
**DEFUSING THE TIME BOMB ONCE AGAIN – DETERMINING
AUTHORSHIP IN A SOUND RECORDING**

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I. INTRODUCTION

Congress did not know the potential trouble it caused by not defining authorship when it enacted copyright protection for sound recordings.¹ This problem might have been softened by the determination that a sound recording can be a work for hire under Section 101 of the Copyright Act of 1976.² But courts have been finding otherwise,³ and the record industry failed in its attempt to add sound recordings to the definition.⁴ If courts continue to hold as they have, the termination right of sound recordings under Section 203 will go into effect in 2013.⁵ This right belongs to the true authors of these recordings. But is it really so simple to determine who the author is?

Consider: The album *Thriller*, originally released in 1982, is the most successful studio album recording of all time.⁶ It was credited to, of course, the already exceptionally famous Michael Jackson.⁷ Anyone who purchased the album would associate *Thriller* with Jackson, the star attraction with the distinctive vocals.⁸ But the album was produced by a super-

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¹ See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 109 (1966).

² 17 U.S.C. § 101 (2000). The current version of Title 17 of the United States Code was enacted by the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–1332 (2000) (“1976 Act”). The 1976 Act took effect on January 1, 1978.

³ See *infra* Part IV(D).

⁴ See *infra* Part IV(B).

⁵ See *infra* Part III(A).

⁶ *Thriller* has sold 26 million copies in the United States since its release, the second most of any album, according to the Recording Industry Association of America [hereinafter RIAA]. See Diamond Awards, <http://www.riaa.com/gp/bestsellers/diamond.asp>. The greatest selling album of time, *Their Greatest Hits 1971–1975* by musical group the Eagles, is a compilation of pre-existing material. *Id.*

⁷ See Artist Direct, Michael Jackson: *Thriller*, <http://www.artistdirect.com/nad/store/artist/album/0,,107885,00.html>.

⁸ *Id.*

star in his own right,⁹ Quincy Jones.¹⁰ Jones, who also produced Jackson's previous top-seller *Off the Wall*,¹¹ supervised the recording session, vocal arrangements, rhythm arrangements and musicians.¹² Furthermore, the album recording included guest contributions whose own caché and talent helped the album's unprecedented success: ex-Beatle Paul McCartney shared vocals with Jackson on the song *Girl Is Mine*,¹³ Van Halen guitarist Eddie Van Halen performed a virtuosic guitar solo on *Beat It*,¹⁴ and veteran actor Vincent Price orated a monologue on the individual track *Thriller*.¹⁵ Each of these songs was released as a single embodied on a "45 RPM" phonorecord, and each was a hit song.¹⁶ In addition to Jackson and the other superstars who made guest appearances on the recording, more than thirty musicians are listed in the album's liner notes.¹⁷ Each, arguably, has created an original form of expression to that recording.

In January 2017, the authors who created *Thriller* will likely have the right to terminate any assignment with Sony International and exploit the recording on their own.¹⁸ But who has that right? Surely, Jackson is considered the primary author of *Thriller*, but history suggests that Jones was an equal factor in its success.¹⁹ And what about the contributions by McCartney, Van Halen, Price, and the dozens of other musicians who performed? Do they have a claim of authorship, and thus an entitlement to termination?

Where participants in a recording session have not signed written contracts declaring their authorship or lack thereof, problems can arise imme-

⁹ See Profile: Quincy Jones, <http://www.achievement.org/autodoc/page/jon0pro-1>.

¹⁰ See *infra* note 6. Quincy Jones has produced numerous albums for which he is the credited as the designated artist. See Quincy Jones, <http://www.artistdirect.com/nad/music/artist/card/0,,450482,00.html>.

¹¹ See Michael Jackson: *Off the Wall*, <http://www.artistdirect.com/nad/store/artist/album/0,,107884,00.html>. Termination rights in *Off the Wall* go into effect in 2014.

¹² See Artist Direct, *supra* note 7.

¹³ *Id.* McCartney was credited as a "featured" artist on this song. *Id.* See *infra* note 312 and accompanying text.

¹⁴ See *The 500 Greatest Songs Of All Time*, ROLLING STONE, http://www.rollingstone.com/news/story/_/id/6596182/sort/artist?pageid=RS.RS500&pageregion=BLob (recognizing Van Halen's guitar as a major element to the song's appeal).

¹⁵ See Artist Direct, *supra* note 7.

¹⁶ *Id.* Furthermore, *Beat It* and *Thriller* were also released as music videos. The musical contributions were used, but neither Van Halen nor Price appeared personally in these videos.

¹⁷ See Artist Direct, *supra* note 7.

¹⁸ The album was originally recorded for Epic Records, which was later purchased by Sony. See *id.*

¹⁹ *Id.*

diately.²⁰ Hip-hop recording artist Jay-Z and his label Roc-A-Fella entered into litigation with Demme Ulloa, a woman who sang a short vocal phrase while visiting the artist's studio.²¹ Jay-Z used the vocals for a catchy chorus in the #1 song *Izzo (H.O.V.A)*.²² The uncredited singer sued for authorship of the sound recording,²³ but the case was later settled.²⁴ If the parties had not decided to settle,²⁵ the court might have been the first to determine whether an uncredited "side artist" can be the author of a sound recording.²⁶

More than ten years ago, Randy S. Frisch and Matthew J. Fortnow warned of a ticking time bomb: the upcoming right of termination in 2013 for creators of sound recordings.²⁷ Frisch and Fortnow expressed their concern that under Section 101, sound recordings were not works for hire, and thus record companies will have to give up their rights to the recordings.²⁸ Their suggested remedy, an amendment to the Copyright Act declaring a sound recording to fit within the definition of "work for hire," was a failure.²⁹ Congress did add "sound recording" to the definition,³⁰ only to face angry lobbying from unionized recording artists,³¹ and accusa-

²⁰ See *infra* note 136 and accompanying text

²¹ *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409, 411 (S.D.N.Y. 2003), *reconsideration denied*, 70 U.S.P.Q.2d 1835 (S.D.N.Y. 2004).

²² *Id.* at 412.

²³ *Id.* Ulloa also claimed authorship in the musical composition. The court denied the defendants' motion for summary judgment on this claim, holding that there are triable issues of fact as to her originality.

²⁴ The details have not been made public. Stipulation and Order of Dismissal With Prejudice and Without Costs, 1:01-corporate veil-09583-BSJ (S.D.N.Y. June 11, 2004).

²⁵ See *id.*

²⁶ Numerous well-publicized claims have been brought by uncredited musicians as to authorship of musical compositions, including in this case. See also Rodd McLoed, *The Reeducation of Lauryn Hill*, http://archive.salon.com/ent/music/feature/2000/05/10/pop_song.

²⁷ Randy S. Frisch & Matthew J. Fortnow, *The Time Bomb in the Record Company Vaults*, in 1993-94 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 111, 115-16. See also Corey Field, *Their Master's Voice? Recording Artists, Bright Lines, and Bowie Bonds: The Debate Over Sound Recordings as Works made for Hire*, 48 J. COPYRIGHT SOC'Y 145, 172 (2000); Testimony of Paul Goldstein, *infra* note 155.

²⁸ Frisch & Fortnow, *supra* note 27, at 115.

²⁹ See *infra* Part IV(B).

³⁰ *Id.*

³¹ See Recording Artists' Coalition, *Work for Hire*, http://www.recordingartistscoalition.com/issues_workforhire.php.

tions of underhandedness.³² The amendment was repealed in a matter of months.³³

With the likelihood that termination rights will indeed be in effect in 2013,³⁴ an important question remains insufficiently answered: who may claim authorship in a sound recording? Although a common purchaser of these works would deem the designated artist the sole creator, and some recording artists would happily agree,³⁵ there are many individuals with a colorable claim. Producers of sound recordings, who often control the recording session, are generally considered creators.³⁶ Engineers have been found to be authors of a sound recording.³⁷ With respect to session musicians and back-up singers who are not paid as employees, the question has not even been answered in a federal court. Considering the numerous participants in a typical recording session, a great deal of litigation can be anticipated for sound recordings created after January 1, 1978. Will Congress or the Supreme Court provide guidelines to defuse the time bomb?

This article discusses the issues involved in determining the extent of authorship in a sound recording. Parts II and III discuss the legislative history of sound recording protection, and the rights involved. Parts IV and V discuss the history and policy of the work-for-hire-provision, and its applicability to sound recordings. Parts VI, VII, and VIII discuss relevant issues in determining authorship, the multiple participants in a recording session, joint authorship, and the relevant case history. Finally, Part IX proposes guidelines, although no absolutist rules, for determining authorship based on the underlying principles in this article.

³² See, e.g., Prepared Testimony of Michael Greene, President/Chief Executive Officer, National Academy Recording Arts & Sciences, Inc., Before the House Judiciary Committee Subcommittee on Courts and Intellectual Property on the Subject of Sound Recordings As Works For Hire, May 25, 2000 [hereinafter Testimony of Michael Greene].

³³ See *infra* Part IV(B).

³⁴ There is good reason to believe that are recordings that will continue to be marketable and profitable by then. For instance, the album recording “Back in Black,” by musical group AC/DC, was first released in 1978. It continues to sell between five and ten thousand copies per week. See 2004 Year End Charts, <http://www.billboard.com/bb/biz/yearendcharts/2004/tlc-titl.jsp>. See also *supra* notes 6–19 and accompanying text; see *infra* Part III(D).

³⁵ See, e.g., Part IV(C)(2).

³⁶ See, e.g., HOUSE REPORT, *infra* note 53.

³⁷ See *infra* notes 382–387 and accompanying text.

II. BACKGROUND

A. Copyright Protection

Congress protects original works of creative expression through powers expressly provided to them in the United States Constitution, to promote “the Progress of Science” by securing for limited times to Authors the exclusive right to their “writings.”³⁸ As early as the nineteenth century, the Supreme Court recognized that the copyright protection of writings can be broadly construed to include forms of expression that did not exist, or perhaps were not in contemplation, at the time the Constitution was drafted.³⁹ In *Burrow-Giles Lithographic*, the Court found that a photograph was a “writing” and a photographer was an “author.”⁴⁰ The Court held that “an author in [the constitutional] sense is he to whom anything owes its origin”⁴¹ and that Congress included in the definition of writing “all the forms of writing, printing, engraving, etching, etc. by which the ideas in the mind of the author are given visible expression.”⁴² Thus, the Constitution was found “broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author.”⁴³

Following that, the 1909 Copyright Act added motion pictures and musical compositions as classification of works available for registration.⁴⁴ The “originality” standard of authorship later developed in the courts. The requirement of originality was ultimately added to the Copyright Act,⁴⁵ but Congress has not chosen to codify its definition. The Supreme Court took that task in *Feist Publications v. Rural Telephone Service Co.*, where it held that originality, a constitutional requirement based on the words “writings,”⁴⁶ means merely “that the work was *independently created* by the author (as opposed to copied from other works), and that it possesses at least some *minimal degree of creativity*.”⁴⁷

³⁸ U.S. CONST. art. I, § 8, cl. 8.

³⁹ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)

⁴⁰ *Id.* at 57.

⁴¹ *Id.* at 57-58 (internal quotations omitted).

⁴² *Id.* at 58

⁴³ *Id.*

⁴⁴ Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 [hereinafter “1909 Act”].

⁴⁵ 17 U.S.C. § 102(a) (2000)

⁴⁶ 499 U.S. 340, 346 (1991)

⁴⁷ *Id.* at 345 (emphasis added).

B. Copyright Protection Granted to Sound Recordings

Before 1971, the musical compositions embedded in a recording were subject to copyright.⁴⁸ However, the actual recording as embodied in a phonorecord was not.⁴⁹ The sound recording only had protection under state law.⁵⁰ Thus, a songwriter would receive the benefit of a federal copyright protection for his or her songs. But the performing artist who recorded these songs would receive none, and nor would the producer or record company.⁵¹

With growing concerns about record piracy⁵² and the substantial revenues lost by the recording industry as a result,⁵³ Congress passed the Sound Recordings Act of 1971 (hereinafter “1971 Act”).⁵⁴ This amendment added sound recordings to the 1909 Act as copyrightable works of protection, declaring that “the copyrightable work comprised of the aggregation of sounds” is “clearly within the scope of ‘writings of an author’ capable of protection under the Constitution.”⁵⁵ This protection was the result of more than ten years’ discussion between the record industry and Congress.⁵⁶

The right granted in sound recordings was, and still is, fairly limited as compared to other protected works of authorship. Because Congress acknowledged that their primary concern was the proliferation of pirated records and cassettes,⁵⁷ the protection afforded a right for infringement

⁴⁸ See 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.05 (2005).

⁴⁹ *Id.* § 2.10[A].

⁵⁰ Sound recordings created before 1972 may still be protected under state law. The Sound Recording Amendment of 1971 did not preempt any state law in these rights. See *Capital Records, Inc. v. Naxos of Am.*, 830 N.E.2d 250 (N.Y. 2005) (holding that sound recordings created before 1972 are protected by New York common law copyright).

⁵¹ See generally John R. Kettle III, *Dancing to the Beat of A Different Drummer: Global Harmonization – And the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1041 (2002). Even after the 1971 Act, rights in a sound recording are not as extensive as those in the underlying musical composition. See *infra* notes 58–64 and accompanying text.

⁵² Piracy results from the unauthorized duplication of sound recordings. 1 *NIMMER & NIMMER*, *supra* note 48, § 2.10[A].

⁵³ H.R. REP. NO. 92-487 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1567 [hereinafter *HOUSE REPORT*].

⁵⁴ Pub. L. No. 92-140, 85 Stat. 391 (1971).

⁵⁵ *HOUSE REPORT*, *supra* note 53, at 1570.

⁵⁶ See Statement of Marybeth Peters, Register of Copyrights, Before the House Subcommittee on Courts on Intellectual Property on the Issue of Sound Recordings as Works Made for Hire, 106th Congress, May 25, 2000 [hereinafter *Statement of Marybeth Peters*].

⁵⁷ *HOUSE REPORT*, *supra* note 53, at 1567.

against only the illegal distribution or physical reproduction of these works.⁵⁸ They explicitly declared that there is no copyright infringement where a sound recording is independently created by another, even if it is intended to and does sound like another recording.⁵⁹ Further, no right was given for a public performance,⁶⁰ one of the most lucrative streams of revenue for composers of musical compositions.⁶¹

Congress's House Report provides some guidance as to who is an author of the work, noting that "performers, arrangers, and recording experts are needed to produce [a] finished creative work in the form of a distinctive sound recording."⁶² They further said that the copyrightable elements will usually involve authorship on the part of the performers (notably, they took no position as to which performers), and the "record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling them and editing them to make the final sound recording."⁶³ They elaborated on the producer's role, noting that in some cases that the contribution is so minimal that the performance is the only copyrightable element in the work, and in others the producer's contribution is the only copyrightable expression.⁶⁴

The Copyright Office's discussion of sound recordings also recognizes authorship in the performers and producer, advising that "generally, copyright protection extends to two elements in a sound recording: (1) the contribution of the performer(s) whose performance is captured and (2) the contribution of the person or persons responsible for capturing the sounds to make the final recording."⁶⁵ But neither Congress nor the Copyright Office has taken a position on which performers on a sound recording can

⁵⁸ *Id.* at 1578.

⁵⁹ *Id.* See also *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 398 (6th Cir. 2004). The performer of that independently created sound recording would need a compulsory license for the underlying musical composition. See 17 U.S.C. § 115 (2000). If the performer had not secured one (or did not comply with the provisions of the compulsory license), that artist is infringing the musical composition. But so long as the music was independently created, under no circumstance is there an infringement of the sound recording.

⁶⁰ See *Kettle*, *supra* note 51. A performance right was granted for digital transmissions of sound recordings under the Digital Millennium Copyright Act. See *infra* note 105 and accompanying text.

⁶¹ See, e.g., ASCAP.com; BMI.com; SESAC.com.

⁶² HOUSE REPORT, *supra* note 53, at 1569. Whatever they might have meant by the term "recording expert," it does not appear in other discussions on this topic, and will not be used in this article.

⁶³ *Id.* at 1570.

⁶⁴ *Id.*

⁶⁵ Copyright Registration for Sound Recordings, available at <http://www.copyright.gov/circs/circ56.html>.

claim authorship. Ultimately, Congress decided not to make a final determination of the issue, leaving it to “the employment relationship and bargaining among the interests involved.”⁶⁶ In other words, authorship in the sound recording is to be a matter of contract.

The classification of a sound recording is conceptually difficult, because it is distinguished both from the underlying musical compositions⁶⁷ (if any) and the phonorecord in which it is embodied.⁶⁸ The 1971 Act defines a sound recording as:

a work that results from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.⁶⁹

The author of a musical composition, therefore, would retain rights independent of those in the sound recording.⁷⁰ Authors of musical compositions have received the benefit of copyright protection for over a century, and Congress has deemed it not necessary to define a musical work.⁷¹ The authors of the work are generally the composer(s) of the music and the composer(s) of the lyrics, and defining authorship as such is not as controversial an issue.⁷² Vocalists, musicians, and producers can claim a copyright in the underlying musical work only if they composed the material.

The “phonorecord,” however archaic that the term might sound, refers to the actual physical embodiment of the sound recording. These are “material objects in which sounds . . . are fixed by any method now known or later developed, and from which the sounds can be reproduced, otherwise communicated, either directly or with the aid of a machine or device.”⁷³ The phonorecord is generally in the form of a vinyl record, audiocassette, or compact disc.⁷⁴ It is not in itself copyrightable.⁷⁵

⁶⁶ HOUSE REPORT, *supra* note 53, at 1570.

⁶⁷ *Cf. Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003) (separating the musical composition from the sound recording).

⁶⁸ *See* 1 NIMMER & NIMMER, *supra* note 48, at § 2.10 n.5

⁶⁹ 17 U.S.C. § 101 (2000).

⁷⁰ *Cf. HOUSE REPORT*, *supra* note 53, at 1169 (discussing that the compulsory license for musical compositions applies only to musical works and not the sound recordings).

⁷¹ *See* H.R. REP. NO. 94-1476 (1976). In this article, the term “musical work” is used interchangeably with “musical composition”

⁷² Although authorship can, like anything else, be the subject of litigation. *See, e.g., Reeducation of Lauryn Hill*, *supra* note 26.

⁷³ 17 U.S.C. § 101 (2000).

⁷⁴ Sound recordings, before the Internet, were nearly always embodied on a vinyl record, audiocassette, or compact disc. *See* Testimony by Marybeth Peters,

III. RIGHTS AT STAKE

Sound recordings were included among the enumerated works in the 1976 Act, which overruled the 1909 Act and clarified and changed preexisting rights.⁷⁶ Sound recordings created on or after January 1, 1978, the date that the Act went into effect, are governed by these rights.⁷⁷ Those created between February 15, 1972 and December 31, 1977, are still governed by the provisions of the 1909 Act.⁷⁸ A discussion of the rights available to authors and copyright owners of sound recordings is necessary to appreciate the full value of what is at stake in a claim of authorship.

A. The Termination Right

The right to terminate any assignment or transfer of a copyright is the most important available to its author,⁷⁹ because with that termination the author can receive the full benefit of all her other rights. The 1976 Act removed the clumsy renewal provisions for copyright holders,⁸⁰ and Section 203 granted to authors the right to terminate any existing contracts and retain full rights in their work thirty-five years after the time of its transfer.⁸¹ This right cannot be assigned nor waived in advance, and any contractual provision providing the acquiescence of the termination right is void.⁸² The author must provide notice within two and ten years before the end of the thirty-five year period.⁸³

This means that the first works eligible for termination under Section 203 will revert to their creators no sooner than January 1, 2013.⁸⁴ Many authors may now give notice to assignees and licensees that they wish to

Register of Copyrights Before the House Judiciary Subcommittee and the Subject of Licensing and Royalties for Reproduction of Music (2004) [hereinafter Statement of Marybeth Peters]. *But see, e.g.,* JCW Invs., Inc. v. Novelty, Inc., 289 F. Supp. 2d 1023 (N.D. Ill. 2003) (ruling on an infringement in a sound recording embodied in a “farting” doll).

⁷⁵ See 1 NIMMER & NIMMER, *supra* note 48, § 2.10. *But see* this article *infra* Part IX(A)(1) (suggesting that the right has the effect of protecting only phonorecords and not original expression).

⁷⁶ Pub. L. No. 92-140, *supra* note 54.

⁷⁷ See Testimony of Marybeth Peters, *supra* note 74.

⁷⁸ *Id.*

⁷⁹ Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 377-78 (2003).

⁸⁰ See Testimony of Marybeth Peters, *supra* note 74.

⁸¹ 17 U.S.C. § 203 (2000).

⁸² *Id.* See also LaFrance, *Sound Recordings*, *supra* note 79, at 377-78.

⁸³ 17 U.S.C. § 203 (2000).

⁸⁴ See Testimony of Marybeth Peters, *supra* note 74.

terminate their contracts and receive the rights in their works.⁸⁵ If they do not provide notice within a five year window, the copyrights remain with the owner for the life of the copyright.⁸⁶ If the right is terminated, the author may exploit the work on her own, or assign those rights to another company.⁸⁷ The author may also use the termination right as a bargaining chip to renegotiate with the original assignee for a new contract with more favorable terms.⁸⁸

The termination right is not available if the recording is deemed a work for hire.⁸⁹ In that case, the owner of the copyright would remain the owner for the life of the copyright.⁹⁰ Where the work is a joint work, if two or more joint authors grant rights in the work, the termination will go into effect where a majority of the authors who executed the grant choose to terminate.⁹¹ Therefore, in the case of a musical group that terminates its rights to a record company (assuming that each member of the group is a joint author of that sound recording), a majority of the group's members must choose to terminate the rights in order for the termination to take place. However, if a joint author had granted his rights in a separate execution, as a record producer often does, that author can terminate and enjoy non-exclusive rights to that work, subject to an accounting of the profits from that exploitation.⁹²

If a sound recording is no longer generating substantial revenue, this would not necessarily dilute the appeal of the termination right. Many creators feel that the copyright owners are not properly exploiting these works to their full potential.⁹³ A second chance with another company might present a new opportunity for revenue streams, including resissue of compact discs and other sources of revenue discussed below.⁹⁴ Even

⁸⁵ See John P. Strohm, *Comment: Writings in the Margin (of Error): The Authorship Status of Sound Recordings Under United States Copyright Law*, 34 CUMB. L. REV. 127, 130 (2003).

⁸⁶ See Testimony of Marybeth Peters, *supra* note 74.

⁸⁷ See Field, *supra* note 27, at 150.

⁸⁸ See *id.* A contract between a record company and a recording artist is typically very unfavorable to the latter. See *infra* notes 262–273 and accompanying text.

⁸⁹ LaFrance, *Sound Recordings*, *supra* note 79, at 378.

⁹⁰ *Id.* The owner of a work for hire is treated as an author for purposes of copyright, but it does not in itself have termination rights if it assigns the work.

⁹¹ 17 U.S.C. § 203(A)(1) (2000).

⁹² See H.R. REP. NO. 94-1476 (1976).

⁹³ See Sen. Kevin Murray, *Recording Industry Practices*, <http://www.recordingartistscoalition.com/industrypractices.php>.

⁹⁴ See Field, *supra* note 27, at 150.

where works have no more substantial economic value, they may still be of important sentimental significance to its author.⁹⁵

Works that were created before January 1, 1978 are governed by Section 304 of the 1976 Copyright Act, which provides a termination right and a nineteen-year extension of the copyright fifty-six years after the copyright has been secured.⁹⁶ This means that the termination rights to any recordings under the 1909 Act will go into effect no earlier than February 15, 2028,⁹⁷ and authors may give notice for those works in 2018.⁹⁸ Although those works are not governed by the work-for-hire standards of the 1976 Act, the analysis as to authorship of those recordings is the same.⁹⁹ Any sound recording created before the Sound Recordings Amendment went into effect is not covered under federal law.¹⁰⁰ State common law can protect these works, and they are not subject to termination provisions.¹⁰¹ Authorship in these recordings may present interesting situations for discussions,¹⁰² but might not result in any substantial litigation.

B. Digital Performance Right

The most increasingly important right in a sound recording is the performance right in digital transmissions, as granted by the Digital Millen-

⁹⁵ See Murray, *supra* note 93.

⁹⁶ See Testimony of Marybeth Peters, *supra* note 74.

⁹⁷ *Id.* There is reason to believe now that there will be economic value in the works whose termination rights are in effect at that time. For instance, the album, *Dark Side of the Moon* by the rock group Pink Floyd, released in 1973, has spent more than 1,200 weeks on Billboard's top seller charts. It currently sells between five and ten thousand copies per week. The work can be terminated from its assignee in 2029, with notice given as early as 2019. At the time this article was submitted, it was just reported that a vocalist on that album, who was paid only for a single recording session, settled out of court in Britain for a claim of authorship. See Pink Floyd Singer Wins Settlement from Band, <http://www.contactmusic.com/new/xml/feed.nsf/mndwebpages/pink%20floyd%20singer%20wins%20settlement%20from%20band>.

⁹⁸ Testimony of Marybeth Peters, *supra* note 74.

⁹⁹ Discussions related to work for hire and authorship of a sound recording have generally been limited to those under the 1976 Act. Cf. Jay L. Cooper & Kenneth L. Burry, *The Work for Hire Conundrum*, available at <http://www.gtlaw.com/pub/articles/2001/cooper01a.asp>.

¹⁰⁰ See Frisch & Fortnow, *supra* note 27, at 214.

¹⁰¹ *Id.*

¹⁰² Among the most interesting would be regarding recordings by the Beatles. For instance, it is well-known that Paul McCartney recorded the Beatles song *Yesterday* with string musicians arranged by producer George Martin, but with no other members of the band. See http://www.rollingstone.com/news/story/_/id/6595858/sort/rank?pageid=RS.RS500&pageregion=BLob.

nium Copyright Act (DMCA).¹⁰³ Enacted in 1998, the Act for the first time grants a right for the performance of a sound recording transmitted digitally, as in over the Internet.¹⁰⁴ Because more consumers are likely to listen to their music through the Internet than by purchasing tangible phonorecords,¹⁰⁵ the digital performance may well be the most profitable one by 2013.

The provisions of the digital performance right are complicated.¹⁰⁶ Some rates are set by compulsory licenses and others are fully negotiable, depending on the method by which they are broadcast.¹⁰⁷ The numerous complications in the DMCA are enough to confuse experienced copyright attorneys.¹⁰⁸ It is beyond the scope of this article to fully discuss the revenue streams from this right, and it suffices to note that the profit potential of digital performance is well recognized.

C. *Rights Related to the Licensing of Individual Songs*

The discussion of a sound recording's potential for revenue often takes for granted that the value of individual songs as sound recordings (as opposed to musical compositions) are quite valuable, regardless of whether the full-length album in which they were originally embodied is still a top-seller. The digital transmission right, discussed briefly above, is only the newest of profit streams for an individual song. Long before that, copyright owners have enjoyed substantial revenue from licensing song recordings for use in motion pictures,¹⁰⁹ television programs, and television commercials.¹¹⁰ Today, excerpts of these recordings are used for "ring-tones" in cellular phones, a remarkably popular use for the songs.¹¹¹

¹⁰³ Pub. L. No. 105-304, Sec. 407, 112 Stat. 2860 (1998). See Prepared Testimony of Don Henley Before the Senate Judiciary Committee, Apr. 3, 2001 [hereinafter Testimony of Don Henley].

¹⁰⁴ See David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189, 191 (2000). Rights were first granted in the Digital Performance Right in Sound Recordings Act of 1995. *Id.*

¹⁰⁵ See Testimony of Marybeth Peters, *supra* note 74.

¹⁰⁶ See Nimmer, *supra* note 104, at 190.

¹⁰⁷ See *id.* at 192-93.

¹⁰⁸ See generally *id.*

¹⁰⁹ See JEFFREY BRABEC & TODD BRABEC, *MUSIC MONEY AND SUCCESS* 170-88 (2d ed. 2000).

¹¹⁰ See M. WILLIAM KRASILOVSKY & SIDNEY SHELLEY, *THIS BUSINESS OF MUSIC* 269-73 (9th ed. 2003).

¹¹¹ See Evan Ponder, *A Way To Ring Up a Profit*, L.A. DAILY NEWS, available at <http://www.madison.com/wsj/home/features/index.php?ntid=37345&ntpid=1>.

Individual songs can also be licensed for use in compilations.¹¹² A hit song from the late 1970s or 1980s, for which there is no longer any market for its original album, can appear in dozens of compilation CDs.¹¹³ Furthermore, many authors of sound recordings can realize profits in licensing portions of their songs for other artists to sample in their own recordings.¹¹⁴

D. Duration

The duration of a copyright is affected by whether or not the work is designated a work for hire.¹¹⁵ If the recording is a work for hire, it will enter the public domain 120 years after its creation, or ninety-five years after it is published, whichever comes first.¹¹⁶ For a work of authorship that is not a work for hire, the copyright lasts seventy years past the life of the author.¹¹⁷ In a joint work, the copyright lasts until seventy years past the death of its last surviving author.¹¹⁸

IV. IS A SOUND RECORDING A WORK FOR HIRE?

If a sound recording is deemed to be a work for hire, an issue that has not yet been settled, the rights listed above will be much less significant for its original creators.¹¹⁹ If any participant has assigned his or her rights as a work for hire, that person's termination right does not apply and the copyright owner may retain rights for the life of the copyright.¹²⁰ A typical recording contract with a record company provides that the featured artist, musician, producer, engineer or other contracting party shall be deemed as employees in work for hire.¹²¹ However, the contractual provision alone cannot alone make it a work for hire.¹²² Whether or not a sound recording can constitute a work for hire under the definition in the 1976 Act is

¹¹² See KRASILOVSKY & SHEMEL, *supra* note 110, at 44.

¹¹³ *Id.*

¹¹⁴ For instance, the song *Genius of Love* by recording artist Tom Tom Club, created in 1981, has been sampled by dozens of top-selling artists. See Tom Tom Club, <http://www.tomtomclub.com/history.html>.

¹¹⁵ See LaFrance, *Sound Recordings*, *supra* note 79, at 377.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ 17 U.S.C. § 302(b) (2000).

¹¹⁹ See LaFrance, *Sound Recordings*, *supra* note 79, at 378.

¹²⁰ *Id.* at 376-77.

¹²¹ See Prepared Testimony of Professor Marci A. Hamilton Before the House Committee on the Judiciary Subcommittee on Courts and Intellectual Property on the Subject of Sound Recordings As Work For Hire, May 25, 2000 [hereinafter Testimony of Marci Hamilton].

¹²² See Testimony of Marybeth Peters, *supra* note 74.

one of the most contentious issues between recording artists and record companies, and their debate sheds light on views of authorship.

A. *History of Work for Hire*

Prior to the 1976 Act, in the 1909 Act, the term “author” included “an employer in the case of works made for hire,” but defined neither of these terms.¹²³ The clause was presumably to ensure that employers would enjoy the full benefit of copyrights in works created by their employees.¹²⁴ The courts broadly construed this provision, and ultimately found that any commissioned work would be a work for hire with full rights in the party who has commissioned it, regardless of any employer/employee relationship.¹²⁵

1. *The 1976 Act*

The 1976 Act codified the definition of a work made for hire and narrowed its scope.¹²⁶ Section 101 defined two ways in which a work can constitute a work made for hire: either (1) a work made by an employee in the scope of his employment and (2) a specially ordered or commissioned work, provided that a written document signed by both parties designates the creation as a work for hire, and the work is one of nine enumerated categories in the definition.¹²⁷

2. *Work Prepared By an Employee Within the Scope of an Employment*

The first way that a work can be a work for hire is if it is a “work prepared by an employee within the scope of employment.”¹²⁸ Works that fall under this definition can be any category of copyrightable expression, and no written agreement that the work is a work for hire is necessary.¹²⁹

In *Community for Creative Non-Violence v. Reid*, the Supreme Court clarified the relationship necessary to fit within this definition.¹³⁰ *Reid*

¹²³ Mary LaFrance, *Authorship, Dominance, and the Captive Collaborator: Preserving the Rights of Joint Authors*, 50 EMORY L.J. 193, 194-95 (2001).

¹²⁴ See Prepared Statement of Hillary Rosen, President and CEO Recording Industry Association of America, Before the House Judiciary Committee Subcommittee on Court and Intellectual Property, May 25, 2000 [hereinafter Testimony of Hillary Rosen].

¹²⁵ LaFrance, *Joint Authors*, *supra* note 123, at 202.

¹²⁶ *Id.*

¹²⁷ 17 U.S.C. § 101 (2000).

¹²⁸ *Id.*

¹²⁹ LaFrance, *Joint Authors*, *supra* note 123, at 212.

¹³⁰ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989).

held that the common law of agency, as well as the weighing of thirteen listed factors, control.¹³¹ The Second Circuit, in *Aymes v. Bonelli*, identified five of those factors that it deemed most important in the analysis: (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.¹³² Thus, the courts have narrowed a company's claim of a work-for-hire ownership to more generally recognized employment relationships.¹³³ If the standards for this test are not met, the party claiming work for-hire-status must satisfy the "specially ordered or commissioned" definition.¹³⁴

3. *Specially Ordered or Commissioned Works*

The second way by which a work can be deemed a work for hire is if it is a "work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."¹³⁵

Clearly, a sound recording is not specifically enumerated as one of the works eligible for work-for-hire-status under this definition. Nevertheless, a declaration that the contribution to a sound recording shall be deemed a work for hire is the standard on virtually every recording contract between a performer or producer and a record company.¹³⁶

Because the status of recording artists as employees is at best questionable,¹³⁷ and because of concerns that a court may find that a sound recording may not fit under the "specially ordered or commissioned" definition,¹³⁸ record companies typically add a "fallback clause" after the work for-hire-provision.¹³⁹ This clause states that in the event that the work is deemed not be to a work for hire, any and all rights that the crea-

¹³¹ *Id.*

¹³² 980 F.2d 857, 861 (2d Cir. 1992). *See also* *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409, 414 (S.D.N.Y. 2003), *reconsideration denied*, 70 U.S.P.Q.2d 1843 (S.D.N.Y. 2004).

¹³³ LaFrance, *Joint Authors*, *supra* note 123, at 212.

¹³⁴ *See id.*

¹³⁵ 17 U.S.C. § 101 (2000) (emphasis added).

¹³⁶ *See, e.g.*, Testimony of Marci Hamilton, *supra* note 121. Performers who retain their rights in the sound recording also generally register the recordings as works for hire. *See* Testimony of Hillary Rosen, *supra* note 124.

¹³⁷ *See infra* Part V(A).

¹³⁸ *See* Frisch & Fortnow, *supra* note 27.

¹³⁹ *See* KRASILOVSKY & SHEMEL, *supra* note 110, at 180.

tor may have is assigned and granted to the record company exclusively.¹⁴⁰ This clause is generally valid except as to duration, because an author will still retain any termination rights regardless of the grant in the contract.¹⁴¹

*B. The “Millennial Flip-Flop”*¹⁴²

The record industry had been operating under the assumption that sound recordings would qualify as works for the hire by virtue of the fact that they were always contracted as such.¹⁴³ However, concerns that this would be not be universally recognized led to the Recording Industry Association of America’s (hereinafter “RIAA”) lobbying to include sound recordings to the list of enumerated items that can be a work for hire under the “specially ordered or commissioned” definition.¹⁴⁴ As part of the Intellectual Property Communications Omnibus Reform Act of 1999, a “technical amendment” did just that.¹⁴⁵ Because a technical amendment is designed to clarify existing law, as opposed to changing it,¹⁴⁶ the amendment would have the effect of validating all the work-for-hire clauses in recording artist contracts, thus resolving the dispute over termination in favor of the record companies.¹⁴⁷

The opposition to the amendment arose swiftly and loudly.¹⁴⁸ Congress was faced with intense scrutiny from recording artists and the media, and accusations that the amendment was the product of a conspiracy between Congress and the RIAA.¹⁴⁹ Further, the weight of unbiased au-

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Field, *supra* note 27, at 146.

¹⁴³ *See, e.g.*, Testimony of Hillary Rosen, *supra* note 124.

¹⁴⁴ *See* LaFrance, *Sound Recordings*, *supra* note 79, at 375. When this article or any other discusses whether or not a sound recording is a work for hire, it recognizes that a sound recording is not in itself a work for hire merely because it was one of the enumerated items. There still must a written contract, or an employer/employee relationship pursuant to *Reid*.

¹⁴⁵ Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113 app. I-S. 1948, sec. 1011(d), 113 Stat. 1501A-521, 1501A-544 (amending 17 U.S.C. § 101) (repealed 2000).

¹⁴⁶ *See* LaFrance, *Sound Recordings*, *supra* note 79, at 375.

¹⁴⁷ *Id.*

¹⁴⁸ *See id.* at 375-76; Peter J. Strand, *What A Short Strange Trip It's Been: Sound Recordings and the Work Made For Hire Doctrine*, 18 ENT. & SPORTS LAW. 12 (2000).

¹⁴⁹ *See* Strand, *supra* note 148, at 12. *Compare* Testimony of Representative Howard L. Berman, Before the House Judiciary Crime Subcommittee on the Status of Sound Recordings as Works Made for Hire, May 25, 2000 (defending against this accusation).

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thority agreed that the amendment was actually a substantive, and not a technical, amendment.¹⁵⁰

Congress immediately responded, agreeing to hear testimony from the RIAA, recording artists, and copyright experts (though, notably, nobody representing the interests of producers), regarding the inclusion of the technical amendment.¹⁵¹ Within six months, the amendment was repealed.¹⁵² A compromise was included on behest of the record industry that presumably would result in no prejudice to either side in the debate.¹⁵³ Section 101 now states that in any determination of whether a work is a work for hire, no effect shall be given to the fact that Congress ever included or omitted sound recording from its definition.¹⁵⁴ In other words, the Copyright Act is now back where it started with respect to the authorship status of sound recordings.¹⁵⁵

C. *The Work-Made-For-Hire Hearings*

The extensive hearings before the House Judiciary Committee, although principally about the work-for-hire amendment, shed light on competing views of authorship of a sound recording.

1. *The Work-for-Hire Arguments*

Hillary Rosen, then the President of the RIAA, testified that the amendment merely clarified existing law, stating as proof the continued practice of contracting sound recordings as works for hire and registering them as such.¹⁵⁶ She added that the artists who contract for rights to ownership of their masters¹⁵⁷ also register them as works for hire, suggesting

¹⁵⁰ See, e.g., Jay L. Cooper & Kenneth L. Burry, *The Work for Hire Conundrum*, available at <http://www.gtlaw.com/pub/articles/2001/cooper01a.asp>. Compare Prepared Testimony of Paul Goldstein, Lillick Professor of Law, Stanford University, Before the House Judiciary Committee Crime Subcommittee on the Subject of the Status of Sound Recordings as Works Made For Hire, May 25, 2000 [hereinafter Testimony of Paul Goldstein].

¹⁵¹ See *infra* Part IV(D).

¹⁵² Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444. See LaFrance, *Sound Recordings*, *supra* note 79, at 376.

¹⁵³ See Cooper & Burry, *supra* note 150.

¹⁵⁴ 17 U.S.C. § 101 (2000).

¹⁵⁵ *Id.* The text specifically demands that courts will make decisions as if both amendments were never enacted. *Id.*

¹⁵⁶ Testimony of Hillary Rosen, *supra* note 124. But see Testimony of Marybeth Peters, *supra* note 74 (stating that the contractual provision alone does not make it a work for hire).

¹⁵⁷ “Owning the masters” is record industry parlance; it is the same as owning the copyright in the sound recording. See Krasilovsky, *supra* note 110, at 28.

that the work for hire is as much for the protection of the performers as it is for the record companies.¹⁵⁸

Therefore, she concluded, the work for hire benefits everyone involved, including artists and producers.¹⁵⁹ Without a work-for-hire provision, anyone with a “colorable claim of authorship” can trap the true creators in litigation just to “make a quick buck.”¹⁶⁰ She further rejected the idea that a key performer or “featured artist” can be designated the author of a work,¹⁶¹ dismissing a suggestion by Copyright Office Register, Marybeth Peters.¹⁶² This approach, she argued, would pit “creator against creator.”¹⁶³ Because the identities of key performers and lesser contributors cannot be determined, this standard of authorship cannot work.¹⁶⁴ Congress, she concluded, cannot “legislate a one size fits all approach.”¹⁶⁵

Professor Paul Goldstein prepared statements of behalf of the RIAA,¹⁶⁶ and his unyielding assertion that the amendment was technical suggests a lack of impartiality on his behalf.¹⁶⁷ Goldstein asserted that a “contribution to a sound recording will typically constitute a contribution to a collective work,” and therefore is eligible as a work for hire under the second definition.¹⁶⁸ He argued that an album or compact disc is made up of individual contributions, the songs.¹⁶⁹ However, he acknowledged that each individual song recording does not fit the definition of a collective work.¹⁷⁰ He also set forward some of the economic rationales for including sound recordings within the enumerated categories under work for hire.¹⁷¹ Identifying ownership in collaborative works involves heavy

¹⁵⁸ Testimony of Hillary Rosen, *supra* note 124.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See Testimony of Marybeth Peters, *supra* note 74; *infra* notes 212–223 and accompanying text.

¹⁶³ Testimony of Hillary Rosen, *supra* note 124.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* But see Testimony of Marci Hamilton, *supra* note 123 (arguing that work for hire becomes the default rule. Where work for hire is an option, nearly all recordings will become works for hire with the record company as sole owner for the life of the copyright).

¹⁶⁶ Testimony of Paul Goldstein, *supra* note 150.

¹⁶⁷ Research for this article uncovered no scholarly authority, other than members of the RIAA, that support Goldstein’s point of view that sound recordings were always works for hire under the 1976 Act.

¹⁶⁸ Testimony of Paul Goldstein, *supra* note 150.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* As the market shifts back to a song-driven market instead of an album-driven one, Goldstein’s analysis will make even less sense. See, e.g., Testimony of Marybeth Peters, *supra* note 74.

¹⁷¹ Testimony of Paul Goldstein, *supra* note 150. Economic rationales may very well be good reasons as to why a sound recording ought to be included in

transaction costs.¹⁷² Most of the categories included under the definition of work for hire involve collaborative contributions among a large number of authors.¹⁷³ A work-for-hire provision would solve the problem of bargaining for authorship with all of these parties.¹⁷⁴ That would promote marketability in a work by eliminating an undetermined state of authorship.¹⁷⁵

2. *Sheryl Crow: It's the Artist and Nobody But the Artist*

Sheryl Crow, a multi-platinum selling record artist¹⁷⁶ and vice president of the Recording Artist Coalition,¹⁷⁷ took the radical viewpoint that the designated artist is the sole author of a sound recording.¹⁷⁸ She explicitly dismisses any claims to authorship by producers, musicians, and engineers.¹⁷⁹ To illustrate her point, Crow discusses the process by which musical artists author their sound recordings.¹⁸⁰ After signing a contract with a record label and receiving her advance, she is the “captain of the ship” — left to her own devices without any control or advisement.¹⁸¹

During the pre-production, she is the decision maker.¹⁸² She decides what musicians and engineering staff will implement her “sonic vision,”

the categories available as work for hire. *See* Testimony of Marybeth Peters, *supra* note 74. But they do not provide any basis for determining that the addition of sound recording in the definition of work for hire is merely a clarification of existing law. *Id.*

¹⁷² Testimony of Paul Goldstein, *supra* note 150.

¹⁷³ *Id.* But *see* 17 U.S.C. § 101 (only two categories — collective work and motion picture or audiovisual work, are likely to have many individual collaborators).

¹⁷⁴ Testimony of Paul Goldstein, *supra* note 150.

¹⁷⁵ *Id.* Goldstein does not acknowledge that, because a written agreement is necessary for any participant under the second definition, transactions costs might still be high and authorship questions might still remain if any contracts are omitted. *See, e.g.,* Ulloa v. Universal Music & Video Distrib. Corp., 303 F. Supp. 2d 409, 414 (S.D.N.Y. 2003), *reconsideration denied*, 70 U.S.P.Q.2d 1843 (S.D.N.Y. 2004) (guest in the studio spontaneously sang on sound recording, and later sued claiming authorship).

¹⁷⁶ *See* Sheryl Crow, <http://www.artistdirect.com/nad/music/artist/card/0,,418906,00.html?src=search&artist=Sheryl+Crow>.

¹⁷⁷ *See* RAC Web site, <http://www.recordingartistscoalition.com/index.php>.

¹⁷⁸ Prepared Testimony of Sheryl Crow, Before the House Judiciary Committee Courts and Intellectual Property Subcommittee, May 25, 2000 [hereinafter Testimony of Sheryl Crow]. *See also* Strohm, *supra* note 87, at 155 (supporting this point of view).

¹⁷⁹ Testimony of Sheryl Crow, *supra* note 178.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

and she controls the operation of the studio.¹⁸³ During production, she directs the engineer and musicians.¹⁸⁴ Although Crow is the producer of her work,¹⁸⁵ she claims that the artist who is not also the producer has hired a producer merely to facilitate the process of capturing his vision.¹⁸⁶ “The producer follows the artist’s vision in mind and follows the creative lead of the artists.”¹⁸⁷ During post-production, she chooses which songs appear on the album, and the title.¹⁸⁸ She then delivers a finished master.¹⁸⁹

Crow’s discussion presents a common situation in recording an album, but her lack of recognition of any other authorship claims does not receive broad support.¹⁹⁰ In particular, her reluctance to credit a producer, who is often in control of the elements she discusses, is not widely shared.¹⁹¹

3. *Marybeth Peters: The Key Contributor Exception*

Marybeth Peters, Register of Copyrights, testified as to her opinion on the amendment and as to a proposal for resolving the problem of authorship and multiple claimants.¹⁹² She rejected the idea that a sound recording is a work for hire under the 1976 Act, and that the 1999 addition was a technical amendment.¹⁹³ She discussed the history of both the contemplation of sound recordings as copyrightable subject matter as well as the discussion of the work-for-hire definition in the 1976 Act.¹⁹⁴ Despite the fact that the record industry’s lobbying resulted in the 1971 Amendment, at no point were sound recordings ever considered as inclusions in the work-for-hire category.¹⁹⁵ Peters recognized that in the 1960s, record

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Crow’s first full-length album, *Tuesday Night Music Club*, credits two other people as producers, and not Crow. See Sheryl Crow: Tuesday Night Music Club, <http://www.artistdirect.com/nad/store/artist/album/0,,192509,00.html>.

¹⁸⁶ Testimony of Sheryl Crow, *supra* note 178.

¹⁸⁷ *Id.* Compare Testimony of Marybeth Peters, *supra* note 74 (recognizing that producers are the primary force behind a recording).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See, e.g., PAUL THEBERGE, *TECHNOLOGY, CREATIVE PRACTICE AND COPYRIGHT IN MUSIC AND COPYRIGHT* 141-44 (2d ed. 2004) (discussing the collaborative role between musicians, producers and engineers).

¹⁹¹ In fact, the Recording Artists Coalition suggests that producers, as well as union musicians, deserve their chance to be heard before Congress. See “Work for Hire,” http://www.recordingartistscoalition.com/issues_workforhire.php.

¹⁹² Testimony of Marybeth Peters, *supra* note 74.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

companies had a more reasonable claim as to an employment-for-hire relationship with the contracting performers.¹⁹⁶ Then, the record company “exercised a great deal of control over the creation of a sound recording, employing back-up singers and engineers and owning the studio space in which featured artists would record.”¹⁹⁷ This might be a reason why record companies did not seek to include sound recordings in the specially commissioned definition.¹⁹⁸

However, the level of involvement in the creation of sound recordings has diminished to the point where it more closely resembles Sheryl Crow’s model.¹⁹⁹ Designated artists are now generally the ones who control the elements of recording.²⁰⁰ She also confirms that the reason set forth by the RIAA, that sound recordings are registered as works for hire, cannot make them works for hire.²⁰¹ Only by satisfying the specially commissioned test can a work be a work for hire.²⁰² Therefore, the addition to the act could not be considered a technical amendment.²⁰³

Nevertheless, Peters recognizes that there are merits to including sound recordings in the work-for-hire definition.²⁰⁴ She acknowledges that, considering the many participants in a recording session who claim authorship in a part of the work, any one of them can choose to terminate and frustrate the will of the others.²⁰⁵ If a joint author, for instance, terminates a right and assigns that right to another company, the original copyright holder is faced with the prospect of a competing version of the work on the market.²⁰⁶ Record companies do not want to market a product for which they will not receive a benefit, and therefore it “might be faced with a situation in which it can be held hostage to the demands of [an] individual artist.”²⁰⁷ This situation, as also discussed by Rosen, is favorable to

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* See also Copyright Law Revision Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft House Comm. on the Judiciary, 88th Cong., 352-58 (comments, Sidney A. Diamond, London Records, writing on his own behalf, Feb. 11, 1963).

¹⁹⁸ Testimony of Marybeth Peters, *supra* note 74. The facts above could reasonably lead the companies to think that the relationship was that of an employer and employee. However, it cannot easily be determined if the relationship would have met the *Reid* test.

¹⁹⁹ *Id.* See Testimony of Sheryl Crow, *supra* note 178.

²⁰⁰ Testimony of Marybeth Peters, *supra* note 74.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

neither the record company nor the other artists.²⁰⁸ But unlike Rosen, Peters does not feel that the amendment as enacted provided a proper balance between the interested parties.²⁰⁹ She therefore submitted a proposal, albeit an intentionally undeveloped one, for a work-for-hire provision.²¹⁰

The Copyright Office submitted that those who contribute significant authorship, or “key contributors,” should enjoy termination rights provided in Section 203.²¹¹ Their contribution should therefore be exempt from classification as a work for hire.²¹² Sound recordings could be added to the list of enumerated items under the specially commissioned definition, but with an exception for these key contributors.²¹³ A key contributor is “someone who has made a major contribution of copyrightable expression to a sound recording.”²¹⁴ Peters’ suggestion is only a proposal for exploration,²¹⁵ and therefore she does not specifically address all the typical participants in a recording session and whether they would fall under the definition of key contributor. She acknowledges that featured artists like Madonna and the individual members of Metallica are key contributors, but a background musician would not be.²¹⁶

As for producers, she acknowledges well-known producers whose contribution can equal or even exceed that of the designated artist, such as Quincy Jones²¹⁷ and Phil Spector.²¹⁸ However, there were no advocates for record producers in these hearings, and their voices will need to be heard for any determination of their contribution.²¹⁹ Five years after these discussions, Congress has made no change as to sound recordings or the definition of work for hire.

D. Case History: Sound Recording as a Work for Hire

Because Congress did not succeed in enacting an amendment with retroactive effect, the issue of whether a sound recording can constitute a

²⁰⁸ *Id.* See also Testimony of Hillary Rosen, *supra* note 124.

²⁰⁹ Testimony of Marybeth Peters, *supra* note 74.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* Sound recordings by both Metallica and Madonna may be subject to termination as early as 2018. See Metallica: Kill ‘Em All, <http://www.artistdirect.com/nad/store/artist/album/0,,130724,00.html>; Madonna, <http://www.artistdirect.com/nad/music/artist/card/more/0,,414944-1-2,00.html>.

²¹⁷ See *supra* notes 9–12 and accompanying text.

²¹⁸ Testimony of Marybeth Peters, *supra* note 74.

²¹⁹ *Id.*

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work for hire under Section 101 will remain a matter for the courts.²²⁰ Judicially, it is unlikely that a sound recording will be found to be a work for hire as a matter of law.²²¹ There are only a handful of cases that have touched on this issue, with the only Court of Appeals case reaching the fairly obvious conclusion that a sound recording does not constitute an “audiovisual work.”²²²

That decision was *Lulirama v. Axxess Broadcasting Services*, which actually involved the composition of jingles for a sound recording.²²³ Because the defendant company contracted to obtain these songs, they claimed that the jingles were “part of a motion picture or other audiovisual work” pursuant to the specially commissioned prong.²²⁴ It was not difficult for the court to reject this classification. An audiovisual work must have a visual component, and a sound recording does not.²²⁵ Furthermore, the court correctly noted that “audiovisual works” and “sound recordings” are distinct categories of works, each entitled to copyright protection.²²⁶ The categorization would be meaningless if one work could completely encompass the other.²²⁷

*Ballas v. Tedesco*²²⁸ concerned a compact disc recorded at the request of a dance studio.²²⁹ The defendant Gennarro Tedesco was contracted to make a compact disc of “competitive dance music,” which he then arranged, produced, mixed and mastered.²³⁰ A dispute arose after

²²⁰ *Id.*

²²¹ *See, e.g.,* Cooper & Burry, *supra* note 154.

²²² *Lulirama, Ltd. v. Axxess Broad. Servs., Inc.* 128 F.3d 872, 878 (5th Cir. 1997). Because of the compromise discussed above, *supra* Part IV(B), any court decision prior to the 1999 Amendment remains unaffected.

²²³ *Id.* at 875. A musical composition, could, theoretically, be transferred permanently to the record company if it is deemed “part of a collective work.” *See* LaFrance, *Sound Recordings*, *supra* note 81, at 400. This would be an unfortunate, and perhaps unintended, consequence of deeming a sound recording a collective work. *Id.* It would most likely affect recording artists who contract with a company to create an album, and who write their own material. *Id.* at 408. It could not cover compositions recorded under a mechanical license, because those songs are by definition not specially ordered or commissioned. *Id.*

²²⁴ *Lulirama*, 128 F.3d at 878.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ 41 F. Supp. 2d 531 (D.N.J. 1999). *See also* Wallace Collins, *Recision* [sic] of *Recent Amendment to the Copyright Act*, <http://www.wallacecollins.com/workforhire.html> (discussing his successful representation of the defendant).

²²⁹ *Id.* at 534.

²³⁰ *Id.*

the defendant chose to use the sound recordings for his own purposes.²³¹ The District Court of New Jersey rejected the plaintiff's claim that the sound recording was a work for hire, because sound recordings "do not fit within any of the nine enumerated categories."²³² Because there was no written agreement, and because no employment relationship could be established, the result was clear.²³³

In *Staggers v. Real Authentic Sound*,²³⁴ which is discussed in further detail in the Authorship section of this article, the record company RAS contracted with record producer McLarty to produce a new album based on previously existing lyrics.²³⁵ McLarty in turn contracted to have musician Staggers write, arrange and perform most of the song recordings on the album.²³⁶ Staggers fulfilled these requirements and delivered a master tape to McLarty.²³⁷ Upon learning that RAS was distributing the album without his consent, and because of a dispute over royalties, he began what ultimately led to the district court's decision.²³⁸

Among other defenses, RAS argued that Staggers created the recording for McLarty as a work for hire.²³⁹ The court could not determine from the facts if McLarty had established an employer/employee relationship,²⁴⁰ but concluded that a sound recording cannot be a specially commissioned work for hire because "a sound recording does not fit within any of the nine categories" recognized in that definition.²⁴¹

In *Ulloa v. Universal Music and Video Distribution Corp.*,²⁴² plaintiff Demme Ulloa sang briefly in a recording session conducted by performer Jay-Z.²⁴³ Ulloa and Jay-Z made no agreement, written or otherwise, as to the usage of her vocals.²⁴⁴ However, the vocals were ultimately used in the song *Izzo (H.O.V.A.)*, which was released as a single as well as a track on his album *The Blueprint*.²⁴⁵ The song was a big hit for Jay-Z, in

²³¹ *Id.*

²³² *Id.* at 541.

²³³ *Id.*

²³⁴ 77 F. Supp. 2d 57 (D.D.C. 1999).

²³⁵ *Id.* at 59.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² 303 F. Supp. 2d 409 (2003), *reconsideration denied*, 70 U.S.P.Q.2d 1843 (S.D.N.Y. 2004).

²⁴³ *Id.* at 411.

²⁴⁴ *Id.* at 411-12.

²⁴⁵ *Id.* at 411.

no small part due to the use of Ulloa's vocal phrase for its chorus.²⁴⁶ Ulloa sued, claiming ownership in the sound recording as well as the musical composition.²⁴⁷ Here, the defendants did not argue that the work fell within the specially commissioned definition, presumably because there was no written agreement. Instead, the court only determined that Ulloa did not meet the requirements of *Reid* and *Aymes*, and therefore she could not be deemed an employee of Jay-Z.²⁴⁸ The case was permitted to proceed, but was subsequently settled.²⁴⁹

Although these cases reach the same conclusion, their sum total amounts to very little.²⁵⁰ None of these cases provides anything close to a detailed analysis of whether a sound recording can fit within the enumerated categories.²⁵¹ In fact, none of these cases needed to do so. In *Ballas*, *Staggers*, and *Ulloa*, there were no written agreements designating the contributions as a work for hire.²⁵² Only in *Lulirama* was there a written agreement as to work for hire, but the court was limited to a discussion of whether a sound recording was an audiovisual work.²⁵³

Because no court has sufficiently analyzed the applicability of a sound recording under the second work-for-hire definition, particularly whether a sound recording constitutes a collective work, these decisions leave more questions unanswered than they solve. Still, they may reflect a court trend that they are unwilling to rubber stamp the record industry's position.

V. Analysis: Is a Sound Recording a Work for Hire

The Copyright Office acknowledges that in order for a new sound recording to be a work made for hire, it must be made by an employee within the scope of his employment.²⁵⁴ This is because "a sound recording is not one of the types or works affected by clause (2) unless it constitutes a supplementary work, collective work, or compilation."²⁵⁵ But the Copyright Office does not provide guidance as to when a sound recording would be recognized as one of these items. This leaves open the proposi-

²⁴⁶ See, e.g., Kanye Hits, <http://www.southcoasttoday.com/daily/08-04/08-07-04/digest.htm>.

²⁴⁷ *Ulloa*, 303 F. Supp. 2d at 412.

²⁴⁸ *Id.* at 412-14.

²⁴⁹ See *supra* note 24 and accompanying text.

²⁵⁰ Cf. LaFrance, *Sound Recordings*, *supra* note 81, at 382.

²⁵¹ *Id.* at 382.

²⁵² *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999); *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 63 (D.D.C. 1999); *Ulloa*, 303 F. Supp. 2d at 412.

²⁵³ *Lulirama, Ltd. v. Axxcess Broad. Servs.*, 128 F.3d 872, 878 (5th Cir. 1997).

²⁵⁴ Copyright Registration for Sound Recordings, available at <http://www.copyright.gov/circs/circ56.html>.

²⁵⁵ *Id.*

tion that many sound recordings, by virtue of how they were made, could constitute works for hire because they generally do fit within one of those definitions.

A. *A Performer is Generally Not an Employee Creating Within the Scope of Employment*

The argument that a performer or producer is an employee creating the work within the scope of his or her employment has little credibility in a typical relationship between them and a record company.²⁵⁶ Under the principles and guidelines from *Reid* and the clarification in *Aymes*, they cannot reasonably be determined to be employees. It is unlikely that the record industry will utilize the argument.²⁵⁷

Reid limited the opportunities to invoke this opportunity by narrowing the scope of what would fit within this classification, adding that “strict adherence to the language and the structure of the [1976 Act] is particularly appropriate where, as here [the definition of work for hire], a statute is the result of a series of carefully crafted compromises.”²⁵⁸ *Aymes* further elaborated factors necessary to establish the relationship.²⁵⁹ Where employers have not retained the manner or means of control of the creation, and do not provide employee benefits or follow the tax codes regarding employee payments, courts will not be persuaded that the first prong is met.²⁶⁰

It is necessary to understand how the typical arrangement between the creators of a sound recording and a record company works in order to appreciate how the first definition cannot succeed. Not all recording sessions operate just like Sheryl’s Crow’s situation, but performance under a recording contract²⁶¹ is generally closer to Crow’s example than that of an employee within the *Reid/Aymes* definition.

Generally, a designated, featured recording artist performs his or her services under a record contract and assigns any copyrights he or she holds

²⁵⁶ This analysis has done been many times before, and the result does not vary. See, e.g., Cooper & Burry, *supra* note 154; Field, *supra* note 27.

²⁵⁷ Cf. Randy S. Frisch & Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 COLUM.-VLA J.L. & ARTS 211, 219-21 (1993).

²⁵⁸ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 (1989) (citations omitted).

²⁵⁹ *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992).

²⁶⁰ See, e.g., *id.*

²⁶¹ There is no one “standard” recording contract, although many provisions in a recording contract tend to be suspiciously similar between record companies. Cf. Wallace Collins, *Songwriters and Publishers Beware: The “Controlled Composition” Clause*, <http://www.wallacecollins.com/cc99.html>. My discussion relates to fairly universal situations in a recording agreement.

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or might hold (with the exception of musical compositions, if they were written by the artist). The artist is paid royalties for each phonorecord sold.²⁶² The royalty payment structure is shockingly complex, and cannot be discussed in detail in this article.²⁶³ The artist, even a new artist, is usually given a large advance against these royalties.²⁶⁴ This is not, technically, a signing “bonus.”²⁶⁵ In theory, this advance is a loan against the royalties that have not yet accrued.²⁶⁶ Most of the expenses toward producing and marketing the recording, including the expenses for recording, are fronted by the record company and also held against the artist.²⁶⁷ It takes a long time for a record artist to eventually accrue enough royalties to recoup the expenses, and many artists may never see another payment from the record company past the initial advance.²⁶⁸ The artist does not receive any benefits generally associated with employment.²⁶⁹

Although the contract will assign to the record company any rights in the artist’s contribution, it is generally the artist’s responsibility to obtain, for the benefit of the record company, rights from any other persons contributing to the recordings.²⁷⁰ The artist has the choice of the material the artist wishes to record, and these decisions may or may not be subject to approval by the record company.²⁷¹ The artist, with the assistance and the guidance of the producer, is generally the creative force behind the sound recording (much like the way Sheryl Crow describes), and must deliver to the record company a finished master recording that the record company will use to manufacture the phonorecord.²⁷²

Given that the artist retains control over the creation, that the skill necessary to produce the work rests in the producer and not in the record company, and that there is nothing in the royalty payment scheme that resembles an employment relationship under *Reid* or *Aymes*, it would be futile for a record company to press this argument in litigation. At best the relationship between a recording artist and a record company resem-

²⁶² See KRASILOVSKY & SHEMEL, *supra* note 112, at 13-22.

²⁶³ See, e.g., HOWARD SIEGEL, ENTERTAINMENT LAW § 1.0 (3d ed. 2004).

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Although many albums never “recoup” (that is, the accrued royalties never exceed the original advance plus the accumulated expenses), a record company will rarely sue to get back an advance. See Mark A. Goldstein, et al., *Sound Recordings – Basic and Advanced*, 598 PLI/PAT 9, at 6.01 (2000).

²⁶⁷ See, e.g., SIEGEL, *supra* note 267, § 1.9 (“the cost of recording, including editing, raw tape, personnel . . . producer fees, and so on are all recording costs chargeable to the artist”).

²⁶⁸ *Id.*

²⁶⁹ See “Work for Hire,” *supra* note 191.

²⁷⁰ *Id.*

²⁷¹ KRASILOVSKY & SHEMEL, *supra* note 112, at 18.

²⁷² SIEGEL, *supra* note 267, at §1.0

bles that of a joint partnership, although the royalty structure is tipped in favor of the record company.²⁷³

B. A Sound Recording Is Not One of the Enumerated Categories in the “Specially Ordered or Commissioned” Prong

The RIAA’s better argument that a sound recording is a work for hire is that it is generally a specially ordered or commissioned work. Under this prong, however, only enumerated works can constitute works for hire. Because sound recordings are not included, the argument works only if the sound recording would fit into one of the other categories.

Recall *Reid*’s insistence that strict adherence to a provision in the Copyright Act is warranted where the provision is a product of “carefully crafted compromises.”²⁷⁴ Both the work-for-hire definition under the 1976 Act and the grant of protection in sound recordings under the 1971 Amendment warrant strict adherence. The 1971 Amendment was the result of lobbying by the record industry that went as far back as 1961.²⁷⁵ The work-for-hire definition was likewise discussed in Congress for many years, and yet at no point was a sound recording considered for inclusion among the categories.²⁷⁶ In fact, Congress intentionally left the definition narrow so as not to unduly deprive authors of their works. Moreover, a sound recording is a unique form for protection with its own definition and provisions.²⁷⁷ It would be odd for Congress to assume that they would naturally be included in another defined category.²⁷⁸

Notwithstanding the intentions of Congress, is there still a credible claim that a sound recording fits within the definition of another enumerated item? The record industry has never fully evolved this claim, relying on industry standards and economic rationales to support their argument.²⁷⁹ Still, two defined categories merit discussion: compilations and collective works. Section 101 defines a compilation as a “work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship,” noting that the term

²⁷³ See “Work for Hire,” http://www.recordingartistscoalition.com/issues_workforhire.php.

²⁷⁴ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 (1989) (citations omitted).

²⁷⁵ See Testimony of Marybeth Peters, *supra* note 74.

²⁷⁶ See LaFrance, *Sound Recordings*, *supra* note 81, at 386.

²⁷⁷ *Cf. Lulirama, Ltd. v. Access Broad. Servs.*, 128 F.3d 872, 878 (5th Cir. 1997) (recognizing sound recordings and audio visual works as distinct categories of copyright protection).

²⁷⁸ *Cf. id.*

²⁷⁹ See, e.g., Testimony of Hillary Rosen, *supra* note 124; Testimony of Paul Goldstein, *supra* note 150.

includes collective works.²⁸⁰ A collective work is “a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.”²⁸¹ The key difference is that a collective work requires that each contribution to the work must in itself be a separate and independent copyrightable work, while a compilation may consist of elements that are not in themselves copyrightable.²⁸²

To designate a sound recording as a compilation, on the basis that it is made of individual song recordings, is of little value to the copyright owner. This is because the copyright in a compilation is in the sequencing and arrangement of those song recordings, but not in the song recordings themselves.²⁸³ Thus, if the individual song recordings revert back to their original author, the original owner is left with nothing.²⁸⁴ To determine that it is a collective work, however, has much more significant consequences, because the specially commissioned definition designates that a *contribution* to a collective work may be a work for hire.²⁸⁵ This means that each and every song recording can be a work for hire.²⁸⁶

Two theories that nearly contradict each other are used to support the idea that a sound recording is a collective work. One is that because a sound recording album is made of more than one song recording, it is a collective work.²⁸⁷ The other is that there are many elements of copyrightable expression, those of the singers, musicians, engineers, and so on, that together make up the collective work. With the latter view, each individual song may be its own collective work.

The first argument, that a sound recording is a collection of individual song recordings, is the more commonly asserted one. Like the compila-

²⁸⁰ 17 U.S.C. § 101 (2000).

²⁸¹ *Id.*

²⁸² See *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

²⁸³ Cf. LaFrance, *Sound Recordings*, *supra* note 81, at 387.

²⁸⁴ Arguably, though, the performing artist will not be able to assign the rights to the full-length album, in its original sequence, to another company. This may often result in a substantial loss for artists who record albums that sell well under their original sequence. Such works are not limited to “concept albums,” but also to albums such as *Back is Black*, *supra* note 34. However, today’s most substantial catalog sales are from “Greatest Hits” type albums. See, e.g., Top Pop Catalog Albums of 2004, <http://www.billboard.com/bb/biz/yearendcharts/2004/tlctitl.jsp>. Furthermore, artists enjoy the digital transmission, licensing, and sampling rights in the individual songs. See *supra* Parts III(C) and (D).

²⁸⁵ LaFrance, *Sound Recordings*, *supra* note 81, at 387.

²⁸⁶ *Id.* Cf. *Lulirama, Ltd. v. Axxcess Broad. Servs.*, 128 F.3d 872, 878 (5th Cir. 1997) (deciding whether a musical contribution would be “part of motion picture or audiovisual work,” and thus a work for hire).

²⁸⁷ See Testimony of Paul Goldstein, *supra* note 154.

tion suggestion, this argument might also prove economically useless to the record industry. With the increasing interest in purchasing individual songs instead of albums, especially through digital downloads, the industry may very well move to a market where individual songs are commonly recorded without respect to a full-length album.²⁸⁸

The list of items that may constitute collective works, although not inclusive, is suggestive of its scope. These items all relate to the publishing industry, with works that are typically comprised of authors who write their contributions independently of others, and then submit them.²⁸⁹ It would be more than a little stretch to say that a sound recording has anything in common with a periodical issue, an anthology, or an encyclopedia.²⁹⁰

It is worth noting that two counter-arguments to this argument are also flawed. The first is that a sound recording resembles a multi-act play or a “chaptered” novel, which are deemed not to be collective works.²⁹¹ The comparison does not work, especially in the light of current interest in downloading and listening to individual song recordings instead of a full-length album.²⁹² Indeed, long before the availability of songs over the Internet, there was substantial interest in individual songs, especially in the form of radio airplay. Compact discs were manufactured so that listeners could easily listen to a preferred song, or listen the “tracks” in various sequences. By contrast, it is not at all common to read the individual chapters of a book in a random order, or to prefer to see only a single act of a play. However, this argument is relevant to the classification as an individual song recording as a collective work, because only a few separate elements have been brought together to make an inseparable whole.²⁹³

The other counter-argument is that the record company has little, if any role in selecting and arranging the materials that make up the sound recordings.²⁹⁴ Indeed, by contract a signed artist is required to deliver a fully-mixed master to the record company, ready for manufacture.²⁹⁵ The problem with this argument is that the definition of work for hire, under the second prong, does not require that the owner of the work for hire be

²⁸⁸ See, e.g., Testimony of Marybeth Peters, *supra* note 74.

²⁸⁹ Cf. Cooper & Burry, *supra* note 154.

²⁹⁰ However, the list of eligible collective works is merely suggestive, and not all-inclusive like the enumerated works under the specially commissioned prong.

²⁹¹ *Hearing Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary*, 106th Cong. (2000). See also H.R. REP. NO. 94-176.

²⁹² See Testimony of Marybeth Peters, *supra* note 74.

²⁹³ See Cooper & Burry, *supra* note 154.

²⁹⁴ See, e.g., Testimony of Sheryl Crow, *supra* note 178.

²⁹⁵ *Id.*

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the one who does the collecting or selects the contribution.²⁹⁶ It merely provides that if a work fits one of the enumerated items, it can be deemed a work for hire and sold as such to any party, so long as it was “specially ordered or commissioned.”²⁹⁷ The act of signing an artist and contracting for that artist to make an album should be sufficient for that purpose.²⁹⁸ The *Reid* or *Aymes* tests do not apply.

The second record industry justification, and a rather undeveloped one, is that the individual contributions are those of the individual performers — the singers, musicians, producers, engineers, and so on.²⁹⁹ The theory is that each performer contributes a form of copyrightable expression, together they make up a collective work.³⁰⁰ This theory is more grounded in theory than in logic. It is a comparison to another work which consists of many participants with a claim of authorship, the motion picture.³⁰¹ Congress solved that problem by including motion pictures as one of the enumerated items, eliminating the need to speculate as to whether it would constitute a collective work. They chose not to do so for sound recordings.³⁰² A fundamental principle of statutory construction, that the enumeration of express items implies an intent to exclude any other items, controls.³⁰³

It seems most likely that Congress did not intend for sound recordings to constitute a collective work when it wrote the work-for-hire definition, but the argument that it could has some merit. The Copyright Office recognizes that some works might fit within this definition.³⁰⁴ Before the compact disc era, it was generally assumed that the full album is the copyrighted work, and not a sum of individual parts.³⁰⁵ But the view of the album as a single work, as opposed to a collection of individual works, is now an issue that needs to be fully considered and resolved. A full-length album is not the same as a novel made up of individual chapters. No court has yet done an analysis on the issue.

²⁹⁶ See Testimony of Paul Goldstein, *supra* note 150.

²⁹⁷ See *Playboy Enters., Inc. v. Dumas*, 53 F.3d 549, 562 (2d Cir. 1995), *cert. denied*, 516 U.S. 1010 (1995). Compare *The Work For Hire Conundrum*, *supra* note 150.

²⁹⁸ *Playboy Enters.*, 53 F.3d at 558.

²⁹⁹ See, e.g., Testimony of Paul Goldstein, *supra* note 150.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² See *supra* note 276 and accompanying text.

³⁰³ “Expressio unius est exclusio alterius.” See *Cooper & Burry*, *supra* note 150.

³⁰⁴ See Copyright Registration for Sound Recordings, available at <http://www.copyright.gov/circs/circ56.html>.

³⁰⁵ Cf. Testimony of Marybeth Peters, *supra* note 74.

VI. *IF A SOUND RECORDING IS NOT A WORK FOR HIRE,
THEN WHO IS ITS AUTHOR?*

It is likely that courts will continue to determine that sound recordings are not works for hire, and that Congress will not soon draft a provision clarifying its status. Therefore, an important pressing issue is soon to arise: who is the author of a sound recording? And what portion of ownership should each participant share?

Designated artists and producers are most often cited as authors of the work, but many other persons have a colorable claim of authorship as well — including the musicians and singers who are not designated or recognized as the artist, and the recording engineer. These claims are particularly justified in a sound recording, because the work is completely separated from the underlying musical compositions.³⁰⁶ Therefore, only the performance itself is relevant to a claim of authorship, and that could very well be all of the dozens of people who often contribute to an album.

A. *The Designated Artist*

This article uses the term designated artist, as opposed to the more commonly used “featured artist,” to refer the artist who is contracted to be the creator of the sound recording.³⁰⁷ This artist typically is entitled to a royalty structure as discussed above, and the artist is rarely an employee of the record company.³⁰⁸ The designated artist is listed on the cover art and packaging materials as the artist of the work, and is referred to in any promotional materials as the artist representing the work.³⁰⁹ The consuming audience, by and large, recognizes the designated artist as the one who created its music.³¹⁰ Where the artist is an individual, that person’s name or alias is listed as the artist. Where the designated artist is made up of a group of individuals, it frequently records as a single band with a single name.³¹¹ A recording contract will specify which individuals make up that band.³¹²

³⁰⁶ See THEBERGE, *supra* note 190, at 141-44 (discussing the separation and arguing that the performers are the focal point of the recording); *Cf.* Newton v. Diamond, 349 F.3d 591, 596 (9th Cir. 2003) (recognizing that the musical performance represents a contribution to the sound recording and not the musical composition).

³⁰⁷ Compare Testimony of Sheryl Crow, *supra* note 182.

³⁰⁸ See Testimony of Marybeth Peters, *supra* note 74.

³⁰⁹ See RICHARD SCHULENBERG, *LEGAL ASPECTS OF THE MUSIC INDUSTRY* 143-48 (1999).

³¹⁰ See KRASILOVSKY & SHELME, *supra* note 112, at 14.

³¹¹ *Id.*

³¹² See 2A ALEXANDER LINDEY & MICHAEL LANDAU, *LINDEY ON ENTERTAINMENT, PUBLISHING & THE ARTS* § 9:4 (3d ed 2004).

More complicated is the presence of a “guest star” on another designated artist’s work.³¹³ An artist will frequently contract with another individual or group to appear on one or more song recordings on the artist’s album.³¹⁴ Usually, that guest will participate in a recording session with the designated artist, but sometimes the featured artist will submit a finished master of vocals or instrumentation to the designated artist or producer.³¹⁵ The guest star is usually given credit as a featured artist, as in “Michael Jackson featuring Paul McCartney.”³¹⁶ On an album, the guest artist’s name frequently appears after the title of the song instead of beside the designated artist. The guest appearance has become an industry standard, particular in R&B and hip-hop music.³¹⁷ It can be a means of generating more interest in the designated artist by including a well-recognized featured artist, or vice-versa, or both.

B. The Producer

The producer’s role in a sound recording is often misunderstood by the general public unassociated with the record industry, perhaps because of the perception in the motion picture industry that a producer is someone who just fronts money for the project (of course, it is the record company who fulfills that duty). In fact, the record producer is more similar to that of the motion picture’s director.³¹⁸

In reality, the producer is generally very involved in each aspect in the creation of a recording, and is often considered the dominant force behind the project.³¹⁹ The independent record producer³²⁰ takes on a role that used to belong to the “A&R³²¹ executive” of a record company, who selected and trained artists to fulfill their own vision.³²² The producer’s role varies from project to project, but it usually involves direction of the entire

³¹³ See *id.* § 9:80.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ See *supra* notes 13, 16, 17 and accompanying text.

³¹⁷ Nearly half of Billboard’s Top R&B songs of 2004 included a “featured” artist. See 2004 Year End Charts, <http://www.billboard.com/bb/biz/yearendcharts/2004/bsititl.jsp>.

³¹⁸ 8-164 Entertainment Industry Contracts § 164.01[1].

³¹⁹ See Testimony of Marybeth Peters, *supra* note 74; THEBERGE, *supra* note 190, at 141-45.

³²⁰ Here, “independent” record producer means one that is not employed by the record company, as opposed to a producer of albums for independent (not for the major labels) record labels. See KRASILOVSKY & SHEL, *supra* note 112, at 30.

³²¹ Artist and Repertoire.

³²² See Testimony of Marybeth Peters, *supra* note 74.

project.³²³ The producer typically guides the musicians and vocalists, including the designated artist, and supervises the recording process.³²⁴

In recent years, the producer is becoming increasingly recognized as a star in his own right, and frequently enjoys as much recognition as the performing artist.³²⁵ This is especially so in hip-hop and R&B music, where the producer often composes the music and retains his portion of the copyright in the compositions.³²⁶ The producer generally has a contract with both the designated artist and the record company, and frequently receives a royalty in addition to a flat payment.³²⁷ Unlike the designated artists, their contracts are typically not exclusive, and they have the opportunity to do projects with other labels.³²⁸

C. *The Engineer*

The engineer works directly with the producer in a creative and administrative role.³²⁹ Frequently, it is the engineer who mixes the master that is ultimately delivered to the record company.³³⁰ The engineer is hired by either the record company or the artist, and is often paid as an employee.³³¹

D. *Back-up Vocalists and Contributing Musicians*

Many musicians and vocalists often participate in a recording session, and their contributions are used on the final recording.³³² They are neither designated nor featured artists, although they generally do receive credit on the phonorecord's liner notes.³³³ They are often called "sidemen" or "session musicians," and they usually do not have exclusive recording agreements with the record company.³³⁴ They are usually con-

³²³ See, e.g., *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 60 (D.D.C. 1999).

³²⁴ See, e.g., *id.*

³²⁵ See KRASILOVSKY & SHEMEL, *supra* note 112, at 31.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ See, e.g., *Systems XIX, Inc. v. Parker*, 30 F. Supp. 2d 1225, 1226 (N.D. Cal. 1998).

³³⁰ See, e.g., *id.*

³³¹ LINDEY & LANDAU, *supra* note 316, § 9:86.

³³² 8-164 ENTERTAINMENT INDUSTRY CONTRACTS § 164.01 [1].

³³³ See SCHULENBERG, *supra* note 313, at 160-61.

³³⁴ *Id.*

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tracted by the producer, artist, or record company, and paid wages for their services.³³⁵

In some cases, a group of side musicians are recognized as those that typically support a recording artist, even though they are not the designated artist.³³⁶ These musicians accompany the same artist on many albums, and accompany them on tour.³³⁷ Many of these musicians would be recognized as employees of the artist or producer, but *Ulloa* suggests that others will not qualify. As a safety for the artist and record label, these musicians will forgo any claim of authorship, and agree in writing that their services are works for hire.³³⁸

E. Uncertainty

All the possible claimants raise the concerns of uncertainty both as to who may claim authorship in a sound recording, and what share each author has in the work.³³⁹ Furthermore, it is necessary to ascertain whether producers, engineers and other possible claimants are joint authors, or merely contributors.³⁴⁰

VII. JOINT AUTHORSHIP

Even where a contributor can prove a copyrightable form of expression, they may or may not be considered joint authors.³⁴¹ This is a significant claim, because joint authors share joint ownership of the work.³⁴² That means that they enjoy equal and divided ownership of the recording, and can freely exploit the work subject to an accounting for their share in the profits.³⁴³ Therefore, it is more valuable to any contributor to be deemed a joint author of the recording. The Copyright Act defines a joint work as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”³⁴⁴

³³⁵ See American Federation of Musicians, Protecting You in the Recording Studio, available at http://www.afm.org/public/departments/emsd_soundrec.php.

³³⁶ See Strohm, *supra* note 87, at 151.

³³⁷ *Id.*

³³⁸ American Federation of Musicians of the United States and Canada, Phonograph Record Labor Agreement 10 (1999).

³³⁹ See LaFrance, *Sound Recordings*, *supra* note 81, at 393-94.

³⁴⁰ See *id.*

³⁴¹ See *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991).

³⁴² *Id.*

³⁴³ See LaFrance, *Joint Authors*, *supra* note 125; H.R. REP. NO. 94-1476, at 121 (1976), reprinted in 1976 U.S.C.A.N. 5659, 5736-37.

³⁴⁴ 17 U.S.C. § 101 (2000).

A. Rights in a Joint Work

Absent a contract specifying a different relationship, joint authors typically own a work as tenants in common, enjoying equal and undivided shares of the work.³⁴⁵ This is true even where the contributions themselves are not equal.³⁴⁶ Any joint owner has the right to exploit the work and transfer the work on a non-exclusive basis, subject to a duty to account for the profits and distribute them in equal shares to the other authors.³⁴⁷

The duration of the copyright lasts until seventy years past the death of the last remaining author of the work, regardless of the number of joint authors.³⁴⁸ Before that time, where an author has passed away, that author's share of the ownership, as well as the termination right, passes on to the author's statutory heirs.³⁴⁹

Where two or more others have transferred their rights in a single grant, a majority of others must agree to terminate their Section 203 or 304 rights in order for the termination to go into effect.³⁵⁰ This prevents a group, such as a musical band, from missing its opportunity to terminate its grant and exploit its work because of a single "hold-out" who does not wish to terminate.³⁵¹ This provision might also be advantageous to the grantee, in situations where joint authors are either uninterested or difficult to locate.³⁵²

Where not transferred in a single grant with another individual, any individual author of a joint work can terminate on his own.³⁵³ When this happens, it can result in multiple versions of the same work competing on the market.³⁵⁴ This is often an undesirable result for record companies as well as recording artists, because exclusivity of an album is generally necessary for proper exploitation.³⁵⁵

³⁴⁵ See 1 NIMMER & NIMMER, *supra* note 48, §§ 6.08, 6.09.

³⁴⁶ *Id.* See LaFrance, *Joint Authors*, *supra* note 125, at 193.

³⁴⁷ 1 NIMMER & NIMMER, *supra* note 48, §§ 6.10, 6.12

³⁴⁸ 17 U.S.C. § 302 (2000); See also 1 NIMMER & NIMMER, *supra* note 48, § 6.09.

³⁴⁹ See 17 U.S.C. § 302 (2000).

³⁵⁰ *Id.*

³⁵¹ See Testimony of Marybeth Peters, *supra* note 74.

³⁵² See, e.g., *JCW Invs. v. Novelty, Inc.* 289 F. Supp. 2d 1023, 1027 (N.D. Ill. 2003) (defendant unsuccessfully claiming that "vocal talent," who himself denied any claims to ownership, was joint author of a sound recording embodied in a doll).

³⁵³ See Testimony of Marybeth Peters, *supra* note 74.

³⁵⁴ See Testimony of Paul Goldstein, *supra* note 150.

³⁵⁵ *Id.*

B. *Judicial Tests for Determining Joint Authorship*

The Copyright Act specifies that authors of a joint work intend that their contributions be “merged into inseparable or interdependent parts of a unitary whole.”³⁵⁶ It says nothing about the extent of an individual’s contribution, or whether a contributor must be in a position of control.³⁵⁷ Taken literally, this definition can encompass many individuals who contribute to a work, and result in dozens of joint authors in a work such as a sound recording or motion picture.³⁵⁸ The judiciary has placed limitations on who may claim joint authorship.³⁵⁹ Although there is no universally accepted test for determining joint authorship, some consistent principles have emerged through case law.

1. *Independently Copyrightable Elements*

The most commonly held view is that each individual contribution in a joint work be independently copyrightable.³⁶⁰ This is the position taken by the Register of Copyrights, who argues that independent copyrightability is required under the statutory standard of “authorship,” and perhaps by the Constitution.³⁶¹ The Second and Ninth Circuits have taken this position,³⁶² and other Courts of Appeals have not yet had the opportunity to make a determination.³⁶³ This determination might have less to do with copyright law’s objective of promoting creative works than it does with preventing numerous and frivolous claims by putative joint authors.³⁶⁴

The Nimmer treatise argues that the definition of joint authorship does not require independently copyrightable elements.³⁶⁵ It argues that in many situations a contribution, so long as it is more than de minimis,

³⁵⁶ 17 U.S.C. § 302 (2000).

³⁵⁷ See 1 NIMMER & NIMMER, *supra* note 48, § 6.07.

³⁵⁸ See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 1999).

³⁵⁹ See *infra* Parts VII(C)(1) and (2).

³⁶⁰ *Childress v. Taylor*, 945 F.2d 500, 506 (2d Cir. 1991).

³⁶¹ *Id.* (citing Ralph Oman, *Moral Rights in Our Copyright Laws: Hearings on S. 1198 and S. 1253 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 101st Cong., 210-11 (1989)). See also *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991), discussed *supra* in notes 46–47 and accompanying text.

³⁶² *Childress*, 945 F.2d at 506; *Aalmuhammed*, 202 F.3d at 1232.

³⁶³ See, e.g., *Erickson v. Trinity*, 13 F.3d 1061, 1069-70 (7th Cir. 1994) (finding that the defendant does not meet the standard of authorship in either point of view).

³⁶⁴ See *Childress*, 945 F.2d at 506-07. The case further notes that those with non-copyrightable contributions are best protected by contract. *Id.*

³⁶⁵ 1 NIMMER & NIMMER, *supra* note 48, at § 6.07.

can be considered joint authorship in a work.³⁶⁶ Nimmer asserts that the de minimis standard is not the same as that for copyrightability. Copyright's goal of fostering creativity is best served by rewarding all those who labor to together to unite idea with form.³⁶⁷ Nimmer's point of view has generally not prevailed.³⁶⁸

2. *The Intent Standard*

A more debated issue is the relevance of whether the authors intended to be joint authors at the time of the work's creation. Under the common law, there was no such requirement.³⁶⁹ Under the 1976 Act, where the definition of joint work was added, courts have disagreed as to the meaning and application of author's intent.

In *Childress v. Taylor*, the Second Circuit held that joint authorship, and thus equal share of ownership in a work, "should be reserved for relationships in which all participants fully intend to be joint authors."³⁷⁰ That is, at the time the work is being created, the authors must have intended not only to merge their contributions into a whole, but to all share rights in the work as joint authors.³⁷¹ They need not fully understand the full legal consequences of this determination, but they do need to have regarded themselves as co-authors in the work.³⁷² The *Childress* standard looks to subjective and objective manifestations of intent, such as whether the purported joint authors have billed themselves as co-authors of a work.³⁷³ Thus, where an author of a play contracted with a "dramaturg," to assist in writing the play, the latter was held not a joint author because the former had never intended for her to share in authorship.³⁷⁴

This standard has the convenience of eliminating claims by putative joint authors who are claiming equal rights where another author was the "dominant" one, but it has been criticized.³⁷⁵ The definition of joint work does not refer to a shared intent to be co-authors or to be recognized as such, but merely as an intent that their expressions *be merged into an in-*

³⁶⁶ *Id.*

³⁶⁷ *Id.* See also David A. Gerber, *Joint Authorship Requirements Questioned by Courts*, NAT'L L.J., Apr. 30, 1990, at 24.

³⁶⁸ 1 NIMMER & NIMMER, *supra* note 48, § 6.07. But see *Gaiman v. McFarlane*, 360 F.3d 644 (7th Cir. 2004).

³⁶⁹ See *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406 (2d Cir. 1946).

³⁷⁰ 945 F.2d 500, 509 (2d Cir. 1991).

³⁷¹ *Id.*

³⁷² *Id.*

³⁷³ *Id.* at 508.

³⁷⁴ *Thomson v. Larson*, 147 F.3d 195, 206-07 (2d Cir. 1998).

³⁷⁵ See, e.g., *LaFrance, Joint Authors*, *supra* note 125, at 219-20.

separable or interdependent whole.³⁷⁶ Neither the Copyright Act nor its legislative history demands an inquiry into the authors' intent regarding their own status as authors, but only to their intent regarding their how contributions are to be used.³⁷⁷

In *Aalmuhammed v. Lee*, the Ninth Circuit rejected the idea that subjective intent as to authorship is a basis for whether a work can be considered one of joint authorship, and suggested that an objective intent standard be applied.³⁷⁸ The court did accept the requirement of independently copyrightable expression as a necessary requirement.³⁷⁹ It further laid out criteria for determining joint authorship.³⁸⁰

First, an author "superintends" the work by exercising control.³⁸¹ This person is essentially the "master mind," or the one who "creates, or gives effect to the idea" ³⁸² This is fairly consistent with the Second Circuit's identification of a dominant author. Secondly, the putative joint authors must make *objective* manifestations of a shared intent to be coauthors.³⁸³ The recognition of objective manifestation is arguably a departure from the *Childress* standard, which permitted inquiry into the state of mind of the contracting parties.³⁸⁴ The court recognized that if the determination was based on subjective intent "it could become an instrument of fraud, were one coauthor to hide from the other an intention to take sole credit for the work."³⁸⁵ Third, the audience appeal of the works on both [or all] contributions and the "share of each in its success cannot be appraised."³⁸⁶

The Ninth Circuit's standard of objective intent of shared coauthorship can be illustrated in a Central District of California case that preceded *Aalmuhammed*. In *Systems XIX v. Parker*, discussed in the Authorship section of this article, recording artist Lawrence Parker asked a sound engineer employed by a concert venue to record his concert.³⁸⁷ After that recording later appeared on Parker's album, the engineer's em-

³⁷⁶ 17 U.S.C. § 302 (2000).

³⁷⁷ See 1 NIMMER & NIMMER, *supra* note 48, § 6.07.

³⁷⁸ 202 F.3d 1227, 1234 (9th Cir. 1999).

³⁷⁹ *Id.* at 1232.

³⁸⁰ *Id.* at 1234.

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Childress v. Taylor*, 945 F.2d 500, 508 (2d Cir. 1991).

³⁸⁵ *Id.* at 1235. Compare *Thomson v. Larson*, 147 F.3d 195, 206-07 (2d Cir. 1998). This case would have been analyzed much differently under the Ninth Circuit's standard, although the result might have been the same.

³⁸⁶ *Aalmuhammed*, 202 F.3d at 1235 (citing *Edward B. Marks Music Corp. v. Jerry Vogel Music Co., Inc.*, 140 F.2d 266, 267 (2d Cir. 1944)).

³⁸⁷ 30 F. Supp. 2d 1225, 1226 (N.D. Cal. 1998).

ployer sued for joint authorship of the sound recording.³⁸⁸ The court found that the *Childress* standard did not apply where, as in this case, the relationship was one contemplated by Congress.³⁸⁹ Because the producer/artist relationship (unlike that of a research assistant or dramaturg and a playwright), is specifically recognized by Congress, the court held that an objective standard of intent must be applied to determine joint authorship.³⁹⁰ Parker did not intend for the engineer to be credited as a coauthor, but he must have understood the inherently collaborative nature of producing a live performance.³⁹¹ Therefore, the court left to the trier of fact as to whether the engineer might have been a joint author.³⁹²

C. An Observation Regarding Determination of Joint Authorship in Sound Recordings

The analysis for determining a joint author relationship in a sound recording is unique among copyrightable works, because it is conceptually and statutorily separable from the underlying musical compositions.³⁹³ Unlike an audio-visual work, where the underlying script provides a basis for authorship, the emphasis is on the performance itself. In recognizing authorship in a sound recording, a songwriter is completely absent in the analysis.³⁹⁴ Therefore, musicians and singers have a more logical claim of authorship than, for instance, an actor does for a motion picture or theatrical work.³⁹⁵

VIII. CASE HISTORY: AUTHORSHIP OF A SOUND RECORDING

Several cases shed light on the courts' willingness to permit claims of authorship by parties who arrange and produce a sound recording, and

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 1228.

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² *Id.* at 1228-29.

³⁹³ See THEBERGE, *supra* note 190, at 141-44; *cf.* Newton v. Diamond, 349 F.3d 591 (9th Cir. 2003) (separating the musical composition from the sound recording).

³⁹⁴ *But see* Lulirama, Ltd. v. Axxess Broad. Servs., 128 F.3d 872, 878 (5th Cir. 1997) (claiming that a musical composition was part of a sound recording).

³⁹⁵ *But see* Morrill v. Smashing Pumpkins, 157 F. Supp. 2d 1120 (C.D. Cal. 2001) (recognizing a musician as the author of a music video because the primary focus on the video is on the performer. Can the same logic be applied to an actor?).

one recent case suggests a willingness to recognize authorship in a vocalist who was neither designated nor credited as an artist.³⁹⁶

A. *The Producer or Engineer as Author*

In *Systems XIX*, the Central District of California recognized that an engineer of a live performance might not only be an author, but might be a joint author, of a sound recording.³⁹⁷ The suit was brought by Lawrence Parker (who records as “KRS-ONE”) and his record company Zomba.³⁹⁸ Parker had contracted to do a live performance at the plaintiff’s venue, Maritime Hall.³⁹⁹ Because Parker’s sound engineer was not present, he asked Maritime Hall to record and engineer the concert.⁴⁰⁰ Maritime set up the recording equipment, including stage and audience microphones, and audio lines.⁴⁰¹ They recorded the concert, mixed and equalized the performance, and presented Parker’s manager with a master tape.⁴⁰²

Later that year, two song recordings from the performance appeared on the KRS-ONE album *I Got Next*.⁴⁰³ There was no reference on these tracks to producer credits or venue.⁴⁰⁴ The court recognized that the producer/performer relationship was an inherently collaborative one that has been fully recognized by Congress.⁴⁰⁵ It rejected the defendants’ claim that Parker lacked the requisite intent to create a joint work.⁴⁰⁶ The *Chil-dress* standard, it argued, was based on subjective standards that applied to authorship claimants who are not likely to have been within the contemplation of Congress.⁴⁰⁷ Maritime’s production of the sound recording, by

³⁹⁶ *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409, 411 (S.D.N.Y. 2003), *reconsideration denied*, 70 U.S.P.Q.2d 1835 (S.D.N.Y. 2004).

³⁹⁷ *Systems XIX v. Parker*, 30 F. Supp. 2d 1225, 1228 (N.D. Cal. 1998). It is difficult to determine if the results would be the same if the *Aalmuhammed* standard applied, but I believe that they would be.

³⁹⁸ *Id.* at 1226. The court did determine whether Parker was a work for hire of Zomba. *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 1226. Parker told Maritime that he always recorded the concerts for his own self-evaluation, but the facts suggest that the venue was aware that the recordings might appear on an album. *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* See *supra* notes 393–396 and accompanying text.

⁴⁰⁶ *Systems XIX*, 30 F. Supp. 2d at 1228.

⁴⁰⁷ *Id.*

contrast, was explicitly contemplated by Congress.⁴⁰⁸ Therefore, the *Childress* standard was held inapplicable.⁴⁰⁹

Instead, the court applied an objective, factual standard, allowing Maritime Hall to assert its claims of joint ownership.⁴¹⁰ Maritime argued that Parker was an experienced performer who “understood the inherently collaborative nature of producing a live performance.”⁴¹¹ Further, the Copyright Office acknowledges that a sound recording is work of joint authorship between a performer and producer.⁴¹² Recognizing the validity of these claims, the court dismissed the defendants’ motion for summary judgment and permitted an inquiry as to Maritime Hall’s joint authorship.⁴¹³

In *Staggers v. Real Authentic Sound*, the court also recognized that the contributions of a producer, particularly where the producer is in control of the recording session, may constitute joint authorship.⁴¹⁴ Record company Real Authentic Sound (hereinafter “RAS”) contracted with record producer Harold McLarty to produce a new album re-recording new music with original lyrics from a previously released album.⁴¹⁵ The parties agreed that McLarty was to be solely responsible for acquiring the necessary rights from all artists and for providing RAS with a master tape of the recording.⁴¹⁶ McLarty in turn contracted with the plaintiff Reginald Staggers to write and arrange the music for ten of the album’s songs.⁴¹⁷ Staggers wrote, arranged, and performed the musical compositions and delivered the master tape to McLarty.⁴¹⁸ Upon notice that his music was being distributed allegedly without his authorization, Staggers began the legal proceedings that ultimately led to this case.⁴¹⁹

RAS argued that McLarty (who was under contract with RAS) was the owner of the recording, because, as producer, he paid for the studio time, the tapes, and all other aspects of the recording, and manufacturing of the sound recording.⁴²⁰ The court correctly held that paying for the

⁴⁰⁸ HOUSE REPORT, *supra* note 53, at 1570.

⁴⁰⁹ *Systems XIX*, 30 F. Supp. 2d at 1228.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.* at 1228-29.

⁴¹³ *Id.* at 1229.

⁴¹⁴ 77 F. Supp. 2d 57, 63 (D.D.C. 1999).

⁴¹⁵ *Id.* at 59.

⁴¹⁶ *Id.*

⁴¹⁷ *Id.* As part of their agreement, plaintiff was to retain “all Copyrights and Publishing to the music of the aforementioned compositions.” *Id.* This suit also included Staggers’ action for infringement of his musical compositions. *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 63.

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recording, without more, is not sufficient to establish authorship.⁴²¹ Nevertheless, the court recognized the possibility that McLarty might be an author of the work.⁴²² McLarty created the original concept for the album and hired Staggers to fulfill his vision.⁴²³ The court denied motions of summary judgment on determinations of authorship, and permitted a trial to determine whether either party was a sole or joint author.⁴²⁴

There are limits to the extent that someone who sets up a recording session can claim authorship in a sound recording. In *Forward v. Thorogood*, plaintiff John Forward befriended unsigned band George Thorogood and the Destroyers and agreed to help them produce a demo tape for the band to shop to record labels.⁴²⁵ Forward arranged and paid for the band's recording sessions.⁴²⁶ After the band had been signed to a record label and performed new material for them, Forward asserted a right in the recordings on the demo tape and sought a declaration that he had the rights to reproduce and distribute them.⁴²⁷

The First Circuit rejected Forward's invocation of the House Report that authorship can rest in a "producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording."⁴²⁸ Here, Forward merely arranged the scheduling of the recording sessions, and paid for them.⁴²⁹ He did not supervise or edit the session.⁴³⁰ Consequently, he made no musical or artistic contribution to the recording, and could not claim any authorship.⁴³¹

⁴²¹ See *Forward v. Thorogood*, 985 F.2d 604 (1st Cir. 1993), discussed *infra* notes 429–436 and accompanying text. See also 1 NIMMER & NIMMER, *supra* note 48, § 2.10[A][2][b].

⁴²² *Staggers*, 77 F. Supp. 2d at 63.

⁴²³ *Id.* Compare Testimony of Sheryl Crow, *supra* note 178 (arguing that a producer is hired by the artists merely to fulfill the artist's vision).

⁴²⁴ *Staggers*, 77 F. Supp. 2d at 63.

⁴²⁵ 985 F.2d 604, 605 (1st Cir. 1993).

⁴²⁶ *Id.*

⁴²⁷ *Id.* The case was decided on common law copyright because the tapes were unpublished and recorded prior to 1978. *Id.*

⁴²⁸ *Id.* at 607 (citing HOUSE REPORT, *supra* note 53, at 1570).

⁴²⁹ *Forward*, 985 F.2d at 605.

⁴³⁰ *Id.*

⁴³¹ *Id.* The court also rejected that he could be owner of the material merely because the band gave him the demo tape to keep. *Id.* Compare *Shaab v. Kleindienst*, 345 F. Supp. 589 (D.D.C. 1972) (finding that sound recording firms who provide equipment and organize the diverse talents of arranger, performer, and technicians . . . satisfy the requirement of authorship).

A producer was also recognized as a coauthor in the pending case *Shady Records v. Source Enterprises*,⁴³² a case with a convoluted factual history and a multitude of claims by both parties. That case concerned sound recordings by the successful hip-hop artist Marshall Mathers, who records as Eminem.⁴³³ Because the facts presented by the parties were contradictory, the court could not answer all the questions regarding authorship.⁴³⁴ But they did suggest that the producers as well as the emcees who participated in the creation of previously unpublished sound recordings were coauthors in the works.⁴³⁵

In determining whether they could be joint authors, the court asked if they intended for their contributions to be merged into a whole.⁴³⁶ It determined that a matter of fact exists as to whether the participants can be joint authors, with rights that extends to portions of the recording in which they did not directly participate.⁴³⁷ The court did permit Eminem's label, Shady Records, to assert rights in the copyrights for the contributions in the sound recording that were expressly assigned to Eminem and in turn to Shady.⁴³⁸

In *Morrill v. Smashing Pumpkins*, the Central District of California recognized a music video as a joint work between the producer and the recording artist.⁴³⁹ Although this case involved a video and not a sound recording, it is instructive in its recognition of the importance of the performing artist. The plaintiff produced and directed a promotional video for the band, and later brought an infringement action against the band when it used portions of the video in another commercially released videotape.⁴⁴⁰

The court held that in a music video both the creator of the songs⁴⁴¹ and the creator of the images are the "master mind whose work comes

⁴³² No. 03 Civ. 9944 (GEL), 2004 U.S. Dist. LEXIS 26143 (S.D.N.Y. Dec. 30, 2004).

⁴³³ *Id.* at *2.

⁴³⁴ *Id.* at *28.

⁴³⁵ *Id.* at *33.

⁴³⁶ *Id.* at *34, 35. The court claimed to cite *Childress*, discussed *supra* note 374, and accompanying text, but it was really citing the statutory definition in 17 U.S.C. § 101.

⁴³⁷ *Shady Records*, 2004 U.S. Dist. LEXIS 26143 at *32.

⁴³⁸ *Id.* at *28-29. See also *Feiners v. BMG Music*, 01 Civ. 0937 (JSR), 2003 U.S. Dist. LEXIS 2975 (S.D.N.Y. Feb. 27, 2003) (deferring to what was written in the recording contract).

⁴³⁹ 157 F. Supp. 2d 1120 (C.D. Cal. 2001).

⁴⁴⁰ *Id.* at 1121.

⁴⁴¹ In the context of a sound recording, this would be applicable to the performer of the song and not the songwriter. See *Newton v. Diamond*, 349 F.3d 591, 596 (9th Cir. 2003) (analyzing the difference between the contributions where the performer and songwriter are the same individual).

together to produce a unitary whole.”⁴⁴² It rejected Morrill’s attempt to present himself as the sole force behind the video, recognizing that the primary purpose of the work was the music.⁴⁴³ Therefore, the music itself was the central component of the completed work.⁴⁴⁴ It did recognize that the filming, editing and producing helped shape and present the video, but the video itself could not exist without the music.⁴⁴⁵

B. The Non-Designated Artist as Author

*Ulloa v. Universal Music & Video Distribution Corp.*⁴⁴⁶ is an example of the chaotic and uncertain litigation that can ultimately result if performances are not deemed works for hire.⁴⁴⁷ The plaintiff, Demme Ulloa, an unsigned singer who visited the studio of defendant Shawn Carter (who records as Jay-Z) as a friend of one Carter’s producers.⁴⁴⁸ While she was in the studio listening to an unfinished version of the song *Izzo (H.O.V.A.)*, Ulloa spontaneously began singing a countermelody.⁴⁴⁹ Carter then asked her to sing a vocal phrase in the studio, for possible inclusion in the song.⁴⁵⁰ Ulloa sang the vocal phrase for Carter, but they never discussed any terms for inclusion of the song.⁴⁵¹

Ulloa was later told that the vocal phrase would be rerecorded with a more established singer, but Ulloa’s version ultimately appeared on the track, which became a hit song from the Jay-Z album *The Blueprint*.⁴⁵² Ulloa sued Jay-Z and his record company, Roc-A-Fella, claiming authorship in both the composition and the song recording.⁴⁵³ The Southern District of New York, relying on *Childress*, rejected Ulloa’s claims of joint authorship, because there was no evidence that showed Carter’s requisite intent to share in authorship.⁴⁵⁴ However, the court did find that Ulloa

⁴⁴² *Morrill*, 157 F. Supp. 2d at 1123 (citing *Aalmuhammed v. Lee*, 202 F.3d 1227, 1231 (9th Cir. 1999)).

⁴⁴³ *Morrill*, 157 F. Supp. 2d at 1124.

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.* Compare *JCW Invs. v. Novelty, Inc.*, 289 F. Supp. 2d 1023 (N.D. Ill. 2003) (holding that a voice talent” was not a coauthor of the sound recording embodied in a doll).

⁴⁴⁶ 303 F. Supp. 2d 409 (S.D.N.Y. 2003), *reconsideration denied*, 70 U.S.P.Q.2d 1835 (S.D.N.Y. 2004).

⁴⁴⁷ If Jay-Z had retained the rights to his recordings, he would have still faced this litigation.

⁴⁴⁸ *Ulloa*, 303 F. Supp. 2d at 411. The producer told Ulloa, falsely, that he was producing the song that Carter was recording. *Id.*

⁴⁴⁹ *Id.* at 412.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* at 418.

might have contributed original copyrightable expression, and therefore there were enough facts for her to proceed with a claim of copyright infringement.⁴⁵⁵ The case was later settled,⁴⁵⁶ but if Ulloa's vocal phrase had been held to constitute copyrightable expression, it would have been a broad expansion of who may be deemed an author of a sound recording.

IX. A PROPOSAL FOR DETERMINATION OF AUTHORSHIP OF A SOUND RECORDING

It may very well be too late to make an all-encompassing determination as to who might be the author of any sound recording created under the 1971 Act.⁴⁵⁷ However, case law, congressional reports, Copyright Office materials, and academic resources suggest that some common principles emerge: performing artists and producers who have made significant contributions will generally be deemed co-authors of the recording. By 2013, courts may be sufficiently informed as to make determinations should there be an overflow of litigation.

It is unlikely that Congress will decide as to the authorship of a sound recording with any retroactivity.⁴⁵⁸ Having already failed to do so when it enacted the 1999 Amendment,⁴⁵⁹ they are not likely to draft another proposal that will again infuriate interested parties. Some recordings might be deemed works for hire by courts, but the majority of them will not.⁴⁶⁰ However, the current standards and policies regarding authorship can be applied to draft a *sui generis* standard of authorship for sound recordings that will balance the rights and interests of all interested parties, as well as make certain that true authorship will be protected.

A. Adding Work for Hire to the List of Enumerated Items in the Specially Commissioned Prong as a Matter of Policy

1. Reasons Why a Sound Recording Should be a Work for Hire

The primary policy rationale for inclusion of sound recordings in the definition of work for hire is the so-called "chaos theory."⁴⁶¹ Under this theory, there are so many different participants in a sound recording that the true creators will be consistently trapped in endless litigation.⁴⁶² The

⁴⁵⁵ *Id.* and accompanying text.

⁴⁵⁶ *See supra* note 24 and accompanying text.

⁴⁵⁷ *See* LaFrance, *Sound Recordings*, *supra* note 81, at 396.

⁴⁵⁸ *Id.*

⁴⁵⁹ *See supra* Part IV(B).

⁴⁶⁰ The weight of unbiased authority is that sound recordings do not constitute works for hire under either definition. *See, e.g.*, Cooper & Burry, *supra* note 154.

⁴⁶¹ *See* Testimony of Michael Greene, *supra* note 32.

⁴⁶² *See* Testimony of Hillary Rosen, *supra* note 124.

participation of many individuals is one of the reasons for including contributions to motion pictures as works for hire.⁴⁶³ It may be too difficult to make determinations as to the copyrightable contribution of each participant of a recording session, especially with an old evidence trail.⁴⁶⁴

Furthermore, when termination rights go into effect, any participant deemed a joint author may terminate those rights and independently market the recording, resulting in multiple versions of the same album.⁴⁶⁵ However, much as this may seem attractive to consumers, it would hurt the other creators because a company generally will not want to market an album without exclusive rights.⁴⁶⁶ It is difficult enough to profit off of a sound recording, and neither record companies nor artists will benefit if resources for marketing result in sales of a competing version of the recording.⁴⁶⁷

The counter-argument for this policy rationale is that designated artists generally make contracts with side musicians that transfer the rights to the designated artists.⁴⁶⁸ The problem with this argument is that those agreements are really work-for-hire agreements.⁴⁶⁹ If a sound recording is not a work for hire, and an employer/employee relationship cannot be established, the designated artists will not be protected against authorship claims.⁴⁷⁰ When termination rights go into effect, they might be given notice by these side musicians.

A second policy reason for granting work-for-hire status comes from the limited protection of these sound recordings, which is primarily to stop the spread of pirated phonorecords.⁴⁷¹ Congress has explicitly chosen to grant rights only in physical reproduction and distribution.⁴⁷² There can be no infringement where another performer records the same sounds in the exactly the same manner, even if that second performer intended to sound like the original recording.⁴⁷³ While most other authors of copyrightable material can sue for infringement on the basis that another work

⁴⁶³ See Testimony of Michael Greene, *supra* note 32.

⁴⁶⁴ See LaFrance *Sound Recordings*, *supra* note 81, at 396-97.

⁴⁶⁵ See Testimony of Marybeth Peters, *supra* note 74.

⁴⁶⁶ See LINDEY & LANDAU, *supra* note 316, § 9:4.

⁴⁶⁷ See Testimony of Hillary Rosen, *supra* note 124.

⁴⁶⁸ See Testimony of Michael Greene, *supra* note 32.

⁴⁶⁹ See American Federation of Musicians of the United States and Canada, Phonograph Record Labor Agreement 10 (1999).

⁴⁷⁰ See, e.g., *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409, 411 (S.D.N.Y. 2003), *reconsideration denied*, 70 U.S.P.Q.2d 1835 (S.D.N.Y. 2004) (guest vocalist had no contract with designated artist, and sued for authorship).

⁴⁷¹ See HOUSE REPORT, *supra* note 53, at 1567.

⁴⁷² *Id.*

⁴⁷³ *Id.* at 1568.

was *substantially similar*, there is no infringement action for a sound recording that sounds *exactly the same* as the original copyrightable work.⁴⁷⁴

The limited protection for sound recordings, and the emphasis on preventing piracy, suggests that Congress was not especially interested in protecting artistry so much as they were protecting the sale of the actual phonorecords. To whatever extent a performer presents a unique voice or instrumentation, that uniqueness is not protected by Copyright Law.⁴⁷⁵ That argument would suggest that a grant of ownership by a company, as opposed to individual performers, is not an extreme departure from congressional intent.

A third argument is also rooted in congressional intent, to leave the issue of authorship to the bargaining of the parties involved.⁴⁷⁶ Under this view, authorship can be determined by contract, and the judicial role will be limited.⁴⁷⁷ This point of view, expressed by Paul Goldstein at the congressional hearings,⁴⁷⁸ might fail to acknowledge that bargaining power is almost always one-sided.⁴⁷⁹ There is rarely genuine bargaining of the parties where the issue of ownership is concerned.⁴⁸⁰ While Goldstein is correct that the sound recording amendment would not automatically make a sound recording a work for hire,⁴⁸¹ Professor Marci Hamilton correctly points out that it will have the practical effect of making it so.⁴⁸²

The fourth justification is that investors in a sound recording will get the full benefit from that investment.⁴⁸³ Promoting and marketing a new recording is expensive, and many of them are not profitable for a long period of time, if it all.⁴⁸⁴ A record company's greatest profits come from

⁴⁷⁴ See generally Edward T. Saadi, *Sound Recordings Need Sound Protection*, 5 TEX. INTELL. PROP. L.J. 333 (1997).

⁴⁷⁵ Trademark and competition law might be available where sound recordings are designed to sound like another. See, e.g., *id.* This article takes no position as to whether these alternatives adequately protect performers. Further, this article does not advocate a different level of protection for performers of sound recordings. It merely suggests the possibility that if Congress had not intended to protect the unique elements that performers bring to a recording session, it may follow that corporate ownership is not contrary to their intention. Compare *Newton v. Diamond*, 349 F.3d 591, 596 (9th Cir. 2003) (discussing musician's contribution to the sound recording); *Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390, 396 (6th Cir. 2004).

⁴⁷⁶ HOUSE REPORT, *supra* note 53, at 1570.

⁴⁷⁷ See Testimony of Paul Goldstein, *supra* note 150.

⁴⁷⁸ *Id.*

⁴⁷⁹ See Testimony of Michael Greene, *supra* note 32.

⁴⁸⁰ *Id.*

⁴⁸¹ Testimony of Paul Goldstein, *supra* note 150.

⁴⁸² Testimony of Marci Hamilton, *supra* note 121.

⁴⁸³ See Testimony of Hillary Rosen, *supra* note 124.

⁴⁸⁴ *Id.*

catalog sales, because the company no longer have to make large investments in marketing albums with established success.⁴⁸⁵

Still, thirty-five years seems a sufficient amount of time for a record company to make a substantial return on their investments. For instance, since 1978, there have been two major changes in the dominant physical embodiment of phonorecords, in audiocassettes and compact discs. Record sales always increase for years after the introduction of a new format, because consumers gradually purchase their old catalog in the new format.⁴⁸⁶ The record industry is also seeing increases in sales in digital reproductions (such as MP3s) of catalog material, and its first performance royalties for digital transmissions.⁴⁸⁷

2. *Reasons Why a Sound Recording Should Not be a Work for Hire*

The first significant reason for not permitting the addition of a sound recording to the specially commissioned prong, is so that the proper creators, especially recording artists, can be properly rewarded for their labor and creativity.⁴⁸⁸ The unequal bargaining power between artists and record companies, and the unfriendly (indeed, some argue, unconscionable) contracts have been well documented and need not be discussed in detail here.⁴⁸⁹ Many artists often do not profit from their recordings, needing a constant schedule of touring to be financially successful.⁴⁹⁰ Congress properly added an inalienable right for artists to retain control of their own creations and use them for their own benefit.⁴⁹¹ This is not a right that should be denied, or even reconsidered, so easily through a single addition to the Copyright Act.

The second reason comes directly from the Constitution: that Congress was given the power to grant authors exclusive rights in their creations.⁴⁹² It was not the intent of the founding fathers, or of Congress to

⁴⁸⁵ *Id.*

⁴⁸⁶ See Howard Siegel, et al., *Counseling Clients in the Entertainment Industry*, 554 PLI/PAT 323 at 391 (1999).

⁴⁸⁷ See Testimony of Marci Hamilton, *supra* note 121.

⁴⁸⁸ *Id.*

⁴⁸⁹ See, e.g., Don Henley, Stated at the Select Committee Hearing on the Entertainment Industry, convened at the California State Capitol in Sacramento by California State Senator Kevin Murray (D-Culver City) (Sept. 5, 2001), available at http://archive.salon.com/ent/music/feature/2001/09/06/love_in_sacto.

⁴⁹⁰ See recordingartistscoalition.com.

⁴⁹¹ “[I]t is a basic principle of copyright law that authors should be able to terminate their initial grant of rights” Testimony of Marybeth Peters, *supra* note 74.

⁴⁹² U.S. CONST. art. I, § 8, cl. 8.

take this right away and give them to corporate entities.⁴⁹³ To whatever extent a work-for-hire clause might be valid, it would fly in the face of the Constitution if it becomes the norm instead of the exception.⁴⁹⁴ Given that work for hire will undoubtedly become an industry standard, the unique and important role that Congress has in creating copyright will be undermined.

The third policy, albeit an overlooked one, is that consumers view the designated artist as the creator of the work.⁴⁹⁵ In fact, many consumers purchase records in the belief that the artists are properly rewarded and compensated from their purchase.⁴⁹⁶ For a public that is becoming increasingly questionable about copyrights as a whole and in copyright for music in particular, copyright enforcement is properly justified when it rewards those who create original works of expression.

Any policy rationale, whether economic, moral, or otherwise, does not bear on whether a sound recording is already eligible for work-for-hire status under the 1976 Act.⁴⁹⁷ These rationales must be only be applied to determine whether a sound recording ought to be added to the list of enumerated items under the specially commissioned prong with no retroactive effect. Under the current definition, sound recording is absent, and it is wise to adhere to *Reid's* principle of strict adherence.⁴⁹⁸

B. Sheryl Crow's Standard, That the Designated Artist is the Sole Author, is Too Limited

Sheryl Crow's standard, that the album's designated artist is the sole author of a sound recording,⁴⁹⁹ is too limited. She is correct that consumers associate the name on the recording with its creation.⁵⁰⁰ However, few would agree with her that an independent producer is not also its creator.⁵⁰¹ Recognizing a sound recording's producer as at least a co-author of

⁴⁹³ See Testimony of Marci Hamilton, *supra* note 121.

⁴⁹⁴ *Id.*

⁴⁹⁵ See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 1999), (recognizing audience appeal as a means of determining joint authorship).

⁴⁹⁶ Part of the growing resentment against the record industry (and the RIAA in particular), stems from the public's awareness of the minimal royalties that artists receive compared to the price of a compact disc. Many consumers have chosen not to purchase compact discs, supposedly out of concern that the artists do not see any of the money. See, e.g., Downhill Battle Web site, <http://www.downhillbattle.org>.

⁴⁹⁷ See Testimony of Marybeth Peters, *supra* note 74.

⁴⁹⁸ See *supra* note 262 and accompanying text.

⁴⁹⁹ See *supra* Part IV(C)(2).

⁵⁰⁰ Cf. *Morrill v. Smashing Pumpkins*, 157 F. Supp. 2d 1120, 1124 (C.D. Cal. 2001).

⁵⁰¹ See, e.g., Copyright Registration for Sound Recordings, available at <http://www.copyright.gov/circs/circ56.html>.

a recording is consistent with the positions of Congress and the Copyright Office, as well as the courts. Furthermore, this limited definition of authorship does not recognize the many copyrightable contributions that others make to a work. *Feist* did not confer authorship only to those who control a work, but to those who contribute original expression.⁵⁰² A sound recording is unique among other copyrightable forms of expression because it recognizes originality of performance.⁵⁰³ Surely, musicians contribute original, if not altogether unique, expression in a recording session.⁵⁰⁴ The difference between Crow's backing musicians and a group of musicians is a band that supports its lead singer is one of contracting and bargaining power, not of authorship.

C. *Marybeth's Peters' Standard, Modified, is an Appropriate Compromise Between the Parties*

The proposal by Marybeth Peters, if modified and if fully debated by representatives of all parties with an interest in its enactment, is an appropriate compromise for the parties.⁵⁰⁵

1. *Key Contributors From Work for Hire*

Under the standard that Peters proposed before Congress, a sound recording may be eligible for work-for-hire status, but with an exemption for "key contributors."⁵⁰⁶ A key contributor is one who has made a major contribution of copyrightable expression to a sound recording.⁵⁰⁷ It need not be someone who controlled the proceedings.⁵⁰⁸ The most difficult aspects of this rule, of course, are how to identify a key contributor and how to determine a major contribution.⁵⁰⁹ Some candidates are unlikely to spark too much debate. Most would agree that a designated artist, the one who is credited with the recording, is a key contributor.⁵¹⁰ A producer is also generally recognized as a key contributor, as shown by the testimony of Congress and the Copyright Office.

What of the artists that are "featured" on other artists' recordings?⁵¹¹ If a guest appears on an artist's individual song recording, it might be valid to consider that featured guest a co-author or joint author of that individ-

⁵⁰² See 1 NIMMER & NIMMER, *supra* note 48, § 6.07.

⁵⁰³ THEBERGE, *supra* note 190, at 141-44.

⁵⁰⁴ See *Newton v. Diamond*, 349 F.3d 591, 596 (9th Cir. 2003).

⁵⁰⁵ Testimony of Marybeth Peters, *supra* note 74.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.*

⁵¹⁰ See Part VI(A).

⁵¹¹ See Part VI(A).

ual song recording. But would it make sense to make the featured guest a co-author of the entire album recording?⁵¹² This would be impractical. It would make little logic for that guest to be a joint author, because the guest appeared on only the one song and did not necessarily have an intent for that song to merge with others.⁵¹³ A proposal can be made that a featured guest on a song can be entitled to a share of authorship equal to her share in the song, divided by the number of songs on the album. This is problematic as a general rule, because an artist can include many tracks on an album, diluting that featured artist's interest. A better solution is to permit joint authorship or co-authorship only where the song recording is used in its individual capacity, such as in a license for use in a motion picture or a digital transmission.⁵¹⁴

Another concern is that recognition of a designated artist, and not the other musicians and vocalists, as co-authors has a degree of arbitrariness that does not harmonize well with our view of protecting original expression.⁵¹⁵ Recognizing only a designated artist may have the effect of shutting out performers who have contributed the same amount of expression on a recording as others who retain authorship.⁵¹⁶

Ulloa is illustrative.⁵¹⁷ The defendants told Ms. Ulloa that they were looking for a more established vocalist to sing her vocal phrase.⁵¹⁸ Of course, that would mean that Ulloa would have no action for her vocals.⁵¹⁹ But, more importantly, a more established singer would more likely to be designated as one of the artists on the song.⁵²⁰ Under a scheme that recognizes only a designated artist, that established artist would have author-

⁵¹² Generally, but not always, the "featured" guest is listed on the album's track list, on the back of the compact disc or record. The guest's name is usually not on the front cover or the compact disc's spine (which identifies the designated artist), but is often on a sticker attached to the disc's shrink-wrap in order to generate consumer attention. See LINDEY & LANDAU, *supra* note 316, § 9:80.

⁵¹³ Compare *Shady Records v. Source Enters.*, 03 Civ. 9944 (GEL), 2004 U.S. Dist. LEXIS 26143, *34-35 (S.D.N.Y. Dec. 30, 2004) (discussing how participants in sound recordings may be joint authors of the parts where they did not participate).

⁵¹⁴ See *supra* Part III(C).

⁵¹⁵ See *supra* notes 507-511 and accompanying text.

⁵¹⁶ *Id.*

⁵¹⁷ *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409 (S.D.N.Y. 2003), *reconsideration denied*, 70 U.S.P.Q.2d 1835 (S.D.N.Y. 2004).

⁵¹⁸ *Id.* at 412.

⁵¹⁹ But still, arguably a claim as to authorship of the countermelody.

⁵²⁰ Vocalists that were "featured" on Jay-Z's albums include Faith Evans, Beyonce Knowles and Lenny Kravitz. See Jay-Z, <http://rocafella.com/artist.aspx?key=1&v=avdetail&album=16>.

ship status while Ms. Ulloa would not. For purposes of authorship, their contributions would be exactly the same. The real difference is in bargaining power.

2. *Under This Standard, True Creators of a Work Will Ultimately Be Able to Use It*

With a standard of authorship that rewards key contributors, the true creators of a work will ultimately be able to use it. Because our Constitution was designed to protect genuine authors, the legal fiction of corporate “authorship” as embodied in the work-for-hire doctrine⁵²¹ should be limited to situations where it is necessary to properly provide for the “progress of the arts” and to reward creators.⁵²² The principle problem addressed by work-for-hire proponents is that there are too many collaborators on a recording.⁵²³ That rationale doesn’t provide a basis for why a record company ought to own the work for the life of the copyright (as it inevitably, and almost always will), as opposed to a single artist who has shaped the recording and performed all of its material. Allowing key contributors to own this work, with work-for-hire rights vis-à-vis minor participants, is consistent with our intention of rewarding authors and with providing the public with their creations.⁵²⁴

Under this standard, artists will be able to benefit from the true economic value of their recordings.⁵²⁵ Those who believe that their recordings are no longer being properly exploited will have another opportunity to reintroduce them.⁵²⁶ Where some old recordings become forgotten by their copyright owners, its creators are interested in retaining the rights.⁵²⁷ Furthermore, these sound recordings have an historical and moral value to artists, even where that work is no longer profitable.⁵²⁸

3. *Thirty-Five Years is a Sufficient Amount of Time for a Record Company to Exploit a Work and Profit From It*

Record companies are concerned that they will not receive a return on their investment if artists enforce their termination rights, but this is not true. Where an album recording is successful, thirty-five years is a

⁵²¹ See Ralph Oman, *Berne Revision: The Continuing Drama*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 139, 143 (1993).

⁵²² U.S. CONST. art. I, § 8, cl. 8.

⁵²³ See *supra* notes 466–467 and accompanying text.

⁵²⁴ See Testimony of Marybeth Peters, *supra* note 74.

⁵²⁵ See “Work for Hire,” *supra* note 191.

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ *Id.*

sufficient amount of time to profit from the investment.⁵²⁹ In fact, the record companies receive the benefits of huge sales increases whenever there is a shift in the dominant format of a phonorecord.⁵³⁰ When the record industry voices concern over albums that do not reach a profit, they are referring to their releases which are not successful and do not have economic value for thirty-five years.⁵³¹ The albums that retain market potential — the “catalog” items — are the ones that continue to sell for decades and generate substantial profit for the companies.⁵³² It would be odd for the industry to explain its continuing success if it argued that such albums took more than thirty-five years (before the advent of the audio-cassette and the compact disc, let alone digital transmission) to generate profits.

Further, this provision does not completely deny record companies the opportunity to renegotiate with artists to continue using their recordings.⁵³³ Where artists are satisfied with the exploitation of their work, they will generally remain signed to their record company.⁵³⁴ In fact, many top recording artists have continued to remain contracted with the original record company that signed them, decades after their first release.⁵³⁵ The termination right will put successful recording artists in the advantageous bargaining position they did not have when they originally signed to make recordings with the company.⁵³⁶

The thirty-five year period might be one area where artists and producers might have to consider compromise.⁵³⁷ In order to reach an agreement on any changes to the current law, the record industry is not likely to concede to a scheme that can only grant it less than it thought it originally had.⁵³⁸

⁵²⁹ See *supra* notes 491–492 and accompanying text.

⁵³⁰ *Id.*

⁵³¹ See Testimony of Hillary Rosen, *supra* note 124. Sometimes the artists who record failing albums are “dropped” from a record label, and released from their contract.

⁵³² See *id.*

⁵³³ This is a twist on Goldstein’s argument that adding work for hire to the second definition will not automatically make it a work for hire. Testimony of Paul Goldstein, *supra* note 150.

⁵³⁴ See Testimony of Marci Hamilton, *supra* note 121.

⁵³⁵ See, e.g., Bruce Springsteen Web site, <http://www.brucespringsteen.net>. Bruce Springsteen has remained with the Sony/Columbia recording label for over thirty years.

⁵³⁶ See Testimony of Marci Hamilton, *supra* note 121.

⁵³⁷ See, e.g., LaFrance, *Sound Recordings*, *supra* note 79, at 417-18.

⁵³⁸ *Id.*

D. *Proposals for Statutory Default*

Following are proposals for a statutory default in defining authorship of a sound recording. They are rules that have incorporated the issues discussed throughout this article, and applied in such a way to achieve equitable results. For Congress to legislate any sui generis definition of authorship, which it generally does not do, the issue will necessitate further testimony, including from parties that have not yet been heard.⁵³⁹ These proposals provide proper starting points for discussion and negotiation.

1. *Designated Artists and Producers are Deemed Authors of a Sound Recording*

Any discussion of authorship ought to begin with the assumption that the designated artists, as well as a producer, are key contributors to a recording and thus its authors.⁵⁴⁰ This assumption is consistent with the points of view of Congress, the Copyright Office, and federal courts.

2. *A Sound Recording is, by Default, a Joint Work Between Its Designated Artist and Producer*

As a default rule, a sound recording should be deemed a work of joint authorship between the designated artist and its producer. The Second Circuit and Ninth Circuit standards of joint authorship will be effective in preventing too many dubious or “frivolous” claims.⁵⁴¹ But they are not ideal in defining the relationship between an artist and a producer. The problem with these standards, and especially with the Second Circuit’s, is that they assume a relationship where one person is the “dominant” author.⁵⁴² This is not often clear as between a producer and artist,⁵⁴³ and is rarely apparent between the members of a recording group. Because these relationships are common and within the scope of congressional recognition, it is appropriate to assume joint authorship.⁵⁴⁴ The statute need not redefine joint work (with one change in its application listed below), nor does it need to resolve the determination of joint authorship.

⁵³⁹ See Testimony of Marybeth Peters, *supra* note 74; “Work for Hire,” *supra* note 191.

⁵⁴⁰ See *supra* Parts VI(A) and (B).

⁵⁴¹ See *supra* Part VII(B)(2).

⁵⁴² See LaFrance, *Joint Authors*, *supra* note 125, at 218.

⁵⁴³ See, e.g., *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57 (D.D.C. 1999).

⁵⁴⁴ See 1 NIMMER & NIMMER, *supra* note 48, § 2.10 (ownership of a sound recording copyright will either be exclusively in the performing artists, or (assuming an original contribution between the sound engineers, editors, etc. as employees of the record producer), a joint ownership between the record producer and the performing artists).

3. *The Designated Artist Shall be Deemed a Key Contributor*

The designated artist — the artist who is billed as the artist and whose name is on the album's cover and spine⁵⁴⁵ — shall be deemed a key contributor and a joint author. If the designated artist is a group, each member of the group shall be deemed a key contributor with a presumption of equal undivided interests in the work. The presumption of key contribution might be extended to the “featured artists,” who appear on only one or a few tracks on an album and are designated as artists for that song or songs and not the entire album.⁵⁴⁶ In order for this to work, they must be able to receive a presumption of joint authorship as to the individual song, but not to the album recording.⁵⁴⁷ This can be easily applied to digital performance rights, because they are paid per individual song.⁵⁴⁸ These guest artists will still be able to bargain for any authorship rights in the full-length album.

4. *The Producer of a Work Shall be Deemed a Key Contributor*

The producer of a recording session, although not always the “master mind” of a recording, shall be deemed a key contributor with joint authorship unless contracted otherwise. The producer will share joint ownership with the other key contributors, subject to the termination limitation expressed below.

One concern about the producer's right is that this right will be diluted with any increase in the number of members of a band. It is not fair for the interest to be diminished, because the producer's contribution is not actually minimized by the presence of more musicians on the recording (if anything, the producer's role increases). A scheme might be necessary to make certain that a producer's share is not diluted. It is too soon, however, to set and fix a percentage that a producer ought to own in a work. Of all the interested and important parties in this debate, record producers have not yet been given a chance to have their voices heard by Congress.⁵⁴⁹ Unlike recording artists, session musicians, songwriters, and record companies, there is no lobbying group that has acted on their be-

⁵⁴⁵ This definition needs refining. However, I reject the definition of designated artist as one who receives royalties on the albums shares. *See, e.g.*, Testimony of Marybeth Peters, *supra* note 74. This does not protect authors who have fully assigned their rights. *See, e.g.*, *Newton v. Diamond*, 349 F.3d 591 (9th Cir. 2003) (musician fully assigned his rights to record company, and thus was entitled to nothing when the record company licensed a portion of the sound recording for sampling).

⁵⁴⁶ *See supra* notes 317–321 and accompanying text.

⁵⁴⁷ *See supra* Part III(B).

⁵⁴⁸ *See generally* Nimmer, *The Absurd Complexity*, *supra* note 106.

⁵⁴⁹ *See* Testimony of Marybeth Peters, *supra* note 74.

half.⁵⁵⁰ Because their interests have not been spoken for, it is premature to set a default percentage on producers' authorship.

5. *Supporting Musicians and Vocalists that are Not Designated Artists Can be a Work for Hire Within Either Prong of Section 101*

Supporting musicians and vocalists that are not designated artists are deemed not to be key contributors, and are eligible for work-for-hire status under either prong of Section 101.⁵⁵¹ Many of these side artists are already paid as employees, so fewer problems ought to arise.⁵⁵² Engineers are also often paid as employees.⁵⁵³ This provision, although consistent with *Childress* and *Aalmuhammed*, bears the problem of inequity. In many situations, a musician or vocalist will accompany a singer for an entire song or even an entire album, but not be included as a member of the band.⁵⁵⁴ Often, even the public is aware of these significant contributions.⁵⁵⁵ Where two musicians can contribute equal contributions to a work and only one is deemed an author, there are concerns that the standard is not protective enough of artists.

The solution, albeit a limited one, is to allow a claim of authorship for any non-designated musician or vocalist who has contributed to an album, absent a written agreement or an employee status.⁵⁵⁶ The individual will not, however, have a claim to joint authorship or termination rights.⁵⁵⁷ A decision in *Ulloa* might have shed light on how the courts will define authorship as to individual performances.⁵⁵⁸

6. *A Majority of Authors are Necessary to Terminate, Even If Separate Grants Were Executed*

A majority of a joint recording's authors shall be necessary to terminate a work, even if the grants were made in separate executions. This

⁵⁵⁰ For a comprehensive list of membership organizations, see BRABEC & BRABEC, *supra* note 109, at 415-22.

⁵⁵¹ See Testimony of Marybeth Peters, *supra* note 74.

⁵⁵² See LINDEY & LANDAU, *supra* note 316, § 9:80.

⁵⁵³ *Id.*

⁵⁵⁴ Compare Testimony of Sheryl Crow, *supra* note 178 (arguing that musicians who participate on her album are entirely under her control, and thus are not authors).

⁵⁵⁵ See Bruce Springsteen Web site, <http://www.brucespringsteen.net>.

⁵⁵⁶ See *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409 (S.D.N.Y. 2003), *reconsideration denied*, 70 U.S.P.Q.2d 1835 (S.D.N.Y. 2004).

⁵⁵⁷ See *id.*

⁵⁵⁸ *Id.*

provision is a modification of the Section 203 termination right,⁵⁵⁹ suggested because producers often assign their rights to a record company in a separate grant.⁵⁶⁰ It makes certain that there will not be multiple competing versions of a work where it runs counter to the interests of the recording artists.⁵⁶¹ With this addition to the termination rule, producers as joint authors will not be able to terminate a work and exploit it as their own.

X. FINAL THOUGHTS

There is good reason why there is so much reluctance to defining the scope of authorship rights. Any bright-line rule will ultimately be either under-inclusive, or unworkable, or both. However, there is an opportunity for Congress to provide some guidelines so that courts can make determinations and that performers have a better awareness of their rights. It is likely that the rights as to any work from 1972 to the present date will not be resolved in a conclusive way, and courts will have to bear the burden of generating doctrine as 2013 approaches.⁵⁶² As for works created in the future, Congress has the opportunity to create some statutory guidelines, even if they are not conclusory. In order for them to do so, they will need input from performers, producers, musicians, the record industry, and scholars.⁵⁶³

Any answers may bear on how we view authorship in other copyrightable works. Sound recordings are unique in copyright protection, in that we expect that the rights are granted to performers.⁵⁶⁴ Discussion of performance as copyrightable expression can lead us to discuss whether, for instance, actors contribute original expression to theatrical works and motion pictures. Further, the recent limited rights to unfixed musical performances,⁵⁶⁵ whose constitutionality is currently under debate,⁵⁶⁶ also begs the question of what performers must contribute in order to be deemed authors.

Perhaps the sound recording debate will leave everybody in a position similar to where they were, and authorship rights will be left to the bar-

⁵⁵⁹ 17 U.S.C. § 203(a)(1) (2000).

⁵⁶⁰ See KRASILOVSKY & SHEMEL, *supra* note 110, at 31.

⁵⁶¹ See Testimony of Marybeth Peters, *supra* note 74.

⁵⁶² See LaFrance, *Sound Recordings*, *supra* note 79, at 396.

⁵⁶³ See “Work for Hire,” *supra* note 191.

⁵⁶⁴ See *supra* notes 507–509 and accompanying text.

⁵⁶⁵ 17 U.S.C. § 1101 (2000).

⁵⁶⁶ See *United States v. Martignon*, 346 F. Supp. 2d 412 (S.D.N.Y. 2004), *Kiss Catalog v. Passport Int’l Prods.*, No. CV 03-8514 WJR (CWx), 2004 U.S. Dist. LEXIS 26798 (Dec. 17, 2004), *aff’d*, 135 F. App’x 116 (9th Cir. 2005).

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gaining of the parties.⁵⁶⁷ After all the cases are settled and the treatises are prepared, the contract standard might be best.

We cannot allow, however, bargaining power in itself to determine true standards of authorship. The Constitution provided Congress with the power to grants rights to those who create original works of expression.⁵⁶⁸ If those rights are denied to those who ought to be entitled, the validity of Congress to enact and enforce laws under the Copyright Act is undermined. A standard that will deny claims of authorship to the principal performers of a sound recording, as a work-for-hire addition inevitably will, cannot be what the framers of the Constitution or the 1971 Act had in mind. It is best to contemplate a little more carefully about what they did.

⁵⁶⁷ See HOUSE REPORT, *supra* note 53, at 1570.

⁵⁶⁸ See Testimony of Marci Hamilton, *supra* note 121.

