# You Belong with Me: Retaining Authorship and Ownership of Sound Recordings

Delilah R. Cassidy*

> *"For years I asked, pleaded for a chance to own my work. . . . This is what happens when you sign a deal at fifteen to someone for whom the term 'loyalty' is clearly just a contractual concept. And when that man says 'Music has value*[,]*' he means its value is beholden to men who had no part in creating it. . . . And hopefully, young artists or kids with musical dreams will read this and learn about how to better protect themselves in a negotiation. You deserve to own the art you make."*
>
> – Taylor Swift[1]

## I. INTRODUCTION

Growing up, a girl named Taylor Swift was considered an outcast.[2] The kids at school thought she was "weird."[3] Her feelings of loneliness, frustration, and rejection became all-consuming.[4] With no friends to talk to, Swift began writing songs to express and understand her emotions.[5] Her therapy soon became her craft. She begged her parents to take her to

---

* Editor-in-Chief, 2020–21. For his valuable guidance and expertise, I gratefully acknowledge Professor Jon Kappes. For inspiring this Comment and creating the music I play on repeat, I thank Taylor Swift. For their meticulous production work, I appreciate the members of the *Arizona State Law Journal*. Finally, for their unwavering support and encouragement, I am forever indebted to my parents, Edward and Linda, and brother, Eddie Cassidy.

1. Taylor Swift (taylorswift), TUMBLR (June 30, 2019), https://taylorswift.tumblr.com/post/185958366550/for-years-i-asked-pleaded-for-a-chance-to-own-my [https://perma.cc/9T5V-ECP2].

2. Keith Kendrick, *Taylor Swift: I Wrote Songs Because I Had No Friends at School*, HUFFPOST UK (May 22, 2015), https://www.huffingtonpost.co.uk/2014/08/14/taylor-swift-i-wrote-songs-because-i-had-no-friends-at-school_n_7369118.html [https://perma.cc/3DYU-NDR9].

3. *Id.*

4. *Id.*

5. *Id.* Expressing her feelings remains the motivation for Swift's songwriting today. TAYLOR SWIFT'S REPUTATION STADIUM TOUR (Taylor Swift Productions 2018), at 1:01:00 ("When I write a song, it's usually me just trying to get past something and understand something I'm going through by writing about it."); MISS AMERICANA (Tremolo Productions 2018), at 00:11:50 ("I'll be going through something, write the album about it . . . [it's] kind of like they're reading my diary.").

Nashville where she "knocked on doors up and down Music Row" trying to land a record deal.[6] At thirteen, Swift signed a development deal with RCA Records, and at fourteen, she became the youngest person ever to sign with Sony/ATV Music.[7] When it came time to renew the deal two years later, Swift decided to sign with a new independent label, Big Machine Records ("Big Machine").[8]

Before long, Taylor Swift was a household name in music.[9] She showcased her limitless talent over the years—seamlessly switching between genres, instruments, and styles.[10] And her relationship with her label appeared to be the love story that she had spent her whole life trying to put into words.[11] Perhaps this is why many were surprised to see that, immediately upon expiration of her twelve-year contract, she decided to leave Big Machine and sign instead with Republic Records and Universal Music Group.[12] Swift announced the move via Instagram, saying that she was so excited to own her masters from now on.[13] Masters are the first recordings of songs from which later copies are made, legally termed sound recordings.[14] Swift specifically used the words "from now on" because Big Machine retained ownership of

---

6. Chris Willman, *Taylor Swift's Road to Fame*, ENT. WKLY. (Feb. 5, 2008, 5:00 AM), https://ew.com/article/2008/02/05/taylor-swifts-road-fame/ [https://perma.cc/8WB6-ZWAH].

7. *Id.*

8. Brittany Spanos, *Taylor Swift Signs with Republic Records and UMG, Her First New Home in 13 Years*, ROLLING STONE (Nov. 19, 2018, 10:44 AM), https://www.rollingstone.com/music/music-news/taylor-swift-record-deal-republic-records-umg-757711/ [https://perma.cc/6K6A-FRH3].

9. This is best supported by the fact that in 2018, Swift was named the most famous celebrity from Pennsylvania, beating out former Vice President, now President, Joe Biden. *See* Anjelica Oswald, *The Most Famous Celebrity from Every State*, INSIDER (May 16, 2018, 2:11 PM), https://www.insider.com/most-famous-celebrity-every-state-2017-10 [https://perma.cc/A5HY-DQB9].

10. *See* Sarah Hoenig, *Taylor Swift's Dramatic Music Evolution Through the Years*, STUDY BREAKS (Mar. 30, 2018), https://studybreaks.com/culture/music/taylor-swift-music-evolution/ [https://perma.cc/RG4B-7AZY] (contrasting Swift's music over the years).

11. *See, e.g.*, Randy Lewis, *Taylor Swift Raises the Bar with a Savvy 'Red' Marketing Campaign*, L.A. TIMES (Oct. 30, 2012, 12:00 AM), https://www.latimes.com/entertainment/music/la-xpm-2012-oct-30-la-et-ms-taylor-swift-20121031-story.html [https://perma.cc/SW9Z-DMLE] (chronicling Big Machine's marketing campaign leading up to Swift's *Red* album, selling over one-million copies in the first week); *see* TAYLOR SWIFT, *Love Story*, *on* FEARLESS (Big Machine Records 2008).

12. Spanos, *supra* note 8.

13. Taylor Swift (@taylorswift), INSTAGRAM (Nov. 19, 2018), https://www.instagram.com/p/BqXgDJBlz7d/ [https://perma.cc/R6QS-JJMW].

14. Erin M. Jacobson, *Artists: Are You Sure You Own Your Masters? A Music Lawyer Explains*, SONICBIDS (June 8, 2016, 7:00 AM), http://blog.sonicbids.com/artists-are-you-sure-you-own-your-masters-a-music-lawyer-explains [https://perma.cc/Z52Q-4GRN]; 17 U.S.C. § 101.

the masters to her first six albums.[15] These included *Fearless* and *1989*, which won Grammys for Album of the Year in 2010 and 2015, respectively.[16]

A few months after Swift's announcement, talent manager Scooter Braun purchased Big Machine and, thus, the rights to Swift's masters.[17] Swift apparently dislikes Braun because, like the kids from her childhood, he subjected her to "incessant, manipulative bullying" for years.[18] One of the people who had caused her pain suddenly owned her means of expressing it. The acquisition prompted her to write a Tumblr post explaining her rocky relationship with him and her desire to own her own work.[19] Other artists subsequently expressed concerns about traditional record-label contracts that prevent artists from owning their masters.[20] Grammy-nominated artist Iggy Azalea said in a tweet, "[T]hey really do ppl crazy dirty on ownership of their intellectual property in the biz."[21]

In November 2020, Braun sold Swift's masters to Shamrock Capital for $300 million.[22] However, Swift explained that under the terms of the deal, Braun would continue to profit from her Big Machine-era music.[23] By way of her lyrics, Swift's record deal was "a nightmare dressed like a daydream."[24]

Swift's experience fighting to retain the rights to her masters is useful in counseling artists about ownership of sound recordings. First, some background on the artist-label relationship is helpful to understand the issue.

---

15. Swift, *supra* note 13; Spanos, *supra* note 8.

16. *GRAMMY Awards Winners & Nominees for Album of the Year*, RECORDING ACAD. GRAMMY AWARDS, https://www.grammy.com/grammys/awards/winners-nominees/139 [https://perma.cc/YP8P-HM4Z].

17. Marissa R. Moss, *What Scooter Braun's Purchase of Big Machine Means for Country Music*, ROLLING STONE (July 10, 2019, 12:40 PM), https://www.rollingstone.com/music/music-country/scooter-braun-big-machine-taylor-swift-nashville-country-music-857435/ [https://perma.cc/RL9V-SFDV].

18. Swift, *supra* note 1.

19. *Id.*

20. *See* Ellie Bate, *Here Are All the Celebs Who Have Taken Sides in the Taylor Swift/Scooter Braun Drama*, BUZZFEED NEWS (July 1, 2019), https://www.buzzfeed.com/eleanorbate/taylor-swift-scooter-braun-celebrity-reactions [https://perma.cc/74Y6-T7NP].

21. Iggy Azalea (@IGGYAZALEA), TWITTER (June 30, 2019, 2:30 PM), https://twitter.com/IGGYAZALEA/status/1145444575521181696 [https://perma.cc/W6RP-AJU4].

22. Tim Ingham, *Why Did Shamrock Capital Spend $300 Million on Old Taylor Swift Albums?*, ROLLING STONE (Nov. 17, 2020, 5:26 PM), https://www.rollingstone.com/pro/features/why-taylor-swift-scooter-braun-shamrock-1091742/ [https://perma.cc/2337-Y5DD].

23. Taylor Swift (@taylorswift13), TWITTER (Nov. 16, 2020, 3:55 PM), https://twitter.com/taylorswift13/status/1328471874318311425/photo/2 [https://perma.cc/W9KJ-LRNQ].

24. TAYLOR SWIFT, *Blank Space*, *on* 1989 (Big Machine Records 2014).

In general, an artist joins a record label for two main reasons: money and help mass distributing her creative work, usually an album.[25] A label will give an artist a lump sum called an advance to make an album, often contractually defined as twelve tracks constituting around seventy-five minutes.[26] Although things like the budget for the advance and the final album are subject to label approval,[27] most of the time, an artist who is a singer-songwriter like Swift is able to negotiate for control over creative aspects such as song selection and album artwork.[28] After the album is released, an artist is paid a percentage of each record sale called a royalty.[29] Usually an artist reports royalties as self-employed income, and the label does not withhold taxes.[30] Beyond the money, labels also help with mass distribution by introducing artists to successful producers and overseeing album promotion in influential ways.[31] Labels offer producer options to the artist, but the ultimate hiring decision is usually a mutual one.[32] In exchange for an advance and these connections, the artist transfers to the label the copyright to her masters and the rights flowing therefrom.[33]

Successful label deals are long-term.[34] Customarily, they consist of an initial period and irrevocable options; each correlates with an album and

---

25. Cornelius Cowles, *Music, Money, and the Middleman*, 1 VAND. J. ENT. L. & PRAC. 101, 102 (1999).

26. Justin M. Jacobson, *The Artist & Record Label Relationship—A Look at the Standard "Record Deal" [Part 1]*, TUNECORE (May 11, 2017), https://www.tunecore.com/blog/2017/05/artist-record-label-relationship-look-standard-record-deal-part-1.html [https://perma.cc/E757-US94].

27. *Id.*

28. Richard Salmon, *Recording Contracts Explained*, SOUND ON SOUND (Apr. 2007), https://www.soundonsound.com/music-business/recording-contracts-explained [https://perma.cc/G9YW-BTVQ].

29. *Id.*

30. Lisa Schonberg, *Tips from an Accountant: The Best Way for Musicians To Do Their Taxes*, TOM TOM MAG, https://tomtommag.com/2017/03/tips-accountant-best-way-musicians-taxes/ [https://perma.cc/RRZ3-4U5E]; *Commentary: As 2013 Approaches, Artist Termination Right Faces Record Labels' Work-for-Hire Argument*, LAW J. NEWSLS. (Feb. 2008), https://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2008/02/28/commentary-as-2013-approaches-artist-termination-right-faces-record-labels-work-for-hire-argument/ [https://perma.cc/U4LS-TNXC].

31. *See, e.g.*, JACOB SLICHTER, SO YOU WANNA BE A ROCK & ROLL STAR 76–93 (2004) (explaining the process of record label employees taking band members to radio stations where they have connections).

32. *See, e.g.*, STEPHEN WADE NEBGEN & WENDY KEMP AKBAR, ENTERTAINMENT LAW: MUSIC (OR, HOW TO ROLL IN THE ROCK INDUSTRY) 243 (Kathy Kay & Sophia Miscione eds., 2019 ed.) (example contract language); SLICHTER, *supra* note 31, at 42–46 (exemplifying the band Semisonic's selection of their producer in conjunction with the label for its first album).

33. NEBGEN & AKBAR, *supra* note 32, at 244, 247.

34. Spanos, *supra* note 8.

typically lasts a year or two.[35] At the end of the initial period, a label may exercise an irrevocable option, which extends the term for an additional period.[36] As an example, it is likely Swift had a two-year initial period with Big Machine, and the label exercised five options because Swift created six albums with the label.[37] This ultimately resulted in a lengthy twelve-year contract.[38]

Transferring the copyright to a future album in exchange for capital and access to a high-profile network may seem fair on its face, but the artist's problems begin after the album's commercial release. Until the label recoups the advance, it retains the artist's royalties.[39] What the artist does receive, she must use to pay the producer's royalties.[40] If the label never recoups the advance, it takes the loss.[41] But the concern of Swift and others is that if an artist does manage to pay back the advance, the label has unjustifiably retained ownership of her masters.[42] Essentially, it is like "a bank lending you money to buy a house and then when you've repaid that mortgage, them telling you they still own it."[43]

Labels have the bargaining power to negotiate these unfavorable terms because of the long line of artists trying to get deals, each person coated with the risk of unpredictable commercial success.[44] For those standing in line, Swift's experience is a cautionary tale. This Comment analyzes the authorship of a typical singer-songwriter's sound recordings and then

---

35. NEBGEN & AKBAR, *supra* note 32, at 239–41; Jacobson, *supra* note 26. Although the initial period technically begins at signing, the clock does not actually start to run until the album's commercial release. Thus, if it takes two years to make and commercially release an album, a one-year initial period becomes three years. NEBGEN & AKBAR, *supra* note 32, at 239–41.

36. NEBGEN & AKBAR, *supra* note 32, at 239–41.

37. *Taylor Swift Discography*, DISCOGS, https://www.discogs.com/artist/1124645-TaylorSwift?filter_anv=0&subtype=Albums&type=Releases [https://perma.cc/S9QT-8DRD].

38. Spanos, *supra* note 8.

39. Salmon, *supra* note 28. If the agreement is "cross-collateralized," the label pays for additional expenses like music video production, studio sessions, record label employees, and merchandise funds, and then it recoups from those additional revenue streams. Jacobson, *supra* note 26.

40. *See, e.g.*, Justin M. Jacobson, *The Artist & Record Label Relationship—A Look at the Standard "Record Deal" [Part 2]*, TUNECORE (May 18, 2017), https://www.tunecore.com/blog/2017/05/artist-record-label-relationship-look-standard-record-deal-part-2.html [https://perma.cc/M5XN-MP3K].

41. Jacobson, *supra* note 26.

42. Salmon, *supra* note 28.

43. Colin Stutz, *Kanye Speaks: West's Plan To 'Re-Think' the Music Industry*, BILLBOARD (Sept. 24, 2020), https://www.billboard.com/articles/business/9454350/kanye-west-speaks-plan-to-re-think-the-music-industry [https://perma.cc/AD5E-V2XB].

44. Budi Voogt, *The Truth About Record Deals (and How To Negotiate Them)*, HEROIC ACAD. (Apr. 12, 2018), https://heroic.academy/truth-about-record-deals/ [https://perma.cc/M6AA-5MNN].

provides best practices for an artist seeking to retain ownership of both her masters and the copyright rights flowing therefrom. Part II discusses relevant principles of copyright law, including the requirements for authorship and ownership as well as authors' rights to terminate agreements to sell or license their works. Because a court has never done so, Part III begins by analyzing authorship of sound recordings in the context of an artist-label relationship. Then, it recommends contractual language that an artist should accept or reject along with ways to model her behavior to avoid classification as anything but the sole author of her masters. Part III concludes by identifying practical barriers to these recommendations and considers whether their application advances copyright policy. Part IV concludes.

## II. BACKGROUND

The purpose of copyright law and its relation to the Copyright Act's provisions on ownership and transfers help explain Swift's situation and that of artists across the nation. This Part begins by providing an overview of that purpose and supporting information on how it encourages the creation of musical works and sound recordings. Creations that satisfy the legal requirements for copyright protection discussed in Section B become valuable assets to their owners. Section C explains how copyrights may be authored solely, jointly, or as a work made for hire. Lastly, Section D details how countless artists unknowingly transfer rights to their work because of copyright's works-made-for-hire doctrine, joint authorship, assignment, or license.

### *A. Copyright Protection Exists To Encourage Musical Works and Sound Recordings*

The Constitution gives Congress the power "[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings."[45] For the Founders, "Science" as used in this provision meant knowledge that arises from study and learning.[46] Over time, the Supreme Court has interpreted "Writings" broadly to include virtually all creative works of authorship including sculptures, paintings, musical works, and sound recordings.[47]

---

45. U.S. CONST. art. I, § 8, cl. 8.

46. Eldred v. Ashcroft, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting).

47. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (interpreting writings to include all works "by which the ideas in the mind of the author are given visible expression").

The primary goal of copyright law is to maximize production of creative expression to promote culture, knowledge, and learning.[48] It then seeks to balance authors' right to their original expression with others' freedom to build upon those creations.[49] In the music industry, the owner of the copyright has the exclusive right to make and distribute copies of, publicly perform, and broadcast the music.[50] The economic benefits derived from these rights incentivize the creation of new works.[51] Without copyright, anyone could copy a song and sell it, undercutting the artist's profits and thereby disincentivizing creation. Thus, copyright's financial incentives encourage artists to make music.

### *B. Copyright Rights Are Granted to Original, Creative, and Fixed Works of Authorship Including Sound Recordings*

A copyright provides its owner five exclusive rights: the right to (1) reproduce the work, (2) prepare derivative works, (3) distribute copies to the public, (4) perform the work publicly, and (5) display the work publicly.[52] In the case of sound recordings, the right to perform the work publicly means to transmit it through digital audio.[53] For a work to be copyrightable, it must satisfy three requirements. First, an author must create an original thought, which means there must be a minimal spark of human creativity.[54] For a sound recording, this originality may come from the "performers whose performance is captured" or "the record 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."[55] Almost every performance has the minimal amount of creativity required for

48. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 37–41 (2003).

49. White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1517 (9th Cir. 1993) (Kozinski, J., dissenting from the order rejecting the suggestion for rehearing en banc).

50. 17 U.S.C. § 106. For sound recordings, there are limitations to the right of public performance. *See infra* text accompanying note 73.

51. *White*, 989 F.2d at 1517 (Kozinski, J., dissenting from the order rejecting the suggestion for rehearing en banc).

52. § 106.

53. *Id.*

54. *Id.* § 102(a); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 363 (1991) (holding that a telephone book arranged alphabetically did not possess the minimal spark of creativity necessary to be copyrightable).

55. H.R. REP. NO. 92-487, at 5 (1971), *as reprinted in* 1971 U.S.C.C.A.N. 1566, 1570; S. REP. NO. 92-72, at 5 (1971). *But see infra* Part III.A.2.

originality because it has some form of personality—whether it be in the playing of an instrument, inflection of voice, or timing.[56]

Next, the work must be fixed in a tangible medium, which is when its embodiment in a copy is sufficiently permanent so that it may be perceived "for a period of more than transitory duration."[57] Thus, Swift's live performance would not be copyrightable but a recording of that performance would be.[58]

Finally, an original, fixed thought must be a work of authorship.[59] Section 102 of the Copyright Act includes examples of categories of works of authorship that can be copyrighted, like musical works, literary works, and sound recordings.[60] A modern pop song has three layers of copyright. First is the actual music and notes, which consist of the melody, harmony, and rhythm, and compose the musical works copyright.[61] Second is the lyrics, which can be included in a musical works copyright or protected separately as a literary work.[62] Third is the audio recording of that specific performance, which is the sound recording copyright.[63] So, an imitation of *Shake It Off* would infringe on Swift's musical works copyright but not on the label's sound recording copyright because, while the imitator is singing the lyrics and playing the music Swift wrote, he is not using the exact recording of Swift on the day she recorded *Shake It Off* in studio.[64] This is also why Swift can and has legally re-recorded her songs without owning the original sound recording copyright.[65] This Comment specifically focuses on the sound recording copyright for artists like Swift who are singer-songwriters.[66]

---

56. *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903) (reasoning that even handwriting may be copyrightable because it has something in it that is "one man's alone"). The alternative producer argument, then, would only come into play if a producer is trying to prove joint authorship. *See infra* text accompanying note 101.

57. § 102(a); § 101.

58. *See* § 101.

59. *Id.* § 102(a).

60. *Id.* Ideas cannot be copyrighted. *Id.* § 102(b).

61. MARK S. LEE, ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW §§ 7:12–14, 38 (2020).

62. 17 U.S.C. § 102; LEE, *supra* note 61, § 7:13.

63. 17 U.S.C. § 101 (defining sound recordings as "works that result 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"); LEE, *supra* note 61, § 7:38.

64. *See* 17 U.S.C. § 101.

65. Taylor Swift (@taylorswift13), TWITTER (Feb. 11, 2021, 6:17 AM), https://twitter.com/taylorswift13/status/1359854050544615425 [https://perma.cc/3EF3-C6KK].

66. *Taylor Swift Repertory*, ASCAP, https://www.ascap.com/ace/#ace/performer/TAYLOR%20SWIFT [https://perma.cc/W4SK-

Copyright protection for sound recordings is a recent development, though. Not long ago, sound recordings only had state- or common-law protection.[67] But as technology advanced, piracy grew and deprived artists and labels alike of their profits.[68] Congress stepped in to enact the first federal statutory protection for sound recordings in 1971, protecting sound recordings fixed and published on or after February 15, 1972.[69] But the protection was limited to a right of infringement, which prohibits only the illegal distribution or physical reproduction of a sound recording.[70] In 1976, Congress revised the Copyright Act, with the changes taking effect on January 1, 1978.[71] This copyright overhaul added the rights of reproduction, adaptation, and public distribution for sound-recording authors.[72]

Copyright for sound recordings is constantly developing. In 1996, Congress added a limited right of public performance through digital audio transmission.[73] More recent congressional efforts include the Fair Play Fair Pay Act, which would have required broadcasters to pay a royalty each time a sound recording played on the radio.[74] However, it failed in committee in 2015 and 2017.[75] The plan was introduced a third time as the Ask Musicians

---

FJ3T]. This is important because many artists record songs written by other people, with one of the more famous examples being Elvis Presley. Alan Hanson, *Elvis Presley's "Hit" Songwriters . . . A Top Ten List*, ELVIS HIST. BLOG (Jan. 2011), http://www.elvis-history-blog.com/elvis-songwriters.html [https://perma.cc/936B-NYVY].

67. *See* Sound Recording Act of 1971, Pub. L. No. 92-140, § 1, 85 Stat. 391, 391 (codified as amended in scattered sections of 17 U.S.C.).

68. *See* Mark H. Jaffe, Comment, *Defusing the Time Bomb Once Again—Determining Authorship in a Sound Recording*, 53 J. COPYRIGHT SOC'Y U.S.A. 139, 144 (2005) (explaining piracy as a reason for the 1971 Act). There were other reasons like federal preemption preventing state courts from tackling this issue. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.10(A)(1)(c) (2020).

69. *See* Sound Recording Act of 1971, Pub. L. No. 92-140, §§ 1(a), 3, 85 Stat. 391, 391–92 (codified as amended in scattered sections of 17 U.S.C.).

70. *See id.* § 1(a), 85 Stat. at 391 (codified as amended at 17 U.S.C. § 114).

71. *See* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

72. *See id.* § 114, 90 Stat. at 2560 (codified as amended at 17 U.S.C. § 114).

73. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2(3), 109 Stat. 336, 336 (codified as amended at 17 U.S.C. § 106(6)).

74. Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. (2015); Fair Play Fair Pay Act of 2017, H.R. 1836, 115th Cong. (2017); *see also The Fair Play Fair Pay Act*, SOUNDEXCHANGE, https://www.soundexchange.com/advocacy/reintroduction-fair-play-fair-pay-act/ [https://perma.cc/WD6H-7CCU] (explaining the goals of the act).

75. The Act continues to fail because of resistance from radio broadcast lobbyists. Paula Parisi, *'Fair Play, Fair Pay' Radio-Royalty Act Gains Momentum, but Faces Uphill Climb*, VARIETY (June 12, 2017, 6:51 AM), https://variety.com/2017/biz/news/fair-play-fair-pay-radio-royalty-act-gains-momentum-1202462359/ [https://perma.cc/RZF8-VAL5]; *New Effort in Congress To Secure Radio Royalties for On-Air Music Use.*, INSIDERADIO (Nov. 22, 2019),

for Music Act of 2019 and, once again, failed to get past committee.[76] But not all sound-recording legislation has stalled. On October 11, 2018, President Trump signed the Music Modernization Act into law.[77] Title II of this Act extended federal copyright protection to pre-1972 sound recordings, which were previously only protected by state law.[78] Over the next decade, the legislature and courts will be tasked with fleshing out sound-recording copyright protection in an ever-changing digital age.

### *C. Copyright Ownership Originally Vests in Authors*

The crux of the issue presented in this Comment is the authorship of sound recording copyrights. An author is the person "to whom anything owes its origin," which involves making and producing, as the inventive or master mind.[79] Ownership rights of a copyright are either held solely by the author, jointly by multiple authors, by an employer or hiring party as a work made for hire, or by a third party to whom the author transferred her rights.[80] Copyright law includes within the definition of "author" the hiring party of a work made for hire.[81] This is critical because the work's copyright initially vests in the author or authors of the work.[82] The following Subsections provide an overview of the purpose and components of the three types of copyright authorship: sole, joint, and work made for hire.

#### 1. Sole and Joint Authorship

A person who creates a work alone is the sole author of that work and the only owner of that copyright.[83] The most simplified example of this is an artist who independently records a performance of a song in her own house. The Copyright Act defines a joint work as a copyrightable work created by two or more authors "with the intention that their contributions be merged into

---

http://www.insideradio.com/new-effort-in-congress-to-secure-radio-royalties-for-on/article_a1de527e-0d01-11ea-b35c-ff6b11f6bd4a.html [https://perma.cc/4Q9C-7GH3].

76. Ask Musicians for Music Act of 2019, S. 2932, 116th Cong. (2019).

77. *See* Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified as amended in scattered sections of 17 U.S.C.).

78. *See id.* § 202(a)(2), 132 Stat. at 3728–37 (codified as amended at 17 U.S.C. § 1401).

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

80. 17 U.S.C. § 201.

81. *See id.* § 201(a)–(c).

82. *Id.* § 201(a).

83. *Id.*

inseparable or interdependent parts of a unitary whole."[84] Contributions that have little meaning alone are "inseparable" while they are "interdependent" if able to stand alone but are truly significant when combined.[85] If multiple people create a joint work, they are co-authors and share ownership of that work's copyright.[86] Each joint author receives an undivided, equal share of the copyright despite possible unequal contribution.[87]

Joint authorship analysis works to balance copyright's purposes—the moral rights of original authors and the promotion of new authors building off those creations. The analysis focuses on each potential authors' original intent in order to avoid opportunistic claims by someone who makes a small contribution and then argues for co-authorship if the work is successful.[88] Additionally, if the co-authorship policy is too permissive, creators will stay in their own bubbles rather than consult with others out of fear of losing their claims to authorship, stunting progress.[89]

Courts weigh several considerations to determine whether joint authorship exists. Because most commercially significant sound recordings are made in New York, Tennessee, and California,[90] copyright doctrine in the Second, Sixth, and Ninth Circuits tends to be the most important for artists. Circuits are split as to whether joint authorship requires each author to make independently copyrightable contributions that are fixed and copyrightable on their own.[91] The relevant circuits for artists consider an independently

---

84. *Id.* § 101. Because there is no definition of "joint authorship" in the Copyright Act, the definition of joint work is essentially equated with joint authorship. *See* NIMMER & NIMMER, *supra* note 68, § 6.01.

85. Childress v. Taylor, 945 F.2d 500, 505 (2d Cir. 1991) (using words and music as an example of as interdependent parts of a whole—the song).

86. 17 U.S.C. § 201(a).

87. Eckert v. Hurley Chi. Co., 638 F. Supp. 699, 704 (N.D. Ill. 1986) (denying defendant's motion for summary judgement as to the joint work issue for lack of evidence and stating that contributions need not be equal for co-authorship).

88. H.R. REP. NO. 94-1476, at 120 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5736 (explaining that "[t]he touchstone here is the intention, at the time the writing is done").

89. Aalmuhammed v. Lee, 202 F.3d 1227, 1235 (9th Cir. 2000).

90. Almost seventy percent of the record labels listed at the following source are in one of these three states. *Record Labels (Record Companies) Directory*, SONGWRITER UNIVERSE, https://www.songwriteruniverse.com/labellist.htm [https://perma.cc/QS9A-UMRR].

91. Compare *infra* notes 92–93 and accompanying text to the Seventh Circuit, which has held that joint authorship does not depend on this. Gaiman v. McFarlane, 360 F.3d 644, 659 (7th Cir. 2004) ("[I]f authors *A* and *B* work in collaboration, but *A*'s contribution is limited to plot ideas that standing alone would not be copyrightable, and *B* weaves the ideas into a completed literary expression, it would seem that *A* and *B* are joint authors of the resulting work." (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 6.07 (2003))). The Third Circuit has cited to the Seventh Circuit's reasoning in a general rule statement. Brownstein v. Lindsay, 742 F.3d 55, 65 (3d Cir. 2014) (citing *Gaiman* as "providing the example of two co-authors, one a professor with brilliant ideas and the other an excellent writer").

copyrightable contribution to be an element of joint authorship.[92] The Sixth Circuit has yet to lay out specific elements. However, it cited—albeit in an unpublished opinion—to cases where courts required an independently copyrightable contribution as an element of joint authorship to support a finding that supervising and contributing ideas is insufficient for joint authorship.[93]

In addition to requiring an independently copyrightable contribution, both the Second and Ninth Circuit further consider whether the parties objectively intended to be co-authors.[94] The best way to determine intent is by contract, but courts also look to how the parties bill themselves.[95] In the context of a movie, the Ninth Circuit also analyzes decision-making authority and artistic control and whether audience appeal turns on both contributions and the share of each in the work's success.[96] However, because many people make meaningful contributions that are merged in new media, like movies and music,[97] the Ninth Circuit does not equate a valuable and copyrightable contribution to authorship.[98] In sum, a court analyzing joint authorship of an artist's sound recordings will likely require an independently copyrightable contribution and then consider whether the parties objectively intended those contributions merge into interdependent parts of a unitary whole as well as the amount of control by each party.

Sound recordings may involve significant creative contributions from producers, mixers, or sound engineers who intend for their contributions to merge with the artist's into a unitary whole: the completed song.[99] Thus, an artist's sound recordings can involve co-authorship by these individuals.[100]

---

92. Childress v. Taylor, 945 F.2d 500, 506–07 (2d Cir. 1991); BancTraining Video Sys. v. First Am. Corp., No. 91-5340, 1992 WL 42345, at *3 (6th Cir. Mar. 3, 1992); Ashton-Tate Corp. v. Ross, 916 F.2d 516, 521 (9th Cir. 1990). The Eleventh Circuit has implemented this requirement as well. M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1493 (11th Cir. 1990), *abrogated on other grounds by* Fastcase, Inc. v. Lawriter, LLC, 907 F.3d 1335 (11th Cir. 2018).

93. *BancTraining Video Sys.*, 1992 WL 42345, at *3 (citing Ashton-Tate Corp. v. Ross, 728 F. Supp. 597, 601 (N.D. Cal. 1989), *aff'd*, 916 F.2d at 521).

94. Thomson v. Larson, 147 F.3d 195, 200–05 (2d Cir. 1998) (holding that because the defendant retained authority over what suggestions were implemented, was billed as the sole author, listed himself as the sole author in contracts, and executed these contracts without the plaintiff's permission, the defendant intended himself as the sole author); *Aalmuhammed*, 202 F.3d at 1234.

95. *Aalmuhammed*, 202 F.3d at 1234.

96. *Id.*

97. *See id.* at 1233.

98. *Id.* at 1233–34.

99. *See, e.g.*, SLICHTER, *supra* note 31, at 126–32 (explaining how the band Semisonic created their album *Feeling Strangely Fine* with large contributions from producers and mixers).

100. H.R. REP. NO. 94-1476, at 56 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5669.

But this is not always the case, like when the contribution of the producer is minimal and therefore not original.[101] Nonetheless, artists should be wary of falling into a joint authorship situation with these parties.

### 2. Employers as Authors Through the Work-Made-for-Hire Doctrine

The work-made-for-hire ("WMFH") doctrine is the best-case scenario for a record label trying to claim authorship of an artist's sound recordings because in a WMFH arrangement, the employer or persons for whom the work is prepared is the author, rather than whoever created the work.[102] Thus, copyright vests initially with the employer and is not subject to termination.[103] This is the typical situation for an artist's sound recordings: Her art is controlled solely by a room of label executives.[104] Unless the label decides to sell the sound recordings to the artist, the artist will be left in the same position as Swift—emptyhanded. A WMFH can arise in two scenarios: (1) an employee who creates the work for her employer within the scope of her employment, or (2) an independent contractor who creates a specially commissioned work.[105]

#### *a. Employers Are the Authors of Works Created by Employees Within the Scope of Their Employment*

First, a work can be a WMFH if it is prepared by an employee within the scope of her employment.[106] Courts tend to find an employee is acting within the scope of her employment despite working at home during non-work hours.[107] Therefore, artists who sign with labels to make albums will virtually

---

101. *Id.*; *see, e.g.*, Forward v. Thorogood, 758 F. Supp. 782, 784 (D. Mass. 1991) (holding that because the plaintiff's contribution to the sound recording was limited to arranging and paying for the recording sessions, he was not a joint author), *aff'd*, 985 F.2d 604 (1st Cir. 1993).

102. 17 U.S.C. § 201(a)–(c).

103. *Id.*

104. *Sound Recordings as Works Made for Hire: Hearing on Pub. L. No. 106-113, 113 Stat. 1501 Before the Subcomm. on Cts. & Intell. Prop. of the H. Comm. on the Judiciary*, 106th Cong. 2 (2000) [hereinafter *Hearing*] (statement of Hon. Marybeth Peters, Register of Copyright, Copyright Office of the United States), http://commdocs.house.gov/committees/judiciary/hju65223.000/hju65223_0f.htm [https://perma.cc/K3NP-MUGH].

105. § 101.

106. *Id.*

107. Avtec Sys., Inc. v. Peiffer, 21 F.3d 568, 571 (4th Cir. 1994); Marshall v. Miles Lab'ys, Inc., 647 F. Supp. 1326, 1330 (N.D. Ind. 1986); *In re* Simplified Info. Sys., Inc., 89 B.R. 538, 542 (W.D. Pa. 1988); Cramer v. Crestar Fin. Corp., Nos. 94-2629, 95-1069, 1995 WL 541707, at *4

always be acting within the scope of employment when making music even if the work is not done on the labels' premises.

Next, a court would have to determine if the artist is an employee or an independent contractor of the label trying to claim authorship of the sound recording. The only time the Supreme Court addressed the employee prong of the WMFH doctrine was in *Community for Creative Non-Violence v. Reid*.[108] In *Reid*, the Community for Creative Non-Violence ("CCNV") entered into an oral contract with Reid, a sculptor, to create a sculpture.[109] CCNV paid Reid when he delivered the completed sculpture.[110] The Court had to determine if Reid was an employee of CCNV, making the sculpture a WMFH and CCNV the sole author, or if he was an independent contractor, making Reid the sole author.[111] The Court held that the longstanding definition and principles of agency govern who is considered an employee.[112] Accordingly, the Court considered the factors in the *Second Restatement of Agency*, including:

> (1) the hiring party's right to control the manner and means by which the product is accomplished;
>
> (2) the skill required;
>
> (3) whether the hiring party has the right to assign additional projects to the hired party;
>
> (4) the provision of employee benefits;
>
> (5) the tax treatment of the hired party;
>
> (6) the source of the instrumentalities and tools;
>
> (7) the location of the work;
>
> (8) the duration of the relationship between the parties;
>
> (9) the extent of the hired party's discretion over when and how long to work;
>
> (10) the method of payment;
>
> (11) the hired party's role in hiring and paying assistants;

---

(4th Cir. Sept. 13, 1995); U.S. Auto Parts Network, Inc. v. Parts Geek, LLC, 692 F.3d 1009, 1018 (9th Cir. 2012).

108. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 732 (1989).

109. *Id.* at 733.

110. *Id.* at 735.

111. *See id.* at 738.

112. *Id.* at 740.

> (12) whether the work is part of the regular business of the hiring party; and
>
> (13) whether the hiring party is in business.[113]

The only factor weighing in favor of finding that Reid was an employee was control of the manner and means as CCNV directed enough of his work to ensure he produced the sculpture to its specifications.[114] As for the remaining factors, Reid was a skilled worker—a sculptor—who supplied his own tools, chose to work in his own studio, during hours he decided, all unsupervised by CCNV.[115] He also selected his own assistants and decided how much to pay them and when.[116] CCNV retained him for less than two months and paid him for the completion of a specific job.[117] CCNV had no right to assign Reid additional projects and did not list him on its payroll or treat him as an employee for tax purposes.[118] Finally, CCNV was not in the business of creating sculptures.[119] Thus, the Court held that Reid was an independent contractor, not an employee of CCNV.[120]

The typical label contract characterizes the artist as an employee and the sound recordings as WMFH.[121] But a contract is not determinative.[122] Of particular importance to artists, the Second Circuit emphasized that the first five factors listed above should weigh more heavily because they tend to be highly probative of the true nature of an employer-employee relationship.[123] Additionally, when the hiring party has not extended employment or tax benefits, every court that has applied the factor test since and including *Reid* has found that the hired party was an independent contractor.[124] The Register

---

113. *Id.* at 751–52; *see* RESTATEMENT (SECOND) OF AGENCY § 220(2) (AM. L. INST. 1958). This Comment intentionally lists the five factors that the Second Circuit views as most indicative of an employer-employee relationship first, which is different than their order in the *Second Restatement of Agency*. *Id.*; Aymes v. Bonelli, 980 F.2d 857, 861 (2d Cir. 1992).

114. *Reid*, 490 U.S. at 752.

115. *Id.*

116. *Id.* at 753.

117. *Id.* at 752–53.

118. *Id.* at 753.

119. *Id.*

120. *Id.* at 752.

121. Lisa A. Alter, *Termination of Transfers Under the U.S. Copyright Act*, 33 ENT. & SPORTS LAW. 32, 37 (2017).

122. NEBGEN & AKBAR, *supra* note 32, at 247–48 (stating that even though a contract contains WMFH language, a label would still have to prove that the work is a WMFH).

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

124. *E.g.*, *Reid*, 490 U.S. at 753; MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc., 952 F.2d 769, 777–78 (3d Cir. 1991); Marco v. Accent Publ'g Co., 969 F.2d 1547, 1551–52 (3d Cir. 1992), *abrogated on other grounds by* TD Bank N.A. v. Hill, 928 F.3d 259 (3d Cir. 2019); M.G.B. Homes, Inc. v. Ameron Homes, Inc., 903 F.2d 1486, 1492 (11th Cir. 1990),

of Copyrights has stated that "it seems clear that, like serious composers and choreographers, [artists] were not intended to be treated as 'employees' under the carefully-negotiated definition in section 101."[125]

*b. Hiring Parties Are the Authors of Certain Works Created by Independent Contractors*

If the creator is determined to be an independent contractor rather than an employee, her work still may be WMFH under the second prong of the doctrine, which has three requirements. First, the work must be specially ordered or commissioned.[126] Second, the parties must expressly agree and sign in writing that the work shall be considered a WMFH.[127] Third, the work must fall within one of nine categories of works referenced in the WMFH statutory provision.[128]

First, a work is specially ordered or commissioned when the hiring party induces its creation.[129] The Second Circuit has held that an ongoing partnership and a hiring party's payment of a lump sum in exchange for a work both weigh in favor of a finding that a work was specially ordered or commissioned.[130] However, the court has also stated that the payment of royalties on a work generally weighs against finding a WMFH.[131] Sound recordings are likely specially commissioned because even though an artist receives royalties from them, they are created at the expense of the record label through the advance.[132]

---

*abrogated on other grounds by* Fastcase, Inc. v. Lawriter, LLC, 907 F.3d 1335 (11th Cir. 2018); Johannsen v. Brown, 797 F. Supp. 835, 840–41 (D. Or. 1992); Kunycia v. Melville Realty Co., 755 F. Supp. 566, 574 (S.D.N.Y. 1990).

125. *Reid*, 490 U.S. at 747 n.13 (quoting U.S. COPYRIGHT OFF., SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL ch. XI, at 12–13 (1975)).

126. 17 U.S.C. § 101.

127. *Id.*

128. *Id.*

129. This is sometimes called the motivating-factor test. Playboy Enters., Inc. v. Dumas, 53 F.3d 549, 562 (2d Cir. 1995) (remanding to the district court to decide based on the motivating-factor test); *see also* Marvel Characters, Inc. v. Kirby, 726 F.3d 119, 139–40 (2d Cir. 2013) (applying the motivating-factor test but calling it the "instance and expense" test); Urbont v. Sony Music Ent., 831 F.3d 80, 89–92 (2d Cir. 2016) (finding a genuine issue of material fact as to whether the *Iron Man* composition was created at Marvel's instance and expense).

130. *Kirby*, 726 F.3d at 141–42 (finding that a work was made at Marvel's instance and expense despite the fact that at least one other publisher bought the freelance artist's pieces during the relevant period); *see also Dumas*, 53 F.3d at 555.

131. *Dumas*, 53 F.3d at 555.

132. Jessica Johnson, Comment, *Application of the Copyright Termination Provision to the Music Industry: Sound Recordings Should Constitute Works Made for Hire*, 67 U. MIAMI L. REV.

The signed writing requirement is straightforward: The parties to a written and signed WMFH agreement must designate the work a WMFH.[133] If there is no signed writing, the independent contractor is automatically the author and owner of the work's copyright.[134] In the context of recording contracts, labels generally use form contracts that include WMFH language.[135]

Even if the work is specially ordered or commissioned and the creator signs a WMFH agreement, the resulting work still might not qualify as a WMFH.[136] Only nine categories of works can be WMFH when created by non-employees: (1) a contribution to a collective work, (2) a part of a motion picture or other audiovisual work, (3) a translation, (4) a supplementary work, (5) a compilation, (6) an instructional text, (7) a test, (8) answer material for a test, or (9) an atlas.[137] These categories are the result of a lengthy congressional process that started in the 1960s and lasted through the late 1970s.[138] An attempt to add photos to the enumerated categories failed after the Register of Copyrights objected, noting that "artists and photographers are among the most vulnerable and poorly protected of all the beneficiaries of the copyright law."[139] The final version of the bill that Congress passed, which is still in place today, does not include sound recordings as an enumerated category.[140] Because of the careful and intentional revisions to this list during the legislative process, the Supreme Court interpreted it as exhaustive and stated that it should be construed strictly.[141]

Although Congress did not consider adding sound recordings as a category during those debates, it was briefly added as a category decades later. In 1999, Congress added a last-minute amendment to the Satellite Home Viewer Improvement Act to include sound recordings as an enumerated category.[142] The amendment was characterized as "technical" because sound recordings were regularly registered as WMFH with the Copyright Office.[143] When the

---

661, 674–76 (2013) (arguing that sound recordings are specially commissioned because they are made at the interest and expense of the record label).

133. § 101.

134. *Id.*

135. Alter, *supra* note 121, at 37 (stating that labels often expressly state that the artist's work is WMFH).

136. *See* § 101.

137. *Id.*

138. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 743–48 (1989).

139. *Id.* at 747 n.13.

140. *See* § 101.

141. *See Reid*, 490 U.S. at 748 n.14.

142. Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113 app. I § 1011(d), 113 Stat. 1501 app. I at 1501A–544 (repealed 2000).

143. *See Hearing*, *supra* note 104, at 9 (statement of Rep. Howard Coble, Chairman, H. Subcomm. on Cts. & Intell. Prop.).

amendment was discovered, a number of prominent artists, including Don Henley of the Eagles, Bruce Springsteen, and Sheryl Crow, lobbied to have the provision removed.[144] After the Register of Copyrights testified that this change was substantive rather than technical,[145] Congress moved quickly to repeal the amendment on September 20, 2000, without prejudice.[146]

To date, no appellate court has squarely answered the question of whether sound recordings can be WMFH created by independent contractors—that is, whether sound recordings fall into any of the nine permitted categories of works.[147] However, several district courts have stated that sound recordings are statutorily excluded from being WMFH when created by independent contractors.[148] Nevertheless, artists face serious risks when signing an agreement calling the sound recordings WMFH. An appellate court could decide that the trend among district courts is erroneous. Doing so would materially worsen the artist's chance of controlling her copyrights because even if she avoids being classified as an employee, she may nevertheless lose rights under the second prong.

A sound recording could arguably fall into four of the permitted categories. The first is as a contribution to a collective work, which 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."[149] This category might be the most dangerous area for the artist because both the resulting whole—the album—and each contribution—the individual sound recordings—would qualify as WMFH.[150]

When it passed the 1976 Copyright Act, the House of Representatives took the position that a musical composition consisting of words and music was not a collective work.[151] During the hearings to repeal the 1999 amendment,

---

144. *Id.* at 155–63 (statements of Sheryl Crow and Bruce Springsteen); Larry Rohter, *Legislator Calls for Clarifying Copyright Law*, N.Y. TIMES (Aug. 28, 2011), https://www.nytimes.com/2011/08/29/arts/music/representative-john-conyers-wants-copyright-law-revision.html?pagewanted=all [https://perma.cc/Q8NJ-U5M3].

145. *Hearing*, *supra* note 104, at 48 (statement of Hon. Marybeth Peters, Register of Copyright, Copyright Office of the United States).

146. Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444 (codified in scattered sections of 17 U.S.C.).

147. The Fifth Circuit held that a sound recording does not fit into the audiovisual works category unless accompanied by a visual component. Lulirama Ltd. v. Axcess Broad. Servs., Inc., 128 F.3d 872, 878 (5th Cir. 1997).

148. Staggers v. Real Authentic Sound, 77 F. Supp. 2d 57, 64 (D.D.C. 1999); Ballas v. Tedesco, 41 F. Supp. 2d 531, 541 (D.N.J. 1999).

149. 17 U.S.C. § 101.

150. Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 387 (2002).

151. H.R. REP. NO. 94-1476, at 122 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5737.

testifying professors directly contradicted each other as to whether sound recordings fit into this category.[152] Scholars continue to disagree today.[153] The textualist argument is that sound recordings are contributions to a collective work because they are separate and independent works in themselves that are assembled into a collective whole on an album.[154] Proponents of this argument point to the distinction that unlike a play in which the parts flow together, on the typical popular music album, sound recordings have a clear beginning and end.[155]

Another scholar argued that sound recordings cannot fit into this category because the producer's compiling and arranging of the sound recordings on an album does not meet the minimal spark of creativity necessary for authorship.[156] This argument is contested,[157] as artists like Swift have discussed the deliberate process of ordering songs on their albums.[158] That said, the producer's lack-of-creativity-in-arrangement argument still has merit because there cannot be a collective work "where relatively few separate elements have been brought together."[159] Thus, the arrangement of twelve songs on an album when there were only twenty to choose from likely does not meet the creativity threshold for a collective work. Finally, another scholar noted that Congress's refusal to recognize a set of three one-act plays as a collective work suggests that the work of a single author cannot be a collective work.[160]

Sound recordings might also be deemed WMFH if they fall under the "motion picture or other audiovisual work" category.[161] Audiovisual works

---

152. *Compare Hearing*, *supra* note 104, at 138 (statement of Professor Paul Goldstein, Stanford Law School), *with id.* at 152 (statement of Professor Marci Hamilton, Cardozo School of Law).

153. *See* 146 CONG. REC. 17,162 (2000) (statement of Rep. Howard Berman) (stating sound recordings "always, usually, sometimes, or never fall within [the] preexisting categories").

154. *See* LaFrance, *supra* note 150, at 389 n.66.

155. *Id.*

156. *See* Alter, *supra* note 121, at 38.

157. Johnson, *supra* note 132, at 670.

158. FOLKLORE: THE LONG POND STUDIO SESSIONS (Taylor Swift Productions 2020), at 00:09:34 (describing how opening *Folklore* with the track "the 1" set the tone for the album); *id.* at 00:27:05 (explaining that there is pressure in selecting the fifth track of her albums).

159. The House committee report suggests that if "relatively few separate elements have been brought together," like in "a composition consisting of words and music, a work published with illustrations or front matter, or three one-act plays," the resulting whole is not a collective work. H.R. REP. NO. 94-1476, at 122 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5737; *see* Daniel Gould, *Time's Up: Copyright Termination, Work-for-Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91, 129 (2007).

160. *See* Gould, *supra* note 159, at 129. *But see* NIMMER & NIMMER, *supra* note 68, § 3.02 (reading the statutory history to allow a single author to create a collective work).

161. 17 U.S.C. § 101.

"consist of a series of related images . . . shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds."[162] The Ninth Circuit affirmed a lower court decision that musical compositions can fall into this category if they are created specifically for television or film.[163] Similarly, the Fifth Circuit has held that purely audio recordings such as sound recordings do not fit into this category because audiovisual works must have a visual element.[164] Because the Copyright Act lists motion pictures and other audiovisual works separately from sound recordings as examples of copyrightable works of authorship, it logically follows that sound recordings like Swift's are not audiovisual works.[165]

Next, a supplementary work is permitted to be a WMFH.[166] A supplementary work is "a secondary adjunct to a work by another author for the purpose of . . . assisting in the use of the other work, such as forewords . . . *musical arrangements*, answer material for tests, bibliographies, appendixes, and indexes."[167] Although the definition hints that a sound recording can be supplementary if placed on an album to supplement other sound recordings, this is not the case. First, musical arrangements, not sound recordings, are listed in the definition.[168] Second, there must be multiple artists on an album for an artist's sound recording to be "a secondary adjunct to a work by another author."[169] The focus of this Comment is on instances like Swift's, in which the artist is creating an album comprising entirely her own music.

The last potential category is a compilation, which is a "work formed by the collection and assembling of preexisting materials . . . that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[170] One scholar argued that a sound recording can be a compilation because a producer combines elements of voice and instrumental to form an original work.[171] However, this argument is flawed because the producer combines *new* rather than *preexisting*

---

162. *Id.*

163. Warren v. Fox Fam. Worldwide, Inc., 171 F. Supp. 2d 1057, 1067–68 (C.D. Cal. 2001), *aff'd*, 328 F.3d 1136 (9th Cir. 2003).

164. Lulirama Ltd. v. Axcess Broad. Servs., Inc., 128 F.3d 872, 878 (5th Cir. 1997).

165. *See* § 102(a)(6)–(7).

166. *Id.* § 101.

167. *Id.* (emphasis added).

168. *Id.*; *see* LEE, *supra* note 61, §§ 7:12–14.

169. 17 U.S.C. § 101.

170. *Id.*

171. Scott T. Okamoto, *Musical Sound Recordings as Works Made for Hire: Money for Nothing and Tracks for Free*, 37 U.S.F. L. REV. 783, 809–10 (2003).

elements. A compilation is better exemplified by an album like *Now That's What I Call Music!*, which consists of various *preexisting* radio hits from diverse artists.[172] Although a sound recording may not be a compilation, the Second Circuit held that an album is because creating an album entails combining and arranging sound recordings—preexisting works.[173] However, authoring a compilation only gives ownership to the *arrangement* of the sound recordings, not the individual works within the compilation.[174] It is promising that lower courts have stated that sound recordings like Swift's do not fit into one of the nine categories.[175] That said, as evidenced, an appellate court could find otherwise.

### *D. Copyright Duration, Transfer, and Termination*

Copyright duration has expanded over time. In 1998, the Sonny Bono Copyright Term Extension Act increased the duration of a copyright to the life of the author plus seventy years.[176] For an unknown author or WMFH, the duration is the shorter of 120 years or 95 years from publication.[177] The author of a sound recording may transfer the copyright rights in part as a license or in whole as an assignment, as long as she does so in writing.[178] Authors may transfer rights exclusively or non-exclusively and negotiate limitations on the transfer of those rights.[179] Typical label contracts state that if an artist's work is found not to be a WMFH, the artist assigns all of the sound recording rights to the label to control, distribute, promote, and exploit.[180]

---

172. *See, e.g.*, *Recent Nows*, NOW THAT'S WHAT I CALL MUSIC, http://www.nowthatsmusic.com/music [https://perma.cc/5JUB-NWXF].

173. Bryant v. Media Right Prods., Inc., 603 F.3d 135, 140 (2d Cir. 2010).

174. *See* § 103(b).

175. *See* Ballas v. Tedesco, 41 F. Supp. 2d 531, 541 (D.N.J. 1999); Lulirama Ltd. v. Axcess Broad. Servs., Inc., 128 F.3d 872, 878 (5th Cir.1997); Staggers v. Real Authentic Sound, 77 F. Supp. 2d 57, 64 (D.D.C. 1999) (stating in dicta that sound recordings do not fit into any of the nine categories).

176. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b), 112 Stat. 2827, 2827 (1998) (codified at 17 U.S.C. § 302).

177. 17 U.S.C. § 302(c).

178. *Id.* §§ 203(a), 204(a). But nonexclusive transfers do not need to be in writing. *See id.* § 204(a).

179. *See id.* §§ 201, 203; Robert A. Kreiss, *The "In Writing" Requirement for Copyright and Patent Transfers: Are the Circuits in Conflict?*, 26 U. DAYTON L. REV. 43, 44, 49 (2000).

180. NEBGEN & AKBAR, *supra* note 32, at 244. However, the artist retains the right of public performance. *See id.* at 22.

A license or assignment of rights is subject to termination under certain conditions.[181] A sole author can terminate a transfer by herself.[182] If two or more authors transferred the copyright, a majority of the authors who made the transfer may terminate it.[183] If the author is dead, those who own or are entitled to more than one half of that author's interest are able to terminate the transfer.[184] Important here, if the work is a WMFH, the hired party has no termination right because the creator is not the author.[185] Additionally, some artists create loan-out corporations through which they execute business deals, including their label deal.[186] A district court recently held that because such grants are not made "by the author," but rather by the corporation, neither the artist nor the corporation has a termination right.[187]

Authors may terminate a transfer thirty-five years after its execution.[188] The terminator must serve a notice in writing that states the effective date of the termination, which must fall within a five-year window following the thirty-five years.[189] The notice must be served between two and ten years before the effective date of termination.[190] Upon termination, all of the transferred rights revert back to the person or persons owning the termination interests.[191] Agreements to the contrary do not prevent termination.[192]

Many scholars consider the termination right to be the most important right for an author.[193] It was intended to bridge the gap for authors who are unable to predict the value of their work before it is in the market.[194] Furthermore, the termination right is essential to an artist who may not be interested in initial ownership but later feels that the transfer was a mistake

---

181. § 203(a).

182. *Id.* § 203(a)(1).

183. *Id.*

184. *Id.*

185. *Id.* § 203(a).

186. Justin M. Jacobson, *After You Create an Entity: The "Loan-Out" & Music Production Companies*, TUNECORE (Nov. 14, 2016), https://www.tunecore.com/blog/2016/11/create-entity-loan-music-production-companies.html [https://perma.cc/98M3-XJ6N].

187. *See* Waite v. UMG Recordings, Inc., 450 F. Supp. 3d 430, 441 (S.D.N.Y. 2020). The corporation has no termination right under copyright law because a corporation is not a human and thus, cannot be an author. *See* U.S. COPYRIGHT OFF., CIRCULAR NO. 1, COPYRIGHT BASICS 1 (2019), https://www.copyright.gov/circs/circ01.pdf [https://perma.cc/LL65-U43P].

188. *See* § 203(a)(3). Because this Comment intends to substantiate Swift's warning for future artists, it will not address transfers or creations made prior to January 1, 1978, a watershed date for changes in copyright law.

189. *Id.* § 203(a)(4)(A).

190. *Id.*

191. *Id.* § 203(b).

192. *Id.* § 203(a)(5).

193. *See, e.g.*, LaFrance, *supra* note 150, at 377–78; Gould, *supra* note 159, at 92.

194. *See* Woods v. Bourne Co., 60 F.3d 978, 982 (2d Cir. 1995).

or that the sound recording is not being properly exploited.[195] But because of the WMFH exception, the termination right often fails to achieve its purpose, as evidenced by Swift's situation. If a sound recording is not a WMFH, the artist would be able to terminate any transfer.[196] She could then either retain ownership for herself or assign or license the rights to someone who could provide new life to the sound recording—restoring function to the termination right.

## III. ANALYSIS

Artists may unknowingly be deemed employees depending on their actions. But an artist can order her behavior to avoid being classified as an employee of her label. This Part begins by analyzing how a court would determine authorship of an artist's sound recordings, like Swift's. Then, Section B details actions an artist should take to avoid classification as anything but the sole author of her sound recordings. Finally, Section C addresses potential problems: These suggested practices may not be practical or further copyright's goal of maximizing creation.

### *A. Authorship of Sound Recordings*

A court has not yet squarely confronted the problem of determining authorship of sound recordings in the artist-label context. So, the following Subsections analyze how a court would do so for Swift's. For practical reasons, this analysis assumes that she is in the position of a typical singer-songwriter outlined throughout this Comment. Subsection 1 analyzes Swift under both prongs of the WMFH doctrine and concludes that Swift is not an employee of Big Machine and that her sound recordings do not fit into any of the nine statutory categories. Then Subsection 2 evaluates arguments for Swift-Big Machine joint authorship and concludes that Big Machine is not a joint author of Swift's sound recordings.

#### 1. Sound Recordings Are Generally Not Works Made for Hire

Big Machine would prefer a sound recording to be a WMFH because authorship would initially vest in it, not Swift. Thus, Swift would have no termination right, and Big Machine would have full control over the sound

195. *See, e.g.*, SLICHTER, *supra* note 31, at 108, 111, 165, 177–78, 241 (highlighting examples of Semisonic's frustrations with their record label, MCA Records, Inc.).

196. § 203(a).

recording copyright. There are two separate ways a court could find that Swift created a WMFH: as an employee or as an independent contractor.

*a. An Artist Is Generally Not an Employee of Her Record Label*

For Swift's work to fall under the first WMFH prong, she must have been an employee of Big Machine and created her sound recordings within the scope of her employment. A court would virtually always find that an artist made a sound recording within the scope of her employment with her label. A court would then use the thirteen employee factors of the *Second Restatement of Agency* to determine if Swift is an employee of Big Machine. This analysis proceeds by first discussing the five factors that carry the heaviest weight for authors in the Second Circuit, a popular entertainment authority.

| **Factor:** | **Pro-Big Machine:** | **Pro-Swift:** | **Outcome:** |
|---|---|---|---|
| Right to control the manner and means | Gives parameters for album length and number of songs<br><br>Final approval for commercial release and advance budget | Retains creative control | Big Machine |
| Skill required | | Artistic talent and musicianship<br><br>Creative decision-making | Swift |
| Big Machine's right to assign Swift additional projects | Ability to exercise irrevocable options, thereby requiring Swift to create another album<br><br>Power to reject any sound recording and have Swift make a new one | | Big Machine |
| Employee benefits | | None provided | Swift |

| **Factor:** | **Pro-Big Machine:** | **Pro-Swift:** | **Outcome:** |
|---|---|---|---|
| Tax treatment | | Royalties are self-employed income<br><br>Big Machine does not withhold taxes for Swift | Swift |
| Tools and instrumentalities | Advance used to rent the tools for fixing the sound recordings | Voice and musicianship | Even |
| Location of the work | Advance pays for recording studio time | | Big Machine |
| Duration of the relationship | Two-year initial period, amounting to a twelve-year contract through options | | Big Machine |
| Swift's discretion over when and how long to work | Sets deadlines for completion of the album | Sets daily schedule around other obligations | Swift |
| Method of payment | | More periodic as advances and royalties are album based | Swift |
| Swift's role in hiring and paying assistants | Mutually selects the producer | Pays producer from her own royalties | Swift |
| Whether the work is part of the regular business of Big Machine | Creating sound recordings is *the* business of Big Machine | Big Machine also works on tour management, promotion, and licensing | Big Machine |
| Whether Big Machine is in business | Big Machine is in business | | Big Machine |

On balance, a court would hold that Swift is not an employee of Big Machine. The majority of the important factors, including skill required, benefits offered, and tax treatment, indicate non-employee status. Because this is a close call, future artists should take the steps outlined in Part III.B to protect themselves from being characterized as employees of their label.

*b. Sound Recordings of an Independent-Contractor Artist Are Generally Not Works Made for Hire*

If a court finds that Swift is not an employee of Big Machine, but rather an independent contractor, there is still a chance that her sound recordings are WMFH if (1) the sound recording was specially ordered or commissioned, (2) there was a written contract between Swift and Big Machine stating that the sound recordings are WMFH, and (3) the sound recordings fall into one of the nine categories in section 101 of the Copyright Act.[197] A court is likely to find that Swift's sound recordings pass the interest and expense test, satisfying the first element.[198] Big Machine satisfied the second element by standard practice.

A court would then turn to see if the sound recordings fit into any of the nine statutorily enumerated categories. The only conceivable category a sound recording could fall under is a contribution to a collective work. But for a solo singer-songwriter like Swift, even that argument is a stretch. Congress enumerated that category to protect new works that result from assembling the pre-existing works of many authors. Can a work really be collective if the contributions are all new creations from one artist? The statutory examples, which include a "periodical issue, anthology, or encyclopedia," suggest not.[199] There is a stark contrast between the diverse authorship of encyclopedia contributions and Swift's solo sound recordings on her albums.

Moreover, the WMFH categories are the result of years of carefully crafted compromises by Congress.[200] During this lengthy reformation, Congress passed groundbreaking sound-recording legislation, yet it did not even consider adding sound recordings as a category.[201] This choice appears intentional. It is hard to imagine that Congress simply *forgot* sound recordings existed amid crucial copyright reformation of both the WMFH

197. § 101.

198. *Supra* note 132 and accompanying text.

199. § 101; David Nimmer et al., *Preexisting Confusion in Copyright's Work-for-Hire Doctrine*, 50 J. COPYRIGHT SOC'Y U.S.A. 399, 409–10 (2003).

200. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 743 (1989).

201. *See* Sound Recording Act, Pub. L. No. 92-140, 85 Stat. 391 (1971) (codified as amended in scattered sections of 17 U.S.C.); LaFrance, *supra* note 150, at 385.

doctrine and sound recordings themselves. This is even more suspect considering the lobbying power of the music industry on both the artist and label sides. Furthermore, Congress's rapid repeal of the 1999 amendment bolsters a finding that sound recordings do not fall into any of the nine current categories because the amendment was a substantive change to the law.[202] Because artists are some of "the most vulnerable and poorly protected . . . beneficiaries of the copyright law,"[203] adding sound recordings to this doctrine raises serious moral concerns.

Finally, a court would likely find that sound recordings are not contributions to collective works because the producer who assembled the sound recordings onto the album would not meet the originality requirement of copyright. Although a low bar, the minimal spark of creativity is seemingly more than putting songs in a row on an album.[204] Without this spark, Swift's collection of sound recordings is not a collective work, and thus, the sound recordings cannot be contributions to a collective work. In sum, the legislative history, the single-author aspect, the lack of originality in arrangement, and public policy suggest that a sound recording is not a contribution to a collective work. Thus, a court would likely hold that Swift's sound recordings are not WMFH.

### 2. An Artist and Her Label Are Generally Not Joint Authors

Presumably, if Big Machine is unable to show that Swift's sound recordings are WMFH, it would next argue for joint authorship. If Swift is a co-author, she would only be able to terminate half of the transfer. A court would analyze whether Swift and Big Machine objectively intended that their material contributions merge into interdependent parts of a unitary whole, controlled the creation of the sound recording, and made independently copyrightable contributions. Based on these factors, a court would likely find that Swift and Big Machine are not joint authors.

First, a court would see if Swift and Big Machine objectively intended to be co-authors. This intent analysis may consider how the parties bill themselves. Swift's sound recordings are contractually defined as WMFH, with the backup that if they are found not to be WMFH, Swift assigned her copyrights to Big Machine.[205] Likewise, her contract with her producer also contains a clause that the producer is working with Swift on a WMFH basis

202. *See supra* notes 142–146 and accompanying text.
203. *Reid*, 490 U.S. at 747 n.13.
204. *Supra* note 159 and accompanying text.
205. *See supra* note 180 and accompanying text.

followed by an assignment clause.[206] This suggests that Swift intended to be the sole author of her sound recordings.

Next, a court would analyze whether the material contributions of Big Machine and Swift created interdependent parts of a unitary whole. Swift came to Big Machine for help creating sound recordings, and audience appeal usually depends on this merger. That said, a court would likely find that Big Machine's contributions are insufficient for joint authorship because, while valuable, they are not material.[207] The label is more akin to an advisor on a project, which the Second Circuit found did not find qualify for joint authorship.[208] This also weighs against Big Machine in the decision-making authority analysis, although less so than for the materiality of its contribution. Furthermore, Swift contractually retaining creative control is strong evidence of her claim to sole authorship of her sound recordings.

The Second, Sixth, and Ninth Circuits would then determine whether the contributions of Swift and Big Machine were fixed and independently copyrightable on their own. Swift's contribution to the sound recording, the actual sound, is not copyrightable until it is fixed, which is done by the producer. Thus, her producer may have a claim for joint or even sole authorship. Despite that, her producer does not meet the minimum spark of creativity requirement by simply fixing her voice onto a recording. Once again, this requirement is seemingly more than putting songs in a row on an album.[209] Additionally, policy concerns would limit a producer's sole authorship claim. For example, Swift wrote, sang, and played *Our Song* solo.[210] It is hard to imagine a court holding that the producer of *Our Song* is the sole author of its sound recordings for fixation alone. Thus, Big Machine's claim for joint authorship would fail even if the producer is its employee,[211] and a court would likely hold Swift is the sole author of her sound recordings.

---

206. *Id.* at 226–28.

207. *But see* Shaab v. Kleindienst, 345 F. Supp. 589, 590 (D.D.C. 1972) (stating that labels that provide the equipment and organize the diverse talents of arrangers, performers, and technicians satisfy the requirements for authorship).

208. Thomson v. Larson, 147 F.3d 195, 199–202 (2d Cir. 1998).

209. *See supra* note 204 and accompanying text.

210. TAYLOR SWIFT, *Our Song*, *on* TAYLOR SWIFT (Big Machine Records 2006).

211. As stated earlier, this analysis assumes the situation of a typical singer-songwriter based on the available literature cited in this Comment. If a court found a producer met the minimum spark of creativity, he could be a joint author, and if he also was an employee of Big Machine, the label could be a joint author of Swift's sound recordings.

### *B. An Artist Can Take Steps To Retain Authorship and Ownership of Her Sound Recordings*

Although sound recordings may not be WMFH or a work of joint authorship under current practices, a court may classify sounds recordings as such. A new artist can take the following steps to avoid the possibility of either classification. First, an artist should contractually define her legal relationship with her label as an independent contractor. Second, she should use her own equipment and instruments—including her guitar, drums, or piano—to create the sound recordings when possible. This could help tip the "tools and instrumentalities" factor in favor of the artist.

Third, an artist should try to contract for creative control over the sound-recording process—selecting the mixer, producer, title, and lyrics—while allowing the label to make commercial choices. Retaining creative control is key to preventing the label's contribution from amounting to the minimal spark of creativity needed for authorship. Ceding commercial control will make a court more likely to see the label as a means to an end rather than an author. This also has the added benefit of earning the artist credibility during the negotiation. In the event the artist is unable to work in such contractual language, she should reject as many label changes to the sound recordings as possible. If she does want to make a suggested change, the artist should make it clear in writing that the decision was hers and hers alone. This will help the artist regain control of the "manner and means" factor of WMFH and avoid joint authorship.

Fourth, the artist should negotiate for shorter initial periods and a small number of options. Not only will this help the artist retain authorship of her sound recordings but also, assuming the music is commercially successful, it will expedite the opportunity to renegotiate for a more favorable deal. Next, the artist should strike any contractual language that requires the label to approve or mutually approve a producer. It would also be helpful for an artist to hire a secondary producer as an employee to fix the final audio of the performance. Finally, the artist should strike any language requiring label approval of the recording location and instead substitute language that it is the artist's sole decision. This could significantly help rebalance the "location of work" factor.

For the second WMFH prong, it would be dangerous, if not impossible, for an artist to avoid a written contract altogether, so instead, an artist should strike WMFH language from any contract she signs with the label. This would render the entire second prong moot and avoid the disputed argument as to whether a sound recording fits within the enumerated categories. To avoid joint authorship, the author should say that she is the sole author of her work whenever possible, including in advertising, listings, bookings, and

contracts. Finally, based on the recent district court holding, to ensure an artist retains her termination right, she should not enter into label deals through a loan-out corporation.[212]

If the work is found not to be a WMFH, then artist is the author and may terminate the assignment of the sound recordings thirty-five years after the initial transfer.[213] In Swift's case, she transferred the rights to her self-titled album *Taylor Swift* in 2006 when she was sixteen.[214] Although she will have to wait until she turns fifty-one,[215] the termination right would give Swift and her heirs the opportunity to own her music—an opportunity she would not get otherwise. These small contractual alterations and actions could ensure that an artist is fearless when joining a label rather than worried about the possibility of teardrops on her guitar.[216]

### *C. The Realism and Policy Behind Swift's Rally Cry*

Swift is in a unique position at the top of the music industry. In fact, she has been referred to as *the* music industry.[217] The majority of artists are not reflecting from atop the mountain on what they would have done differently. Rather, they are cooped up in a small apartment, barely paying rent, hoping one day just to get a shot at a label deal. These artists may not care about retaining ownership of their masters because even if the album fails, at least they had their moment. That alone makes the transfer worth it.

Financial feasibility also stands in the way of some of the recommended actions, like an artist using her own equipment or instruments. Money is one of the main reasons an artist seeks out a label in the first place. Furthermore, although a court should find an artist's sound recordings are not WMFH, trying to get such a ruling comes with a price, both financially and in the press—a price tag so big it has already deterred artists as famous as Paul McCartney and Duran Duran.[218] It would take an artist like Swift, who cares

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

213. The artist must provide effective notice of termination to the record label.

214. *See Taylor Swift Biography*, BIOGRAPHY (Dec. 10, 2020), https://www.biography.com/musician/taylor-swift [https://perma.cc/Q5Y8-MT4D]; TAYLOR SWIFT, TAYLOR SWIFT (Big Machine Records 2006).

215. *See* BIOGRAPHY, *supra* note 214.

216. *See* TAYLOR SWIFT, *Fearless*, *on* FEARLESS (Big Machine Records 2008); TAYLOR SWIFT, *Teardrops on My Guitar*, *on* TAYLOR SWIFT (Big Machine Records 2006).

217. Devin Leonard, *Taylor Swift* Is *the Music Industry*, BLOOMBERG (Nov. 13, 2014, 7:02 PM), https://www.bloomberg.com/news/articles/2014-11-12/taylor-swift-and-big-machine-are-the-music-industry [https://perma.cc/9HWP-4R3U].

218. Ashley Cullins, *Paul McCartney Reaches Settlement with Sony/ATV in Beatles Rights Dispute*, HOLLYWOOD REP. (June 29, 2017, 6:29 PM), https://www.hollywoodreporter.com/thr-

more about the message than the price, to win this war.[219] Such a combination of fame and determination is rare, adding another barrier to resolution.

Bargaining power is one of the more obvious obstacles. The deal an artist will be able to negotiate with the label and producer will depend on a variety of factors including the skill of her representation and the business model and financial situation of the label and producer.[220] The most definitive factor is the market position of the artist—whether she is famous or just starting out.[221] Undoubtably, Taylor Swift will always get a better deal than Taylor Slow. The discrepancy in power during an artist's first label deal is striking and possibly unconscionable.[222] Because of this, trying to retain important provisions or strike language related to term, options, and approvals might not be realistic. But tides may be changing as digital tools continue to evolve. The most recent example is the app TikTok, a free, short-form video app where users can create videos and share them instantly with other users.[223] The app has revolutionized how people around the world discover and fall in love with music—rapidly sending songs from static to viral.[224] Record labels are taking notice.[225] In 2020, major labels signed record deals with seventy artists who emerged on TikTok.[226] With more ways for independent artists to establish followings before signing a label deal, artists are likely to have more bargaining power to make some of the suggested changes during their first negotiation.

---

esq/paul-mccartney-reaches-settlement-sony-atv-beatles-rights-dispute-1018100 [https://perma.cc/E98T-4VRP]; *see also* Robert Levine, *Paul McCartney on Life, Art and Business After the Beatles*, BILLBOARD (Nov. 14, 2019), https://www.billboard.com/articles/columns/rock/8543413/paul-mccartney-billboard-cover-story-interview-2019 [https://perma.cc/5323-C3NC].

219. Swift won a countersuit for one dollar against a defendant who sexually assaulted her after an interview. *See* Eliana Dockterman, *'I Was Angry.' Taylor Swift on What Powered Her Sexual Assault Testimony*, TIME (Dec. 6, 2017, 6:10 AM), https://time.com/5049659/taylor-swift-interview-person-of-the-year-2017/ [https://perma.cc/YS3K-SUXW].

220. NEBGEN & AKBAR, *supra* note 32, at 138.

221. *Id.*

222. Todd M. Murphy, Comment, *Crossroads: Modern Contract Dissatisfaction as Applied to Songwriter and Recording Agreements*, 35 J. MARSHALL L. REV. 795, 808–17 (2002) (reviewing the case law where artists have challenged music contracts on several grounds including unconscionability).

223. Kevin Roose, *TikTok, a Chinese Video App, Brings Fun Back to Social Media*, N.Y. TIMES (Dec. 3, 2018), https://www.nytimes.com/2018/12/03/technology/tiktok-a-chinese-video-app-brings-fun-back-to-social-media.html [https://perma.cc/7DHZ-PLMA].

224. Interview by Lulu Garcia-Navarro with Mikael Wood, Pop Music Critic (Sept. 27, 2020, 7:42 AM), https://www.npr.org/2020/09/27/917424879/how-tiktok-has-changed-the-music-industry [https://perma.cc/9Q5L-SU93].

225. *Id.*

226. *Year on TikTok: Music 2020*, TIKTOK (Dec. 16, 2020), https://newsroom.tiktok.com/en-us/year-on-tiktok-music-2020 [https://perma.cc/APT2-EYMW].

Finally, adopting these recommendations may be at odds with the focus of copyright law: maximizing the development of creative expression through financial incentives. If the label knows it will not retain the ultimate rights to a sound recording, it will be less likely to sign a particular artist—even if that artist is Taylor Swift.[227] However, the current state of the law—where a label authors an artist's sound recordings—fails to serve this purpose any better. Successful artist-label relationships breed economic and artistic wealth by bringing music to the lives of billions across the globe. But given Swift's widespread warnings, artists may be less likely to sign with labels if they will be forced to hand over the rights to their sound recordings. In fact, this is the reason three-time Grammy-winner Chance the Rapper is an independent artist.[228] Artists put their hearts and souls into creating their music. Maintaining ownership might be worth more than the true price of mass distribution: seeing it in the hands of someone who not only did very little but, at least in Swift's case, has also hurt them. If artists know whatever original work they produce will be theirs and only theirs, they will be more likely to create, and copyright's primary purpose will be served.

Secondary to maximizing creation, copyright law is also concerned with the moral rights of authors, and that is another problem here. The copyright system should not allow a company to justify copyright authorship based only on a one-time advance. Such is contrary to the goal of the termination right. Swift is not the first artist to lose ownership of her art,[229] and if things continue this way, she surely will not be the last.

---

227. Big Machine evidently preferred Swift sign with a different label rather than let her own her masters. Jem Aswad, *Taylor Swift Couldn't Buy Masters Without Signing New Big Machine Deal*, VARIETY (July 3, 2019, 11:15 AM), https://variety.com/2019/biz/news/taylor-swift-couldnt-buy-masters-without-signing-new-big-machine-deal-1203259078/ [https://perma.cc/AZ6W-76NY].

228. Joe Budden TV, *Chance the Rapper Explains if He's Really an Independent Artist | The Joe Budden Podcast*, YOUTUBE (Oct. 8, 2018), https://www.youtube.com/watch?v=bI-mvYUC-88&feature=youtu.be [https://perma.cc/A36M-PPLZ].

229. Sophie Dodd, *7 Artists Who Have Fought for Ownership of Their Music*, PEOPLE (July 2, 2019, 7:39 PM), https://people.com/music/taylor-swift-beatles-prince-artists-fight-ownership-music/?slide=7113316#7113316 [https://perma.cc/2K5W-ZRTQ].

## IV. CONCLUSION

*"If you don't own your masters, your master owns you."*
– Prince[230]

It has been nearly a half-century since sound recordings gained federal copyright protection. Yet the most important question is still unanswered: To whom do they belong? In light of the constant developments in sound-recording laws, the most recent in late 2018, this is a question a court will have to answer soon.[231] That answer should be guided by this principle: Spreading ideas, emotions, and dreams through music should never come at the expense of fundamental fairness.

Common sense tells us that artists are the real authors of their work. A holding otherwise would create the unfortunate opportunity for companies to take advantage of some of the most vulnerable in our society—artists. Swift may not look so vulnerable with Grammy Awards gleaming on her shelves. But this is not about the thirty-year-old pop star; it is about the fifteen-year-old girl who wrote songs alone on her bedroom floor and had them stripped away for life before she even had a driver's license.

The current state of the law does not effectuate the purpose of the termination right: protecting authors from unfavorable transfers by giving them a second bite at the apple, a chance to enjoy the fruits of their art. But, if an artist heeds the advice of this Comment regarding contractual terms and post-contract decisions, a court is significantly more likely to view her as the sole author of her work. The effect of such could provoke real change in contract and copyright law and the music industry.

Swift has numerous accolades in her youthful career. She has as many world records as years she is old.[232] She is the first female artist to win the Grammy for Album of the Year three times, joining only Stevie Wonder,

---

230. Anthony DeCurtis, *O(+> Free at Last*, ROLLING STONE (Nov. 28, 1996), https://sites.google.com/site/prninterviews/home/rolling-stone-748-28-november-1996 [https://perma.cc/7CDQ-SSA5].

231. Recording artists filed two class actions against major labels to terminate their transfers. Both survived motions to dismiss. Waite v. UMG Recordings, Inc., 450 F. Supp. 3d 430, 432–35 (S.D.N.Y. 2020); Johansen v. Sony Music Ent. Inc., No. 19 Civ. 1094 (ER), 2020 WL 1529442, at *7 (S.D.N.Y. Mar. 31, 2020). The case against UMG is still in litigation as of March 2021, and the parties in the Sony case agreed to stay the case until May 21, 2021 for settlement negotiations. If the parties have not reached an agreement by then, they will submit a stipulated case schedule to resume litigation.

232. *Taylor Swift Set over 30 World Records Throughout Her Career*, BOWLYRICS (May 1, 2019), https://bowlyrics.com/taylor-swifts-guinness-world-records/ [https://perma.cc/JJP4-EXZQ].

Frank Sinatra, and Paul Simon.[233] She is the youngest act on *Rolling Stone*'s "100 Greatest Songwriters of All Time" list.[234] And yet, of all her lyrics, the line Swift may be remembered by is, "You deserve to own the art you make."[235]

233. Hugh McIntyre, *Taylor Swift Is Now the First Female Artist To Win Album of the Year at the Grammys Three Times*, FORBES (Mar. 14, 2021, 10:11 PM), https://www.forbes.com/sites/hughmcintyre/2021/03/14/taylor-swift-is-now-the-first-female-artist-to-win-album-of-the-year-at-the-grammys-three-times/?sh=78ee9ec14ea7 [https://perma.cc/UZG7-29RP].

234. Paris Close, *Looking Back at Taylor Swift's 10 Greatest Accomplishments of Her Career*, IHEARTRADIO (Apr. 26, 2019), https://www.iheart.com/content/2019-04-26-looking-back-at-taylor-swifts-10-greatest-accomplishments-of-her-career/ [https://perma.cc/R3ND-VHT7].

235. Swift, *supra* note 1.