly applicable to sound recordings than section 304(c).<sup>38</sup> Termination may be exercised either thirty-five years after execution of the agreement or the lesser of either thirty-five years after publication or forty years after execution if the agreement also conveyed the right of initial publication.<sup>39</sup> After such period passes, section 203 opens a narrow five-year window for authors or their statutory successors to effectuate termination.<sup>40</sup> Termination is not automatic. An author or their statutory successors must serve notice to the assignee or their successor in interest

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33. *See id.* at 881 (explaining that “[t]he 1976 Act is an unusual statute . . . Congress’s approach to enacting a modern copyright statute reflects an exceptional willingness to adopt particular language because industry representatives had agreed on it”).

34. *See infra* Part III.C for an extended overview on the value and importance of considering the compromises embodied in the 1976 Act; *see also* Litman, *supra* note 29, at 861; *e.g. id.* at 863-64; *id.* at 868-72; *id.* at 879-82.

35. *See* Litman, *supra* note 29, at 901; *see also* 1965 House Hearings Part 3, *supra* note 31, at 1455; *infra* Parts III.C.ii, III.E..

36. *See infra* Part III.D; *see also* Ryan Ashley Rafoth, Note, *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*, 53 VAND. L. REV. 1021, 1049 (2000) for an explanation of how the policy concerns animating the adoption of the commissioned work categories fail to line up with the situation of recording artists in relation to record labels.

37. 17 U.S.C. § 203(a).

38. Sound recordings were not given federal protection until 1972 through the Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 39 (1971).

39. 17 U.S.C. § 203(a).

40. *Id.*

at least two years before but no more than ten years prior to the effective termination date.<sup>41</sup>

Termination notices are subject to formalities outlined in regulations promulgated by the Copyright Office.<sup>42</sup> 37 C.F.R. § 201.10 regulates the content requirements of termination notices.<sup>43</sup> In interpreting these regulations, courts have held that a certain degree of formal deficiency is not necessarily fatal to notice validity.<sup>44</sup> Recording artists and labels have opposing interests in how strictly they would prefer courts to apply section 203's formal notice requirements.

Section 203 contains limitations on the kinds of works and assignments that are subject to termination. Critically, works made for hire are broadly exempted.<sup>45</sup> Section 101 defines a work made for hire as either:

1. a work prepared by an employee within the scope of his or her employment; or
2. a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.<sup>46</sup>

The work made for hire exception, as applied to sound recordings, is a contentious issue yet to be definitively resolved in the courts.<sup>47</sup> Similar to the notice requirement, recording artists and record labels have diverging interests in how they would prefer courts to interpret the work for hire exception. Recording artists' interests are favored by the narrowest possible application of this exception. The narrower the application, the less likely any given artist will be construed as an employee. Employees are not legal authors, employers are. Naturally then, record labels seek the broadest application possible. Additional wrinkles emerge through the author execution requirement embodied in section 203.<sup>48</sup> Only assignments made by the legal author of a work can be terminated.<sup>49</sup> If an artist's work is assigned to an intermediary, and the intermediary assigns the work to a record label, the artist may lose access to

41. *Id.* § 203(a)(4)(A).

42. *Id.* § 203(a)(4)(B).

43. 37 C.F.R. § 201.10.

44. *See Siegel v. Warner Bros. Ent. Inc.*, 542 F. Supp. 2d 1098, 1132–33 (C.D. Cal. 2008).

45. 17 U.S.C. §203; *see also id.* § 304(c) (containing substantively parallel language concerning works made for hire, but applied to works which received protection before January 1, 1978).

46. *Id.* § 101.

47. *See infra* Parts III(A)–(C).

48. 17 U.S.C. § 203(a) states that a grant must have been “executed by the author” to be terminable.

49. *Id.*

their reversion rights permanently.<sup>50</sup> Part III below will begin by providing an overview of standard recording contracts, and then proceed through record labels' defenses against termination.

### III. LOVE LOCK – LABELS' DEFENSES AGAINST REVERSION

#### A. *Overview of Recording Agreements*

The standard recording contract between an artist and label is a raw deal. Some go as far as suggesting that recording artists view them like a loss-leader, a below-cost sale at the front-end might be rewarded with greater compensation on the back-end.<sup>51</sup> Those with this perspective view these imbalanced contracts as a necessary evil on an artist's path towards gaining exposure, cultivating a sustainable fanbase, and exploiting the commercial value of the works they generate. The story may be a nice lozenge after swallowing a bad contract whole, but it only bears out if there is a path to future compensation. Artists claim that advances are becoming smaller and less common.<sup>52</sup> Empirically, a gradually smaller number of recording artists are able to make a sustainable living doing it.<sup>53</sup>

“Record deals”—exclusive recording agreements—are service contracts at their core. These agreements stipulate the terms on which a given artist or group will create, deliver, and assign a given number of recorded works within a given timespan. The recorded works are generally albums but these agreements may also contemplate singles or EPs.<sup>54</sup> These agreements may also require an artist convey their image and likeness licensing rights in connection with those works and a host of additional asks. In return, artists receive a promise that the label will market the recordings and payment of a percentage

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50. *See infra* Part III.E.

51. RICHARD SCHULENBERG, *LEGAL ASPECTS OF THE MUSIC INDUSTRY: AN INSIDER'S VIEW* 27 (2005).

52. DAVID BYRNE, *HOW MUSIC WORKS* 232–34 (2012).

53. *See* Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 *ARIZ. L. REV.*, 301, 324 (2013) (noting that “[r]evenue from compositions and sound recordings each accounts for only 6% of the average musicians' revenue from music”).

54. *See* SCHULENBERG, *supra* note 51, at 44–47; *see also* Alan H. Kress & Daniel Cutler, *Recording Agreements*, in 8 *ENTERTAINMENT INDUSTRY CONTRACTS*, ¶ 159.03(1)(a) (Doug Nevin ed. 2023) (noting that “a crucial element of any recording agreement is the number of records that the artist is obligated to record and deliver . . . the agreement provides that the artist will be required to deliver a particular number of records, usually no more than one or, at most, two albums, during what is referred to as the initial contract period”), *cf.* DONALD PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 108–09 (2019) (noting variety in the amount of albums that may be required during the initial term, but expressing that five to six albums over the course of the option periods is common. The author also notes though that some record labels are moving away from album designation and instead requiring a specific number of masters.

of the royalties generated. These contracts generally provide a recoupable advance against future royalties, though this money also operates as a budget for the creation of recorded works. Recording contracts also often contemplate a twelve to eighteen month initial window for performance of the work—reserving multiple options for the label to extend under the same or similar conditions.<sup>55</sup> A one year contract plus 4–6 options to extend has become industry standard.<sup>56</sup> It is worth noting, the length of the service agreement has no bearing on the length of copyright assignment contemplated within the agreement. Dissolution of the service agreement will not terminate the assignment.

Recording contracts are likely to include master purchase provisions, through which the assignment is executed.<sup>57</sup> Labels incorporate the services provisions into the master purchase agreement, or vice-versa, to dictate the terms on which the putative author will create, sell, and deliver works to the label.<sup>58</sup> These provisions are likely to use broad language contemplating the “sale, transfer, and assign[ment] of all right, title, and interest in and to the master recordings. . . including, without limitation, the copyrights in the master recordings . . . perpetually and throughout the world.”<sup>59</sup>

Agreements with major labels also invariably include a “declaration of employment” provision wherein the artist declares that *each* work they have prepared under the terms of the recording contract is either a work made for hire under the scope of their employment by the label or, in the alternative, specially commissioned by the label as a contribution to a collective work.<sup>60</sup> However, such drafting is unlikely to serve as a defense against an artist exercising their termination rights upon ripening. Simply declaring an individual an employee doesn’t give that designation legal significance.<sup>61</sup> Questions concerning whether a given work is a work made for hire are subject to factual determinations examining the dynamic between the parties.<sup>62</sup> Labels seeking

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55. See SCHULENBERG, *supra* note 51, at 28–34.

56. *Id.*

57. *Id.* at 222.

58. *Id.* at 225.

59. *Id.* at 226.

60. Alan H. Kress & Daniel Cutler, *supra* note 54, Form 159-12 (explaining that “[t]he Declaration of Employment is rarely, if ever, subject to negotiation since, by definition, the rights granted the record company in the agreement are unconditional, absolute and irrevocable, and the consideration to the artist is the record company’s execution of the accompanying recording agreement.”).

61. See *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 290–91 (2d Cir. 2002); see also Ryan Vacca, *Work Made for Hire - Analyzing the Multifactor Balancing Test*, 42 FLA. ST. U. L. REV. 197, 241 (2014) (“[D]eclaring a work to be a work made for hire does not necessarily make it so . . . such statements are only relevant for specially commissioned works made for hire, not those falling under the employee within the scope of employment provision.”).

62. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 750–51 (proclaiming that “[t]o determine whether a work is for hire under the Act, a court first should

to construe each individual master recording as being a specially commissioned work to appear within collective works are unlikely to have such claims sustained in relation to standard musical releases.<sup>63</sup>

Labels may also attempt to avoid the practical consequences of termination rights through case-by-case contestations of the sole authorship status of authors attempting to effect termination. The labels' position in the scenario of a collective work would be as follows: the master recordings, upon which termination notices have been served, were joint works between the author(s) serving notice and collaborators working at the behest of the label. In circumstances where the label employs collaborators instead of executing nonexclusive recording agreements with them, there is a potential argument that a collaborator is a joint author of the work in question. If this is the case, the termination of the assignment would then render the label and artist co-owners of the undivided copyright—allowing the label to continue marketing the work.<sup>64</sup>

#### B. *Section 101(1) – Most Recording Artists are Independent Contractors*

In both lawsuits, neither UMG nor Sony ever claimed recording artists are, as a class, employees of record labels.<sup>65</sup> The Sony case never got there. UMG instead argued against class certification for recording artists, partially on the grounds that the question of whether they were employees or independent contractors was a fact-intensive, individualized inquiry.<sup>66</sup> Judge Kaplan, the judge presiding over the UMG case, agreed.<sup>67</sup> Under such individualized assessments, the would-be employer bears the burden of producing evidence sufficient to demonstrate an employment relationship.<sup>68</sup> In most cases, it is

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ascertain, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor"); *Waite v. UMG Recordings, Inc.* (*Waite IV*), 2023 WL 1069690, at \*9 (S.D.N.Y. Jan. 27, 2023).

63. See *infra* Part III.C.

64. It could also weaken the artist's ability to effectively exploit the work in the market post-termination—making a renegotiation more likely.

65. See generally *Johansen v. Sony Music Entertainment Inc.*, 2020 WL 1529442 (S.D.N.Y. Feb 05, 2019); *Waite v. UMG Recordings, Inc.* (*Waite I*), 450 F. Supp. 3d 430 (S.D.N.Y. 2020).

66. The relevant document was placed under seal by the court. Defs. Opp'n to Pls. Mot. for Class Cert., *Waite* Docket (05/27/22) ECF No. 205. But see Defs. Opp'n to Pls. Mot. for Summ. J. at 11, *Waite* Docket (05/27/22), ECF No. 213; e.g. Defs. Supp. Mem. in Opp'n to Pls. Mot. for Class Cert. at 5, *Waite* Docket (08/24/22), ECF No. 235 for a restatement of UMG's overall argument.

67. See *Waite IV*, at \*9 ("Defendants argue that Plaintiffs have failed to meet their burden on multiple grounds. But the crux of their opposition is their contention that the need for individualized proof – especially with respect to the work-made-for-hire defense – precludes certification of the proposed classes. Based on the individualized nature of the relevant inquires and the evidence in the record, the Court agrees.").

68. See *Woods v. Bourne Co.*, 60 F.3d 978, 994 (2d Cir. 1995) (holding that "the Derivative Works Exception should not be treated like any other exception to a statutory rule . . .

unlikely that labels will be able to bear that burden. Moreover, employment factors applied to industry practices lean towards independent contractor status.

In 1989, the Supreme Court clarified the standard for determining whether the relationship between two parties is that of employee-employer or an independent contractor.<sup>69</sup> This standard was further refined by the Second Circuit Court of Appeals in 1992 in *Aymes v. Bonelli*, differentiating between the weight that should be given particular factors.<sup>70</sup> The Second Circuit's view was that there are five factors "that will be significant in virtually every situation," as compared to the others which are often less relevant or dispositive.<sup>71</sup> These factors include: (1) the hiring party's right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party.<sup>72</sup>

A study tracing the impact of the *Aymes* decision found that tax treatment, employee benefits, and payment method were the three most frequently addressed and heavily weighted factors across all circuits, and that right to control was rarely afforded much weight.<sup>73</sup> This held true even in the Second Circuit where right to control is purportedly given more importance than in other circuits.<sup>74</sup>

In the *Waite* litigation, a significant portion of UMG's rationale against independent contractor status was devoted to right to control.<sup>75</sup> Meanwhile, the

we hold that the district court properly placed the burden on Bourne to prove that particular performances were based upon Bourne-authorized derivative works"); see also *Horror Inc. v. Miller*, 15 F.4th 232, 241 (2d Cir. 2021) ("Generally, the party relying on the work-for-hire exception bears the burden of demonstrating that it applies").

69. The Supreme Court held:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

*CCRN v. Reid*, 490 U.S. 730, 751 (1989).

70. See *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992).

71. *Id.* at 861.

72. *Id.*

73. *Vacca*, *supra* note 61, at 232.

74. *Id.* (noting that "[g]iven that two courts (the Supreme Court and Second Circuit) have bolstered the importance of this factor, it is worth emphasizing that other courts have, by and large, ignored this authority.").

75. See Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment on

three most weighty factors—tax treatment, employee benefits, and payment method—figured heavily into the arguments made by the proposed class members.<sup>76</sup> These formal factors are likely to favor independent contractor status in most cases. Regarding tax treatment, the biggest issue record labels have is that they do not pay recording artists wages. Recoupable advances are not considered wages.<sup>77</sup> Accordingly, labels are unlikely to be able to produce W-2 or W-4 forms typically required for a this showing. Regarding employee benefits, record labels are not in the habit of providing benefits to recording artists, despite contentions that they pay into union funds.<sup>78</sup> Not only are recording artists not paid these benefits, they are not directly remitted to specific collaborators paid from the artist’s budget. Payments to union benefit, retirement, and reserve funds broadly accrue for all members of the union instead of just the session collaborators specifically involved in the creation of recorded works.<sup>79</sup> Lastly, as noted above, recording artists are compensated through royalties and are given an advance against those royalties as a fund to create albums.<sup>80</sup> Such a scheme is much more like a loan than a wage. Further, as UMG itself argued,<sup>81</sup> labels retain a right to control over how this advance can be spent—reserving the right to dictate how much is spent on a given project, who the recording artist can work with and hire, and where recording can take place.<sup>82</sup> Even

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Defendants’ Work Made For Hire Defense at 13–16, *Waite Docket* (S.D.N.Y. May 27, 2022), ECF No. 213 [hereinafter Opposition to Motion for Partial S.J. on WMFH Defense].

76. See Plaintiffs’ Memorandum of Law in Support of Their Motion for Partial Summary Judgment on Defendants’ Work Made Fore Hire Defense at 22–35, *Waite Docket* (S.D.N.Y. Apr. 15, 2022), ECF No. 167.
77. See 29 C.F.R. 17 U.S.C. § 531.35 (2020) (“Whether in cash or in facilities, ‘wages’ cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or ‘free and clear.’”).
78. See Opposition to Motion for Partial S.J. on WMFH Defense, *supra* note 75, at 16.
79. Labels generally make payments to AFM and SAG-AFTRA controlled funds on the basis of exploiting specific recordings in the market. These payments total less than 2–3 percent and are guided by broad agreements with each union. See PASSMAN, *supra* note 54, at, 185–87; see also SCHULENBERG, *supra* note 51, at 116–17 (detailing how label payments to American Federation of Musicians’ controlled funds are generally not considered “recording costs” recoupable from artist royalties, however there are some recording agreements which do).
80. PASSMAN, *supra* note 54, at, 87 (claiming “every contract has a general provision that says all amounts ‘paid to you or on your behalf, or otherwise paid in connection with this agreement’ are recoupable unless the contract specifically provides otherwise”); see also SCHULENBERG, *supra* note 51, at 110–13 (detailing how contract provisions generally stipulate that any and all costs incurred by the artist or money paid to the artist will constitute “advances recoupable” from future royalties).
81. See Opposition to Motion for Partial S.J. on WMFH Defense, *supra* note 75, at 13–16.
82. See Alan H. Kress & Daniel Cutler, *supra* note 54, ¶ 159.03(2)(a) (detailing how “[t]oday, it is more typical for a record company to provide the artist with an overall ‘recording fund’ or ‘album fund’ for each album . . . The artist is expected to pay from the fund all costs required to produce master records . . . and the artist gets to keep any remaining



if labels rarely exercise this control in practice, the right to direct the use of compensation post-disbursement strongly distinguishes recoupable advances from standard wages, again weighing in favor of finding the artist to be an independent contractor.

Three other relevant but less determinative factors include right to assign additional work, skill required, and source of instrumentalities and tools. Standard industry practices weigh in favor of finding independent contractor status through these factors as well. The right to assign additional work could lean in either direction depending on how the bounds of recording agreements are read. As noted, recording agreements are generally twelve to eighteen month contracts with 4–6 options to extend.<sup>83</sup> Record labels generally demand the creation of one or two albums during the initial term.<sup>84</sup> Whether labels have the right to assign additional work depends on whether courts find, through the agreements, that the option terms constitute such a right. Each exercise of termination pertains to the assignment of specific works, while recording agreement option clauses necessarily contemplate future assignments of different works. A court could find the options irrelevant to the assignment the artist seeks to terminate, and therefore outside the scope of relevant evidence.

Regarding the skill required factor, recording artists have a strong argument for being independent contractors. At least one court has recognized that recording artists' role in the creative process can be *prima facie* evidence of skill to an extent.<sup>85</sup> The final factor in this group, the source of instrumentalities and tools, could weigh in either direction depending on the individual relationship. Many recording artists exercise a great deal of agency in determining where they record, who they record with, and what sounds/instruments/etc. are involved in the recording.<sup>86</sup> There will certainly be cases however, where the

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portion of the fund”). See also SCHULENBERG, *supra* note 51, at, 112 for an example “[r]ecording costs” definition provision stipulating that record label will pay broad range of costs on behalf of the artist. Note, all these costs will be recouped from the artist’s future royalties.

83. SCHULENBERG, *supra* note 51, at 28–34.

84. See Alan H. Kress & Daniel Cutler, *supra* note 54, ¶ 159.03(1)(a) (detailing how “agreement[s] provide[] that the artist will be required to deliver a particular number of records, usually no more than one or, at most, two albums, during what is referred to as the initial contract period”); see also SCHULENBERG, *supra* note 51, at 46–47.

85. See *Ulloa v. Universal Music and Video Distrib. Corp.*, 303 F. Supp. 2d 409, 415 (S.D.N.Y. 2004).

86. Recording artists and producers work collaboratively in creating records. *But see* PASSMAN, *supra* note 54, at, 125–26 (detailing how traditional producers undertake a managerial role within the studio—often being the party which guides the selection and hiring of session musicians). However, the producer, studio time, and session musician rates are paid out from the artist’s advance. See Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment as to Plaintiff Kasim Sulton’s Claim for Copyright Infringement, *Waite Docket* (May 27, 2022), ECF No. 201 [hereinafter *Opposition to Motion for S.J. on Kasim Sulton’s Claim*]. The extent to which creative

record label exercised a high amount of discretion and control over how the recording artist created the work and what they created it with. Overall, at least one of these factors leans strongly towards independent contractor status (skill required), another is likely to affirm the same (instrumentalities and tools), and the other is uncertain. The remaining agency factors are less often addressed and afforded less weight in court decisions.<sup>87</sup> Regardless, these factors are unlikely to weigh strongly towards a finding of an employment relationship.<sup>88</sup>

C. *Section 101(2) – Most Recording Artists’ Works are not Specially Commissioned as Contributions to Collective Works*

As noted, exclusive recording agreements take possession of sound recording rights through purchased assignment; and ostensibly, declaration of employment and commissioned work provisions<sup>89</sup> Unlike for section 101(1), section 101(2) work made for hire determinations examine the content of the parties’ contracts. Specially commissioned works must also be examined to determine whether they fit into section 101(2)’s enumerated categories.<sup>90</sup> Sound recordings, as such, are not among the enumerated categories.<sup>91</sup> Labels seeking to retain sound recordings under section 101(2) will need to demonstrate that the sound recording at issue was prepared as a contribution towards

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decision-making is held primarily by the recording artist, by the producer, or shared equally is heavily fact-dependent. Considerations like artist or producer reputation, genre, individual temperament, and more all guide in-studio relationships. See PASSMAN, *supra* note 54, at 126; SCHULENBERG, *supra* note 51, at 206–10. These relationships have historically been in flux, with a general movement from producers primarily taking on managerial roles to being more creatively involved in the creation of sound recordings. See generally MICHAEL CHANAN, REPEATED TAKES: A SHORT HISTORY OF RECORDING AND ITS EFFECTS ON MUSIC (1995); VIRGIL MOOREFIELD, THE PRODUCER AS COMPOSER: SHAPING THE SOUNDS OF POPULAR MUSIC (2005). What has remained constant however, is the provision of producer royalties and session musician payments from the artist’s share of royalties. See *Opposition to Motion for S.J. on Kasim Sulton’s Claim*, *supra* note 75.

87. See *Vacca*, *supra* note 61, at 226–29.

88. See *id.* at 247–51 for an extended application of these factors towards standard recording industry practices.

89. See *supra* Part A.

90. [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.

17 U.S.C. § 101

91. Much has been written about the technical amendment to the 1976 Copyright Act that added sound recordings to the enumerated list of works which can be specially commissioned as a work made for hire and about the massive wave of backlash that led to a repeal of the amendment in 2000. See, e.g., Rafoth, *supra* 36, at 1022 (providing extended overview of the 1999 revision and subsequent repeal); see also Delilah R. Cassidy, *You Belong with Me: Retaining Authorship and Ownership of Sound Recordings*, 53 ARIZ. ST. L.J. 333, 350–52 (2021)

a collective work. Besides compilations,<sup>92</sup> collective works are the only category which could theoretically encompass a decent volume of sound recordings.<sup>93</sup> Labels then, would benefit from the broadest possible interpretation of collective works as defined in section 101. A broad interpretation, however, finds less support in both the text of section 101 and the legislative history of the 1976 Act. Therefore, there should be a relatively narrow range of circumstances in which labels are able to demonstrate that the recordings at issue are section 101(2) works made for hire.

*i. Are Recordings Specially Commissioned Works?*

Section 101(2) requires an express written agreement specifying that the work in question is a work made for hire.<sup>94</sup> Labels will generally be able to meet this requirement, given that exclusive recording agreements almost invariably incorporate language to this effect.<sup>95</sup> However, labels may find more difficulty meeting the substantive test as to whether the works in question were specially commissioned, especially within the Second Circuit. Second Circuit courts maintain the position that section 101(2) incorporates the pre-1976 Copyright Act common law instance and expense test.<sup>96</sup> The instance and expense test is an individualized fact-based assessment of the parties' creative and financial arrangement with one another.<sup>97</sup>

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92. Labels may in fact argue the compilation point as well; however, a 17 U.S.C. § 101(2) compilation theory only allows the label to retain elements of the album release related to selection and arrangement of the sound recordings. The actual sound recordings themselves would not be covered under a compilation theory in the same way that they could possibly under a "contribution to a collective work" theory.
93. It's possible that labels may defend on an audiovisual work theory; however, it's an open question how pervasive full album audiovisual offerings are and whether AI-assisted album visualizations demonstrate sufficient originality to merit protection. Further, it is unclear that labels would always be the authors of audiovisual works in connection with album releases – recording artists often bear the cost of audiovisual production out of their album budgets.
94. There is a circuit split regarding whether the written instrument must be prepared and signed before the work is created. Notably the Second Circuit allows for post-creation written agreements pursuant to pre-creation oral agreements. *See Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 559 (2d Cir. 1995) (“[W]e will assume that the writing requirement of 17 U.S.C. § 101(2) can be met by a writing executed after the work is created, if the writing confirms a prior agreement, either explicit or implicit, made before the creation of the work.”). However, industry practice dictates contracting before the creation of sound recordings anyway, so venue considerations are less relevant to this question.
95. *See supra* Part A.
96. *See Playboy Enters.*, 53 F.3d at 562 (determining that “the phrase ‘specially ordered or commissioned’ has essentially the same meaning as ‘instance and expense.’”).
97. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 140 (2d Cir. 2013) (“Whether the instance and expense test is satisfied turns on the parties’ creative and financial arrangement as revealed by the record in each case”).

The question of whether the work was prepared at the purported employer's instance is whether the "motivating factor in producing the work was the employer who induced the creation."<sup>98</sup> The Second Circuit has clarified that this inquiry assesses the employer's right to supervise, its actual exercise of that right, and whether it made creative contributions.<sup>99</sup> It is worth noting that the Second Circuit has been inconsistent in its standards for what is required to demonstrate instance.<sup>100</sup> As during employment determinations, labels will likely need to demonstrate some exercise of control in addition to the bare right to under the exclusive recording agreement. For the reasons stated earlier, labels are unlikely to meet this burden in most cases.<sup>101</sup> Similarly, labels may find it difficult to proffer convincing evidence of actual creative contribution, except for rarer cases where label personnel are significantly involved.<sup>102</sup> Even if courts continue to examine whether a work was created pursuant to the already existing intellectual property of the purported employer,<sup>103</sup> recording artists have an additional argument against instance. Their works are generally created pursuant to their own artistic visions and brands,<sup>104</sup> as opposed to being created with the intent of augmenting works the record label already owns. On the other hand, there have been cases in which the right to supervise alone has been enough to sustain the purported employer's burden.<sup>105</sup>

The expense component of the common law test refers to "the resources the hiring party invests in the creation of the work."<sup>106</sup> At times, greater emphasis has been placed on tools, resources, and overhead; while at others,

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98. *Siegel v. Nat'l Periodical Publications, Inc.*, 508 F.2d 909, 914 (2d Cir. 1974) (quoting *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir. 1972)).

99. *Kirby*, 726 F.3d at 141 (holding that "Marvel's inducement, right to supervise, exercise of that right, and creative contribution with respect to Kirby's work during the relevant time period is more than enough to establish that the works were created at Marvel's instance.").

100. *Urbont v. Sony Music Ent.*, 831 F.3d 80, 89 (2d Cir. 2016) (holding that "[t]he right to direct and supervise the manner in which the work is carried out, moreover, may be enough to satisfy the 'instance' requirement even if that right is never exercised" while acknowledging the relevance of other factors such as creative contribution or actual exercise of control) (quoting *Martha Graham Sch. And Dance Found., Inc. v. Martha Graham Ctr. Of Contemporary Dance, Inc.*, 380 F.3d 624, 635 (2d Cir. 2004))

101. *See supra* Part B

102. *See* BYRNE, *supra* note 52, at 239–59 for a discussion of the shifting geography of the recording industry.

103. *See Kirby*, 726 F.3d at 143; *see also Urbont*, 831 F.3d at 91.

104. *See* Richard Branson & Simon Draper, *The Search for Talent*, in *MAKING MUSIC* 307 (George Martin ed. 1983) (providing perspective from the label perspective on the value of allowing artists to cultivate their own brands and images).

105. *See Twentieth Century Fox Film Corp. v. Ent. Distrib.*, 429 F.3d 869, 879–81 (9th Cir. 2005) (holding that the entire analysis on instance is reduced to an examination of how expansive the right to control is), *abrogated on other grounds by Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873 (2019).

106. *Kirby*, 726 F.3d at 139.

the nature and type of payment has been controlling.<sup>107</sup> Notably, the Second and Ninth Circuits disagree as to whether royalties weigh against finding expense on behalf of the purported commissioning party.<sup>108</sup> In the Second Circuit, labels asserting authorship on a specially commissioned theory will need to demonstrate that their advancement of funds can sufficiently constitute expense weighed against the royalty provisions of the agreement.<sup>109</sup> In the Ninth Circuit, royalty provisions will not weigh against labels, but they also will not conclusively carry the burden either.<sup>110</sup> Unfortunately for recording artists, courts have begun to focus the expense inquiry through the lens of risk.<sup>111</sup> Labels have a natural argument on this point—regardless of whether the advance is conceived of as a forgivable loan, budget, or payment for the works, recording artists could be considered somewhat indemnified against the failure of their works in the market. However, in the aggregate, recording artists on the label’s roster collectively bear the total risk—the process of talent investment is subsidized by the relative under-compensation of breakout artists.

Overall, instance and expense may lean slightly in the labels’ favor. However, when assessed individually, there will be many situations in which the label’s absolute lack of involvement in anything beyond fronting recording costs will fail to satisfy the test. This is especially true looking towards the future as advances are diminishing<sup>112</sup> and labels are reducing their talent development activities.<sup>113</sup>

## ii. *Are Recordings Collective Works?*

Section 101 defines a collective work as a “work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting

107. *Id.* (citing *Martha Graham Sch. And Dance Found., Inc. v. Martha Graham Ctr. Of Contemporary Dance, Inc.*, 380 F.3d 624, 635–42 (2d Cir. 2004) as recognizing tools, resources, and overhead as constituting expense but noting *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 556 (2d Cir. 1995) as holding that nature of payment is the central focus).

108. *See Playboy*, 53 F.3d at 555 (“where the creator of a work receives royalties as payment, that method of payment generally weighs against finding a work-for-hire relationship”). *But see Warren v. Fox Fam. Worldwide, Inc.*, 328 F.3d 1136, 1142 (9th Cir. 2003) (minimizing the value of the distinction).

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

110. *See Warren*, 328 F.3d at 1142 (“[T]he payment of royalties was only one form of compensation given to Warren under the contracts. Warren was also given a fixed sum ‘payable upon completion.’ That some royalties were agreed upon in addition to this sum is not sufficient to overcome [other evidence].”).

111. *See Urbont v. Sony Music Ent.*, 831 F.3d 80, 89 (2d Cir. 2016).

112. BYRNE, *supra* note 52, at 232–34.

113. *See BYRNE*, *supra* note 52, at 239–259 for a discussion of the shifting geography of the recording industry; *see also Peters, Sound Recordings as Works Made for Hire*, *supra* note 4, (testifying as to the independence recording artists experience in the creation process).

separate and independent works in themselves, are assembled into a collective whole.”<sup>114</sup>

In its current class action suit, UMG took the position that the works of the named plaintiffs were § 101(2) works made for hire in its opposition to summary judgment.<sup>115</sup> UMG’s position hinged on a reading of “collective work” which includes standard musical releases like albums (LPs) and extended plays (EPs).<sup>116</sup> The argument is not completely untenable, but courts should decline to join them in this interpretation. This unnatural reading of the statute fails to comport with settled expectations and creates redundancy. Worse yet, it would render section 203 practically inapplicable to most sound recordings.<sup>117</sup> Judge Kaplan was correct in stating that whether a particular work was a collective work is subject to individual determinations;<sup>118</sup> however, courts have yet to establish clear standards regarding the kinds of works which meet that bar. As of yet, only one court has spoken clearly on the question and it was a non-dispositive issue.<sup>119</sup>

UMG’s rationale was that the collective work definition unambiguously includes standard music releases because sound recordings, generally separate and independent works, are packaged together to be exploited as LPs or EPs.<sup>120</sup> Such a broad reading is irrational. It would render § 101’s definition of sound recording irrelevant, because nearly every sound recording consists of multiple input “tracks” (vocals, instruments, etc.) which would constitute separate and independent works. The crucial piece of § 101’s definition of collective work is the illustrative list including “periodical issue[s], antholog[ies], or encyclopedia[s].” This list provides context for how the phrase “separate and independent works” should be interpreted and reveals how LPs and EPs fail to fit within the definition of collective work. There are at least three common themes that emerge from the illustrative list. (1) Each enumerated category is conventionally composed of works from different authors. A standard LP/EP release is generally the work of one distinct featured recording artist or group; (2) Each enumerated category is conventionally assembled according to practical rather than creative principles. A standard LP/EP release is generally assembled according to genre convention, artistic sensibility, narrative, or aesthetic continuity; (3) None of the enumerated categories involve continuity

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114. 17 U.S.C. § 101.

115. See Opposition to Motion for Partial S.J. on WMFH Defense, *supra* note 75, at 25–27.

116. *Id.*

117. A vast amount of musical works would be read out of the bounds of 17 U.S.C. § 203 and 17 U.S.C. § 304(c) too as collateral damage of this reading.

118. *Waite v. UMG Recordings, Inc. (Waite IV)*, 2023 WL 1069690, at \*17 (S.D.N.Y. Jan. 27, 2023).

119. See *Ballas v. Tedesco*, 41 F.Supp. 2d 531, 540–41 (D.N.J. 1999).

120. See Transcript of Proceeding re: Argument Held on 2/3/2020 Before Judge Lewis A. Kaplan at 9–10, *Waite* Docket (Feb. 25, 2020), ECF No. 66; Opposition to Motion for Partial S.J. on WMFH Defense, *supra* note 75, at 25–27.

of narrative. Standard LP/EP releases often have continuity of narrative or at least showcase some level of continuity in branding and personality.

Legislative history and purpose considerations also weigh against a broad interpretation of collective works which includes standard LP/EP releases. The work made for hire provisions, especially the section 101(2) categories, were the subject of lengthy, vigorous debate.<sup>121</sup> Particularly, the enumerated categories primarily emerged through negotiations between book publishers, the film industry, and representatives of writers and film industry creatives.<sup>122</sup> Notably, Congress considered but then later rejected adding “photographic or other portraits[s]” to the list because of their creators’ vulnerability during contracting and their absence from the record of negotiations.<sup>123</sup> Recording artists and labels were absent from these work-made-for-hire negotiations entirely.<sup>124</sup> As a result, sound recordings were never considered for inclusion in the section 101(2) enumerated works list during the drafting of the 1976 Copyright Act.<sup>125</sup> A narrow interpretation leaves the intent of the compromises embodied in section 101(2) undisturbed.<sup>126</sup> Alternatively, a broad interpretation substantively binds recording artists to the short-end of a negotiation in which they were unable to represent themselves.

This broad interpretation is also contrary to the official policy concerns behind the Act. The official legislative history of the Act clearly evinces a concern for the poor bargaining position of authors during initial assignments.<sup>127</sup> Additionally, the policy concerns animating book publisher and film industry representatives are far less relevant to sound recordings, despite contrary claims.<sup>128</sup> Under current doctrine, disputes related to possible joint authors

121. See Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 384 (2002) (“Congress spent nearly fifteen years negotiating, drafting, and revising the language in the work-made-for-hire definition. Much of this deliberation focused on which categories of specially commissioned copyrightable works should be eligible for contractually-created work-made-for-hire status.”).

122. See Rafoth, *supra* 36, at 1048.

123. See LaFrance, *supra* note 121, at 385.

124. See *1965 House Hearings Part 3*, *supra* note 31, at 1455; see also Peters, *Sound Recordings as Works Made for Hire*, *supra* note 4 (testifying that sound recordings were never a category of work discussed in relation to the work made for hire debates heading into the 1976 Act); Litman, *supra* note 29, at 889 (detailing the parties to the 1965 debates).

125. See *United States Copyright Office and Sound Recordings as Work Made for Hire: Hearing Before the Subcomm. on Cts. and Intell. Prop. of the H. Comm. on the Judiciary*, 106th Cong. 87 (2000) (statement of Hon. Marybeth Peters, Register of Copyrights).

126. *CCNV v. Reid*, 490 U.S. 730, 748 (1989) (expressing reluctance to adopt an interpretation which would “unravel the ‘carefully worked out compromise aimed at balancing legitimate interests on both sides.’” (quoting H. R. REP. NO. 2237 at 114)).

127. See *supra* Part A.

128. At least one author frames the necessity of ownership vesting in labels as being analogous to the necessity of vesting in publishers of collective literary works and film studios. This author frames the policy concern as being the avoidance of hold outs, and that the same policy concern is relevant to sound recordings. See Johnson, *supra* note 6,

are readily judiciable.<sup>129</sup> Some commentators have wrongly assumed that all the possible parties who contribute to a sound recording have equal claims of authorship<sup>130</sup>—ignoring the ways in which industry practice and court standards preclude such a judgment.<sup>131</sup> Commentators have highlighted expediency and efficiency concerns when arguing against recording artists' rights to termination.<sup>132</sup> However, if Judge Kaplan is correct, such individual determinations are already necessary.<sup>133</sup> Additionally, these commentators have failed to offer a convincing justification as to why the burden of judicial expediency should fall on recording artists, the party with less institutional and individual power.<sup>134</sup>

D. *Joint Works – Session Collaborators are Poor Latch points for Label Authorship*

In the event of unfavorable work made for hire determinations, labels may seek to avoid the practical consequences of termination by advancing a joint authorship argument. A label may argue that it is a joint author of a particular recording by way of a work made for hire relationship with associated session collaborators.<sup>135</sup> While plausible, this position cannot be sustained in most cases.

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at 670–71 (2013). This is incorrect for two reasons: (1) theoretical joint authors would be tenants-in-common, free to license and only subject to a duty of accounting, and (2) the majority of collaborators behind sound recordings will not be considered joint authors as a matter of law.

129. See *infra* Part D.

130. See Johnson, *supra* note 6, at 671; LaFrance, *supra* note 121, at 392 (arguing that “identity of the complete joint authorship group will often be highly uncertain because most sound recordings involve the participation of several musicians and vocalists; one or more producers, sound engineers, or both; one or more composers and lyricists who may create compositions specifically for the recording . . .”).

131. See *infra* Part III.D.

132. See Johnson, *supra* note 6, at 671. See generally LaFrance, *supra* note 121, at 408–15 (contemplating the merits of a substantive amendment expressly adding sound recordings to the 17 U.S.C. § 101(2) work categories).

133. See *Waite v. UMG Recordings, Inc.*, 2023 WL 1069690, at \*9 (S.D.N.Y. Jan. 27, 2023).

134. One could just as easily posit that all sound recordings are eligible for termination without consideration of the work-made-for-hire exception because doing so increases predictability and expediency. See Johnson, *supra* note 6, at 672.

135. In fact, at least one successor-in-interest entity has attempted to make this argument at trial. See *Stillwater Ltd. v. Basilotta*, No. 16-cv-01895, 2020 U.S. Dist. LEXIS 137746 (C.D. Cal. Feb. 5, 2020), *aff'd*, No. 21-55241, 2022 U.S. App. LEXIS 12752 (9th Cir. May 11, 2022). The successor-in-interest failed to demonstrate by a preponderance of the evidence that a producer was a joint author of the recordings in question. The district court cited a lack of shared intent to be co-authors, a lack of creative control on behalf of the producer, and a lack of audience appeal related to the producer's contributions. *Id.* at 17–22. The Ninth Circuit Court of Appeals later affirmed on these three factors. See *Stillwater*, 2022 U.S. App. LEXIS 12752, at \*8.



Session collaborators, including vocalists, musicians, producers, engineers, etc., are integral participants in the music industry.<sup>136</sup> In the process of developing and recording their music, artists may rely on a variety of different collaborators to enhance the quality and range of their music.<sup>137</sup> Before labels can make the claim of joint authorship of related sound recordings through their employment of session collaborators, they need to demonstrate that these collaborators were joint authors. In the majority of cases, they will be unable to do so.

The Act does not define joint authorship, but it is accepted that a joint author is an author of a work that satisfies the section 101 joint work definition.<sup>138</sup> Section 101 defines a joint work as a “work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”<sup>139</sup> The primary questions courts wrestle with are (1) whether purported authors intended to be coauthors and (2) whether the contributions were substantial enough to *accord* the legal status of authorship.<sup>140</sup>

After ascertaining that the putative joint author made independently copyrightable contributions, courts examine the intent of the parties by looking to sources of objective intent to either share or hoard authorship.<sup>141</sup> These factors include (1) whether one party exerted dominance over the creative process, (2) whether there were objective manifestations of shared intent to be coauthors, and (3) the level of audience appeal assignable to purported coauthors’ contributions.<sup>142</sup> In the Ninth Circuit, the dominance factor is the

136. See *Career Communities: Session Musician*, BERKLEE COLL. OF MUSIC, [www.berklee.edu/careers/roles/session-instrumentalist](http://www.berklee.edu/careers/roles/session-instrumentalist) [perma.cc/V4SW-JRKM] (last visited Mar. 5, 2024); *Life as a Studio Musician*, RECORDING CONNECTION (June 23, 2022), [recordingconnection.com/reference-library/life-as-a-studio-musician](http://recordingconnection.com/reference-library/life-as-a-studio-musician) [perma.cc/JM4V-8ZGC]; The Tunedly Team, *Session Musicians: Everything You Need to Know about Them*, TUNEDLY, (Apr. 20, 2022), [www.tunedly.com/blog/session-musicians-everything-you-need-to-know-about-them.html](http://www.tunedly.com/blog/session-musicians-everything-you-need-to-know-about-them.html) [perma.cc/9PWP-B26Z]; see also Alexandra El-Bayeh, Comment, *They Could Be Back: The Possibility of Termination Rights for Session Musicians*, 64 AM. U. L. REV. 285, 291–95 (2014).

137. See El-Bayeh, *supra* note 136, at 291–95.

138. 2 WILLIAM PATRY, PATRY ON COPYRIGHT § 5:4 (2024).

139. 17 U.S.C. § 101.

140. See *generally* *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000); 16 Casa Duse, LLC v. Merkin, 791 F.3d 247 (2d Cir. 2015).

141. See *Aalmuhammed*, 202 F.3d 1227 at 1234. Note however, that the question of substantiality of contribution occurs both before and after intent is examined. Independently copyrightable contribution is a low bar to meet, however, in cases where intent does not lend clarity, the Ninth Circuit will then examine the audience appeal of these contributions.

142. *Id.* (“Several factors suggest themselves as among the criteria for joint authorship, in the absence of contract. First, an author ‘superintend[s]’ the work by exercising control . . . Second, putative coauthors make objective manifestations of a shared intent to be coauthors, as by denoting the authorship . . . as ‘Gilbert and Sullivan’ . . . Third, the

most important one.<sup>143</sup> In the Second Circuit, dominance is the question that objective manifestation factors seek to answer.<sup>144</sup> Beyond written agreements, the Second Circuit will look towards billing or attribution, decision-making authority, and the parties' agreements with third parties.<sup>145</sup>

Generally, in the case of session collaborators, their agreements with recording artists and record labels preclude them from asserting joint authorship in the future. Session performers often sign agreements foregoing authorship claims in the final sound recordings.<sup>146</sup> Even if the collaborators contract for the right to appear in the liner notes with adequate credit reflecting their role in creation,<sup>147</sup> such provisions would not override the overall intent of the contract to assign sole authorship and control to one party. The contemplation that the label rather than the artist may be the sole author under agreements with collaborators is irrelevant—the agreements still demonstrate an objective intent towards sole authorship rather than joint authorship.<sup>148</sup>

In the slim range of cases in which the label can demonstrate that relevant session collaborators were, as a matter of law, joint authors of the sound recordings up for termination, the label will then need to assert work made for hire authorship status over the contributions of those session collaborators. Even if a nonexclusive recording agreement contemplates the label as the hiring party, work made for hire determinations go beyond contractual language and examine the substance of the relationship.<sup>149</sup>

It could prove difficult for labels to meet the section 101(1) *Aymes/Reid* employment factors. Recording artists are more likely than labels to exercise creative control during recording sessions.<sup>150</sup> Labels advance artists a recoupable budget per album,<sup>151</sup> which artists use to pay session collaborators.

audience appeal of the work turns on both contributions and 'the share of each in its success cannot be appraised.'").

143. *Id.*

144. *16 Casa Duse*, 791 F.3d 247 at 260 (explaining that when "multiple individuals lay claim to the copyright in a single work, the dispositive inquiry is which of the putative authors is the 'dominant author'") (quoting *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991)).

145. *Id.* ("[E]xpressing that decisionmaking authority, billing, and written agreements with third parties . . . are also relevant to our dominant-author inquiry.").

146. See Alan H. Kress & Daniel Cutler, *supra* note 54, Form 159–17 ¶ 3; AMERICAN FEDERATION OF MUSICIANS, SOUND RECORDING LABOR AGREEMENT FEBRUARY 1, 2006 THROUGH JANUARY 12, 2015 ¶ 26, <https://www.afm.org/wp-content/uploads/2016/03/Sound-Recording-Agreement.pdf>.

147. See Alan H. Kress & Daniel Cutler, *supra* note 54, Form 159–17 ¶ 7 ("Credit is usually whatever is customarily given in the industry and is rarely negotiated.").

148. *Id.* at ¶ 3.

149. See *supra* Part B.

150. See *supra* text accompanying note 86.

151. Gary Stiffleman & Bonnie Greenberg, *Exclusive Recording Agreements Between an Artist and a Record Company*, in 8 ENTERTAINMENT INDUSTRY CONTRACTS, *supra* note 54, ¶ 159.03(2)(a).

In opposition, labels would likely highlight their contractual right to control powers and formal documentation including collaborator W-4s, I-9s, and pay-stubs.<sup>152</sup> Yet, the language of these agreements often, in clear terms, lay the responsibility for such costs and endeavors squarely at the feet of the artist.<sup>153</sup> Terms generally denote that such costs are to “constitute advances,” essentially proclaiming that the artist is the payer of session collaborators.<sup>154</sup> Additionally, industry standards dictate that if residuals are to be paid, they are usually paid out from the recording artist’s royalty share.<sup>155</sup> Arguably, the recording industry has implicitly conceded this point repeatedly during Copyright Act revisions, including the Digital Performance Right in Sound Recordings (DPRSR) Act and the Allocation for Music Producers (AMP) Act. Both amendments are crafted in a way that renders session collaborators’ cut out of the artists’ share of digital performance royalties.<sup>156</sup> To the extent that recording artists specify when session collaborators work (through scheduled studio sessions) and guide whether or not they will need to provide more collaborative input, these factors lean in favor of finding recording artists have creative control.<sup>157</sup> Factors including the skill required, the source of tools, and whether the collaborator is regularly in that line of business don’t necessarily lean in one direction or the other.

On balance, it’s unlikely that a joint work theory will allow labels to avoid the practical consequences of termination in most cases. However, there will be some cases in which they may prevail. If session collaborators are formal employees of the label and the agreements are either ambiguous or reveal an intent to share authorship, labels may have a stronger claim. For example, collaborative relationships like The Salsoul Orchestra or The Funk Brothers—session performers directly and continuously employed by their respective labels, working in in-house studios, and often equally sharing credit with recording artists—might be sufficient to show joint authorship of the label and recording artist.

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152. See Alan H. Kress & Daniel Cutler, *supra* note 54, Form 159-1, 4:03; see also SCHULENBERG, *supra* note 51, at 53–54 for additional sample provisions. Note that the sample provisions lay responsibility for gathering necessary information at the feet of the production company, which may be an entity formed by the artist, an entity that the artist is signed to, or an independent producer.

153. See SCHULENBERG, *supra* note 51, at 106–07; see also PASSMAN *supra* note 54, at 87.

154. *Id.*; see also Alan H. Kress & Daniel Cutler, *supra* note 54, Form 159-1, 4:03.

155. It is standard that producer royalties are paid from the artist’s share. See PASSMAN *supra* note 54, at 96, 131–35; see e.g. Kress & Cutler, *supra* note 54, Form 159.03, 2(a). Less clear, however, is how often artists are on the hook for union residual funds. See SCHULENBERG, *supra* note 51, at 116–17 (noting that artists should be wary of agreements which “split” net royalties). *But see* PASSMAN *supra* note 54, at 185 (cautioning artists to avoid exploitation-based union residuals—claiming they are “customarily borne” by labels).

156. See 17 U.S.C. § 114(g)(2), (6).

157. See *supra* Part B.

Some commentators have expressed the concern that permitting terminations in the recording industry context has the potential to hamper the marketability of sound recordings.<sup>158</sup> However, creative dominance and objective intent standards disperse most joint work claims in the sound recording context. Due to the predominance of standardized nonexclusive agreements outlining the relationship between recording artists and session collaborators,<sup>159</sup> tangled questions of fact should usually be avoidable.<sup>160</sup>

E. “Loan-out” Corporations – Unintended Consequences

A less noted complication to the issue of termination rights is whether artists who have opted to assign their copyright interests through an intermediary are barred from exercising such rights. Many artists, particularly those with a certain level of commercial success, “loan out” their services through intermediary companies that they establish.<sup>161</sup> Doing so can decrease their tax liability and indemnify their personal assets in case of lawsuits.<sup>162</sup> Loan-out corporations have become increasingly prevalent in the music industry because of the possible financial benefits associated with incorporation.<sup>163</sup> These companies can take many forms, but regardless of form they typically render the artist an employee. A typical agreement between an artist and their loan-out corporation includes a work made for hire provision in near-identical terms to what one would find in the exclusive recording agreement between an artist and record label.<sup>164</sup> If these loan-outs are found to be actual employers, section 203’s work made for hire exception seems to unambiguously exempt works made while an artist was engaged in a loan-out from falling within that section.

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158. See *supra* Part C; Johnson, *supra* note 6, at 670–71; see e.g., Peters, *Sound Recordings as Works Made for Hire*, *supra* note 4 (reflecting label concerns about the marketability of sound recordings).

159. See Alan H. Kress & Daniel Cutler, *supra* note 54, ¶ 159.04 (explaining that “[a]rtists who perform on a non-exclusive basis are almost universally paid a flat fee for their services . . . [and] [w]hen the artist is someone other than a superstar, the fee paid to the artist is often based on rates prescribed by the major unions and guilds which have jurisdiction over the artist’s services . . . According to these guild rules, payment is determined by several factors including the amount of time singers and musicians spend rendering their services”).

160. See Daniel Gould, *Time’s Up: Copyright Termination, Work-for-Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91, 135 (2007) (discussing the joint work issue people were worried about in the early 2000s).

161. See PASSMAN, *supra* note 54, at 188.

162. See *id.*

163. See Aaron J. Moss & Kenneth Basin, *Copyright Termination and Loan-Out Corporations: Reconciling Practice and Policy*, 3 HARV. J. SPORTS & ENT. L. 55, 73 (2012) (“Artists who pass their income through loan-out corporations may enjoy better liquidity/cash flow, can coordinate their income distribution by fiscal year, enjoy lower corporate tax rates, and can further shield themselves from taxes by using qualified pension, profit-sharing, and employer medical reimbursement plans”).

164. PASSMAN, *supra* note 54, at 189; see also Moss & Basin, *supra* note 163, at 76.

UMG successfully convinced the court to dismiss multiple plaintiffs' claims in the its litigation due to the presence of a loan-out.<sup>165</sup> Judge Kaplan noted that section 203 permits the termination of grants "executed by the author" and that for at least two of the plaintiffs, it was their loan-out companies which had assigned the works.<sup>166</sup> To date, a court has not applied the section 101(1) factors to a loan-out company. However, considering how common loan-outs are, an alternative to applying the agency factors may be preferable. A more preferable approach would be an amendment to section 203 that reads artist-incorporated loan-outs out of the work made for hire exception. As an alternative, courts could look to the purpose of section 203 and the intent behind the work made for hire exception to avoid what seems to be a textual certainty—the preclusion of termination rights for a broad swath of recording artists.

*i. Formal Deficiency – Notice Requirements*

The text of section 203(a) is unambiguous with respect to the application of the work made for hire exception. Clever arguments attempting to limit the scope of the exception to some but not all employment relationships are incongruent with the text.<sup>167</sup> However, the text of section 203(a) is somewhat ambiguous with respect to the practical application of the "executed by the author" requirement. In *Waite*, this requirement operated as a barrier to service of valid notice.<sup>168</sup> Assuming this application holds, it seems to completely preclude artists from accessing reversion if the assignment was intermediated by a loan-out. The loan-outs of named plaintiffs in *Waite* were currently defunct, so UMG would have been the proper party for service pursuant to section 203(a)(4).<sup>169</sup> Plaintiffs advanced a cogent argument that notice was properly served on the loan-outs' successor in title, UMG, and that the work made for hire question was to be resolved further in litigation.<sup>170</sup> However, the court found this argument unsupported by the allegations.<sup>171</sup>

Seeking to amend their complaint, plaintiffs advanced an alternative theory that the inducement letters accompanying the agreements between

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165. See Memorandum of Law in Support of Defendant UMG Recordings, Inc.'s Motion to Dismiss the First Amended Complaint at 22–24, *Waite* Docket (June 26, 2019), ECF No. 50.

166. See *Waite v. UMG Recordings, Inc.* (*Waite I*), 450 F. Supp. 3d 430, 441 (S.D.N.Y. 2020).

167. Aaron Moss and Kenneth Basin make a valiant effort to formulate a reading of 17 U.S.C. § 203(a) which extends only to the particular assignment up for termination, but ultimately note that such a reading is strained. See Moss & Basin, *supra* note 163, at 81.

168. See *Waite v. UMG Recordings, Inc.* (*Waite III*), 477 F. Supp. 3d 265, 271–73 (S.D.N.Y. Aug. 10, 2020).

169. *Id.*

170. See Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss the First Amended Complaint at 25–27, *Waite* Docket (Aug. 7, 2019), ECF No. 56.

171. Plaintiffs' allegations effectively conceded this point by characterizing the assignment as occurring "through a loan out." See *Waite I*, 450 F. Supp. 3d at 441–42.

the loan-outs and predecessor grantees constituted “direct, personal grants” and were the subject of termination.<sup>172</sup> Artists generally furnish a “side-letter” or inducement document detailing to the label that they, individually, will be liable for any failure of their loan-out corporation to deliver services under the terms of the agreement.<sup>173</sup> UMG argued that such auxiliary documents are not properly construed as grants within the scope of section 203.<sup>174</sup> The court agreed and ultimately rejected the inducement letter theory, stating that plaintiffs “did [sic] convey the copyright[s] to the [predecessor] recording companies through their inducement letters.”<sup>175</sup> Plaintiffs’ termination notices attempting to terminate grants formally made by their loan-outs were therefore invalid.<sup>176</sup> Practically speaking, it seems that current notice requirements completely preclude reversion in cases in which copyright possession was informally intermediated then assigned. There is no formal assignment to terminate between the artist and intermediary, and the artist cannot terminate what the intermediary has transferred. Going forward then, it seems recording artists using loan-outs could better serve their future interests by mediating possession of their copyrights through language that complies with section 204 as opposed to relying on inducement letters.

ii. *Application of the Work Made for Hire Exception*

Substantively, loan-outs still create an issue: whether the initial “assignment” to the loan-out occurred within an employment relationship is determinative of whether termination is barred by the works made for hire exception or author execution requirement of section 203(a).<sup>177</sup> If it is assumed that a loan-out is a per se employer, then UMG’s preferred reading of section 203(a) is correct—the named plaintiffs were not authors who could have executed the grant.<sup>178</sup> Additionally, loan-outs themselves would be unable to terminate on behalf of artists.<sup>179</sup> Yet, it would be improper to assume loan-outs

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172. See Plaintiffs’ Memorandum of Law in Support of Motion for Leave to File Second Amended Complaint at 2–3, *Waite Docket* (May 8, 2020), ECF No. 74 (emphasis in original).

173. PASSMAN, *supra* note 54, at 190.

174. Defendant UMG Recordings, Inc.’s Memorandum of Law in Opposition to Plaintiffs’ Motion for Leave to File a Second Amended Complaint at 10–12, *Waite Docket* (May 22, 2020), ECF No. 75.

175. See *Waite III*, 477 F.Supp. 3d 265 at 272.

176. 37 C.F.R. § 201.10(2) (2005).

177. 17 U.S.C. § 203(a).

178. See Mem. of Law in Supp. of Def. Mot. to Dismiss, at 20–22, *Waite Docket* (06/26/19), ECF No. 50; cf. Mem. of Law in Supp. of Def. Mot. to Dismiss, at 22–24, *Waite Docket* (05/03/19), ECF No. 38 for a slightly different version of UMG’s section 203(a) author execution argument which is more clearly marshaled in service of a broader statute of limitations defense.

179. 17 U.S.C. § 203(a).

are per se employers without applying the *Aymes/Reid* factors on a case-by-case basis.

Some commentators believe that the substantive relationships between artists and their loan-outs are unlikely to pass muster in demonstrating an employment relationship under *Reid*—expressing a conviction that these are employment relationships in name only.<sup>180</sup> However, the contractual language guiding the formation of these entities is problematic. To satisfy tax code requirements, loan-out incorporation documents attempt to present the entity-artist relationship as in accordance with the principles of agency.<sup>181</sup> For these reasons, other commentators are convinced that the presence of loan-out corporations as an intermediary between the author and transferee is fatal to termination attempts by the author.<sup>182</sup>

The extent to which courts following *Aymes* are likely to favor the formal factors causes further complications.<sup>183</sup> These same factors are the ones loan-outs take pains to satisfy.<sup>184</sup> Practically, artists seeking to terminate are placed in the unenviable position of having to explain that their corporation was an employer in name only, and that they adopted such a framework for tax benefits.<sup>185</sup> Judge Kaplan did not let the irony of this situation slip by in his opinion.<sup>186</sup> It's not impossible to imagine situations in which an artist could produce evidence showing the loan-out was an employer in name only—failing to meet the *Aymes/Reid* factors. However, the range for situations in which such evidence would be available thirty-five years later and compelling enough to override the formal factors seems minimal.

### iii. Possible Solutions to the Loan-Out Problem

As noted, the interplay between termination rights and work made for hire status represents a delicate balancing of the interests of authors, publishers, and studios.<sup>187</sup> The work made for hire exception was designed to protect the interests of *particular* assignees in light of their investments into the creation of works. Application of the work made for hire exception to loan-outs fails to further this purpose. In the case of loan-outs, the legal author and

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180. See Moss & Basin, *supra* note 163, at 90; see also Michael H. Davis, *The Screenwriter's Indestructible Right to Terminate Her Assignment of Copyright: Once A Story Is "Pitched," A Studio Can Never Obtain All Copyrights in the Story*, 18 CARDOZO ARTS & ENT. L.J. 93, 117 (2000) (analyzing screenwriters' use of loan out companies and arguing that while "[s]uch writers are probably employees for purposes of the tax code . . . they are not within the common law agency rules articulated by Reid, [so] the works they produce are probably not works for hire.").

181. See Moss & Basin, *supra* note 163, at 90.

182. See Gould, *supra* note 160, at 114; see also LaFrance, *supra* note 121, at 403.

183. See *supra* Part B.

184. 17 U.S.C. § 203(a).

185. See Moss & Basin, *supra* note 163, at 91.

186. See *Waite v. UMG Recordings, Inc. (Waite I)*, 450 F. Supp. 3d 430, 441–42 (S.D.N.Y. 2020).

187. See *supra* Part A.

actual author are one and the same.<sup>188</sup> They do not have competing interests. To the extent that section 203(a) embodies an intent to prioritize the interests of legal authors over actual authors in certain circumstances, its application to loan-outs hinders both. Courts have the discretion to avoid this conclusion by allowing a presumption that, in the case of loan-outs, the legal author *is* the actual author. Courts could limit this presumption to the determination of whether notice was valid and allow the successor in title to contest authorship at trial. Or, courts could go a step further, and allow the presumption to stand through trial. Courts have adopted atextual readings in the past to avoid the alienation of termination rights from authors and their beneficiaries.<sup>189</sup> Courts could also interpret the harmless error provision to allow for termination notices that omit the distinction between legal and actual author in cases where the initial assignment was intermediated through a loan-out.

Nonetheless, an amendment to § 203(a) that limits the work made for hire exception's application to loan-outs would be best. Aaron Moss and Kenneth Basin's proposed amendment language would properly preserve the termination rights of artists without disturbing the benefits meant to vest with distributors.<sup>190</sup> They propose amending § 203(a) to include "(unless the legal author of such work made for hire is a corporation which is owned in whole or in majority part by the individual author of the work, in which case such individual author shall be deemed the legal author of the work for purposes of this subsection)" after the work made for hire exception.<sup>191</sup> Passing such an amendment would likely be difficult due to industry opposition.<sup>192</sup> Alternatively, the Copyright Office may find it worth removing the author execution requirement from 37 C.F.R. § 201.10(2) to avoid the unnecessary invalidation of termination

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188. See generally Sophia Sofferman, *It's My [Recapture Right], and It's Now or Never...*, 38 ENT. & SPORTS L. 55, 55-57 (2022) for a formulation of this argument in greater depth. Notably, however, in *Waite I*, Judge Kaplan denied this strand of argument—focusing on formality. 450 F.Supp 3d. 430, 442 (holding that the “unambiguous text [of section 203(a)] preclude[d]” certain named plaintiffs from terminating grants made by their respective loan-out entities).

189. Moss & Basin, *supra* note 163, at 81 (detailing that in *Larry Spier Inc. v. Bourne Co.*, 953 F.2d 774 (2d Cir. 1992), the court's focus on the author's grant as opposed to a later testamentary grant was guided by its focus on the statute's intent to grant author's and their successors a second bite at the apple).

190. See *id.* at 92–93.

191. *Id.*

192. Far from simply technical, the 1999 work made for hire amendment slipped into the enacted Satellite Home Viewer Improvement Act of 1999 added sound recordings to the list of commissioned works that may be considered works made for hire. See *supra* note 91 and accompanying text; see e.g., LaFrance, *supra* note 121, at 375–76, 379–80; see also Peters, *Sound Recordings as Works Made for Hire*, *supra* note 4, (testifying in support of repealing the amendment). Amending the notice requirements to comport with common practices of recording artists would be less of a diversion from the 1976 Act; yet, labels would likely lobby against it.



notices—allowing the question of authorship to be broached at trial once it is ripe instead.<sup>193</sup>

#### IV. THIS IS YOUR WORLD – SUGGESTIONS TOWARDS A MORE EQUITABLE FUTURE

##### A. *A Better Venue – Resolving Termination Disputes through the Copyright Small Claims Court*

Practically, section 203 is inaccessible to most authors, let alone recording artists. As the previous sections have detailed, there is a slim range of situations where record labels have a strong defense through the work made for hire exception. The affirmative requirements of section 203 presume a level of knowledge that the average author may not have. Assuming an author can even access a copy of the assignment agreement decades after signing it, provisions contemplating perpetual assignment or waiver of reversion may misinform an author of their rights. The formal notice requirements further decrease access. The fact that section 203 places no burden on the assignee to respond to the author's notice incentivizes assignees to ignore termination notices and dare authors to sue them for infringement.

At least one commentator has put forth persuasive suggestions to amend section 203 to ensure greater access.<sup>194</sup> They suggest expanding the range of good faith errors in accordance with the harmless error rule, placing an acknowledgment responsibility on assignees, and requiring mandatory disclosure of termination rights in assignment agreements.<sup>195</sup> Each of these suggestions would probably increase section 203's equitability without unnecessarily burdening assignees.

This Article offers another modest suggestion—utilizing the Copyright Claims Board (CCB) to adjudicate lower-value termination disputes. As the previous sections have detailed, there is a slim range of situations where record labels have a strong claim defense through the work made for hire exception. However, the difficulty of navigating section 203 and the cost of federal litigation prohibit many recording artists from ever exercising their termination rights. The Copyright Small Claims Court (CSCC) could be mobilized to adjudicate such termination validity proceedings. Utilizing the CSCC has the potential to lower costs for both parties, decrease the risk for record labels,

193. It's possible that the author execution requirement could be removed from this section entirely. 17 U.S.C. § 203(a) preserves the author execution requirement substantively without barring reversion due to a common industry practice. Alternatively, an exception could be added in for circumstances where intermediation and assignment occur simultaneously. *See* 37 C.F.R. § 201.10(b)(2) (2005).

194. *See* Megan Keelan, *Can't Buy Me Love, but You Can Buy My Copyrights (As Long as You Give Them Back): Finding Balance in the Era of Terminating Transfers*, 53 CREIGHTON L. REV. 575, 595–99 (2020).

195. *Id.*

and streamline the reversion process for recording artists—increasing access to section 203.

Recognizing the need for low-cost venues for small businesses and individual copyright owners to pursue infringement claims, Congress enacted the Copyright Alternative in Small-Claims Enforcement (CASE) Act.<sup>196</sup> The Act noted that federal litigation was cost-prohibitive for many individuals with lower-value claims.<sup>197</sup> Moreover, it suggests that for lower-value claims, the likelihood that plaintiffs would break even was low—decreasing the likelihood that they could access representation on a contingency fee basis.<sup>198</sup> The CASE Act created the CCB as a voluntary forum for lower-value copyright disputes.<sup>199</sup>

The CSCC, overseen by the CCB, is authorized to adjudicate infringement claims.<sup>200</sup> Unlike federal venues, the CSCC caps total monetary relief at \$30,000.<sup>201</sup> Statutory damages are capped at a maximum of \$15,000 per work infringed,<sup>202</sup> and willfulness is expressly barred from consideration.<sup>203</sup> Alternatively, the CCB may consider an agreement by the defendant to cease or mitigate infringing activity in making a determination to award statutory damages.<sup>204</sup> Most importantly, the claimant themselves can decide whether to pursue damages<sup>205</sup>—increasing the likelihood that defendants will agree to CSCC claim adjudication.

Assuming individual determinations of the validity of sound recording termination are here to stay, the CSCC offers a lower-stakes forum for artists and labels alike. Currently, artists are likely to assert their rights through either declaratory judgment actions or infringement suits against labels exploiting the works past the effective date of termination. In infringement suits, labels are on the hook for statutory damages if the termination notices are valid. Moreover, the counsel fees associated with individually contesting termination in federal court would be extremely costly. In light of the risk of repeated infringement liability in federal court, labels may find it worth opting into CSCC proceedings.

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196. *See generally* S. REP. NO. 116–105 (2019).

197. *Id.* at 2; *see also* U.S. COPYRIGHT OFF., COPYRIGHT SMALL CLAIMS: A REPORT OF THE REGISTER OF COPYRIGHTS 8 (2013) (noting that “the [estimated] median cost for a party to litigate a copyright infringement lawsuit with less than \$1 million at stake through appeal is \$350,000”).

198. *See* S. REP. NO. 116–105, at 2.

199. H. R. REP. NO. 116–252, at 17 (2019).

200. 17 U.S.C. § 1504(e)(1).

201. *Id.* § 1504(e)(1)(D).

202. *Id.* § 1504(e)(1)(A)(ii)(I); *see also id.* § 1504(e)(1)(A)(ii)(II) (placing a maximum limit of \$7,500 per work and \$15,000 total for works not timely registered).

203. *Id.* § 1504(e)(1)(A)(ii)(III).

204. *Id.* § 1504(e)(1)(A)(ii)(IV).

205. *Id.* § 1504(e)(1)(B).

The CSCC's synergy with section 203 is apparent. However, it could be bolstered even further. The CSCC is limited to infringement, noninfringement, and section 512 misrepresentation claims.<sup>206</sup> Yet, the policy rationale for adopting the CASE Act strongly applies to section 203 declaratory judgment actions as well. If the CCB were permitted to adjudicate termination notice validity, author access to termination rights would greatly increase. Moreover, to the extent that Congress envisioned law school clinic interactivity,<sup>207</sup> aiding artists in navigating section 203 may be an appealing project for universities.

B. *Embracing Labor Identity – Possible Benefits of Employee Status*

It's crucial to note that if labels want even greater certainty, they could simply offer formal employment to recording artists. Paying yearly wages and providing employment benefits to an artist signed to a recording agreement would strongly weigh in favor of finding section 101(1) employment. Some artists might balk at the proposition but others might welcome yearly wages as opposed to recoupable advances. Moving to a system where wages are disaggregated from project budgets might shift some creative control from artists to record labels. However, some artists may be willing to contract away some measure of control for greater compensation certainty. Similarly, many artists may find the prospect of employee benefits more appealing than the ability to regain their copyrights thirty-five years down the line. Most importantly, many artists may find that the ability to organize and collectively bargain is worth offering up their copyrights. This was the crossroad that screenwriters found themselves at in the first half of the 20<sup>th</sup> century.<sup>208</sup>

Screenwriters insist that unionization is crucial in guaranteeing a minimum standard of treatment for all writers in the industry.<sup>209</sup> It's possible that like screenwriters, recording artists could also develop standard form agreements that act as the floor for negotiations.<sup>210</sup> Screenwriters “see unionization as a necessary trade-off for the loss of intellectual property rights.”<sup>211</sup> Recording artists, if deprived of access to their termination rights, have neither.

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206. *Id.* § 1504(c).

207. H. R. REP. NO. 116–252, at 31; *see also* S. REP. NO. 116–105, at 4.

208. *See generally* Catherine L. Fisk, *Hollywood Writers and the Gig Economy*, 2017 UNIV. CHI. LEGAL FORUM 177 (2018).

209. *Id.* at 193 (noting that interviewed writers and showrunners “insisted that writers’ solidarity and unionization is what makes writing jobs good in an industry where, as one showrunner said, ‘people literally would [work] for free . . . So it’s good that the Guild is there to make sure that there’s minimums and protect people’”).

210. *Id.* at 195 (“Many [writers] explicitly linked the protections of the Minimum Basic Agreement as being the absolute minimum of fairness given that writers sell the intellectual property rights in their work as a condition of hire”).

211. *Id.* at 200.

## V. CONCLUSION

Taken to its extreme, the idea that labels deserve total exploitative control of artists' works because of their capital investment in creation is misguided. However, in some cases, the degree and quality of investment is such that the label should be construed as the legal author. Individual determinations allow labels that believe they have met such a threshold to contest the artist's termination notice and demonstrate their claim to legal authorship. Under either section 101(1) or section 101(2) employment determinations, the extent to which the label was creatively and managerially involved will be considered. Labels that engage in comprehensive talent development across their roster of artists will be better protected against reversion in the future. Labels that eschew a hands-on approach and simply dole out recoupable advances will have more difficulty meeting either employment standard.

Termination rights have yet to deeply impact the music industry. Yet, they can still potentially aid recording artists in achieving greater fairness during contracting. Fair application of the work made for hire exception and greater accessibility to declaratory judgments on ownership could gradually improve initial contracting parity. Labels seeking perpetual rights to sound recordings should be forced to balance this desire against the concessions necessary to its guarantee (e.g. wages, benefits, creative and managerial investment, non-recoupable advances, etc.). Meanwhile, artists given a broader range of options during initial contracting can more clearly balance their desire for future copyright ownership against financial security, promotional investment and marketability, and the potential to engage in concerted activity aiming towards collective representation.

