



## Terminating the Struggle Over Termination Rights

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### I. INTRODUCTION

Copyright termination rights, also known as copyright reversion rights, are an important yet confusing set of rights reserved to authors of copyrighted works. As applied to musicians and performers, these rights represent an opportunity to reclaim ownership in musical works and sound recordings after decades. These rights are additionally increasingly relevant, as more artists are becoming eligible to exercise them as years pass. Indeed, the first musicians that were eligible to exercise these rights could do so in 2013. These rights are increasingly important for musicians to exercise as soon as possible; the window for the first eligible musicians to exercise their rights already closed in 2016, and future windows will also quickly lapse as more years pass.

While termination rights are extremely important for musicians, the process that allows them to exercise these rights is far from straightforward. As the windows of eligibility have begun to open, it has been difficult for artists to successfully exercise this right. This paper will explore why it is so difficult for music artists to exercise copyright termination rights as focused on the sound recording copyright in the United States. It will offer a brief history to provide background context on the various issues involved, and will then consider what steps may be taken to help music artists better exercise their copyright termination rights, by incorporating potential approaches from the legal lens, the business lens, and the policy lens.

## II. BACKGROUND ISSUES

At the heart of the issue surrounding copyright termination rights as they pertain to sound recordings is whether sound recordings can be classified as works made for hire under the law. As the overview of relevant statutory provisions below will show, copyright termination rights do not apply to works made for hire. Thus, if sound recordings can be considered works made for hire, then music artists will not be eligible to exercise copyright termination rights in order to re-obtain the rights to their sound recordings. Alternatively, if sound recordings cannot be considered a work made for hire, then music artists will have the ability to exercise these copyright termination rights in order to re-obtain the rights to their sound recordings.

### *A. Overview of Relevant Statutory Provisions*

Copyright termination rights are contained in § 203<sup>1</sup> and § 304<sup>2</sup> of the U.S. Copyright Act of 1976. The relevant provisions in § 203 of the statute set forth that “[i]n the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination . . .”<sup>3</sup> Termination of works transferred (or assigned) after January 1, 1978 may be exercised during a five-year window that starts 35 years after the date of assignment under certain conditions.<sup>4</sup> Among those conditions include the requirement that the author provide notice to the grantee of an intent to exercise this termination right between two and ten years before the intended effective date of the termination.<sup>5</sup> On the effective date of termination, all rights previously transferred from the author to the grantee revert back to the author.<sup>6</sup> This means that the first available window to exercise copyright termination rights opened in 2013 and closed on January 1, 2018. Further, the most recent available window for authors to provide notice to grantees of an intent to exercise this termination right already closed in 2016.

The relevant provisions in § 304 of the statute set forth that “. . . other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, ex-

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<sup>1</sup> 17 U.S.C. § 203 (termination of transfers and licenses granted by the author).

<sup>2</sup> 17 U.S.C. § 304 (duration of copyright: subsisting copyrights).

<sup>3</sup> 17 U.S.C. § 203(a) (conditions for termination).

<sup>4</sup> 17 U.S.C. § 203(a)(3).

<sup>5</sup> 17 U.S.C. § 203(a)(4)(A).

<sup>6</sup> 17 U.S.C. § 203(b).

cuted before January 1, 1978, by any of the persons designated by subsection 304 (a)(1)(C) of this section, otherwise than by will, is subject to termination . . .”<sup>7</sup> Termination of works transferred (or assigned) before January 1, 1978 may be exercised during a five-year window that starts at the later date of 56 years after the date of original copyright publication, or January 1, 1978, under certain conditions.<sup>8</sup> Among those conditions include the requirement for the author to provide notice to the grantee of an intent to exercise this termination right between two and ten years before the intended effective date of the termination.<sup>9</sup> On the effective date of termination, all rights previously transferred from the author to the grantee revert back to the author.<sup>10</sup> For works transferred (or assigned) before January 1, 1978, this copyright termination right may also be exercised during an additional five-year window that starts 75 years after the date of original copyright publication.<sup>11</sup>

As previously mentioned, it is important to restate that these copyright termination rights do not apply to works made for hire under the statute. Works made for hire (or works for hire) are also defined in the U.S. Copyright Act of 1976, in § 101. The relevant provisions in § 101 of the statute set forth that

“A ‘work made for hire’ is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”<sup>12</sup>

This means that a work can only be considered a work for hire if it was created within an author’s scope of employment or if it was a commissioned work created by an independent contractor in one of the nine specifically enumerated categories in the statute.

Notably, sound recordings are not included among one of these nine specifically enumerated categories. However, the statute also includes an important reference to a “Technical Amendment” that was added and then

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<sup>7</sup> 17 U.S.C. § 304(c) (termination of transfers and licenses covering extended renewal term).

<sup>8</sup> 17 U.S.C. § 304(c)(3).

<sup>9</sup> 17 U.S.C. § 304(c)(4)(A).

<sup>10</sup> 17 U.S.C. § 304(c)(6).

<sup>11</sup> 17 U.S.C. § 304(d)(2).

<sup>12</sup> 17 U.S.C. § 10.

subsequently removed to an unrelated statute in 1999.<sup>13</sup> This Technical Amendment to the Intellectual Property and Communications Omnibus Reform Act of 1999 added sound recordings to the list of specifically enumerated categories of works for hire in § 101 of the U.S. Copyright Act of 1976.<sup>14</sup> The record industry, led by the Recording Industry Association of America (RIAA), lobbied for the insertion of this Technical Amendment in an effort to specifically enumerate sound recordings as works for hire in the copyright statute.<sup>15</sup> However, music artists, led by a group called the Artists' Coalition,<sup>16</sup> worked to repeal the Amendment, which was successfully repealed in 2000.<sup>17</sup> Thus, as it currently stands, sound recordings are not explicitly considered works for hire in § 101 of the copyright statute, and works for hire are not considered transfers or assignments of copyright subject to copyright termination in § 203 and § 304 of the statute.

### B. Overview of Relevant Contract Provisions

In the context of the recording industry, musicians and performers are considered authors and record companies are considered grantees within the context of the aforementioned relevant provisions in the copyright statute. Traditionally, recording agreements between these parties contain a grant of rights provision that specifies that the musician's sound recordings are considered works for hire and that if those sound recordings are determined not to be works for hire, then the contract serves as a transfer or assignment of the musician's copyrights to the record company. For example:

Solely for the purposes of any applicable Copyright Law, you and all others rendering services in connection with the recordings of Master Recordings made hereunder and/or the creation of any Subject Materials shall be Company's employees for hire and each item of such Subject Materials under this Agreement or during its Term . . . shall be deemed 'works made for hire.' Company shall be deemed the author of such Subject Materials but if

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<sup>13</sup> William Fisher, *CopyrightX: Lecture 5.3, Authorship: Works for Hire*, YouTube (Feb. 2, 2015), <https://www.youtube.com/watch?v=4-2qLmmDBnE&feature=youtu.be>, [https://perma.cc/G2GE-GCSP].

<sup>14</sup> Intellectual Property and Communications Omnibus Reform Act of 1999, S. 1948, 106th Cong. § 1011(d) (1999).

<sup>15</sup> Eric Boehlert, *Four little words*, SALON.COM, Aug. 28, 2000, [https://www.salon.com/2000/08/28/work\\_for\\_hire/](https://www.salon.com/2000/08/28/work_for_hire/), (on file with the Harvard Law School Library), [https://perma.cc/434R-UR6B].

<sup>16</sup> *Id.*

<sup>17</sup> Barry Willis, *Clinton Signs Repeal of "Works for Hire" Law*, STEREOPHILE.COM, Oct. 29, 2000, <https://www.stereophile.com/news/10880/> (on file with the Harvard Law School Library), [https://perma.cc/2QZC-8W92].

for any reason any such Subject Materials shall not be a work made for hire, then you hereby assign to Company all Territory-wide right and title to copyrights and all other rights in and to each element of such Subject Materials and all records and reproductions made therefrom for the full term of such copyright and all renewals and extensions of same.

### C. *Artist Interests*

From a musician's perspective, these contract provisions can be extremely restrictive. However, while this "belt and suspenders" clause appears in most recording contracts, musicians can still find recourse in their copyright termination rights, which are inalienable and cannot be transferred or waived.<sup>18</sup> In order to find this recourse, they need the grant of rights provisions to be interpreted as transfers or assignments of their copyrights, so that such grants may be terminated subject to § 203 and/or § 304 of the copyright statute. It is important for artists not to have their sound recordings classified as works for hire under the law in these agreements.

Artists who are eligible to exercise their copyright termination rights have a few options. They can either renegotiate for better recording agreements with higher royalty rates during the termination window, or they can attempt to exercise their termination rights, thereby reverting ownership of their sound recordings from the record company back to themselves. While it historically may have been difficult for artists to exploit these sound recordings on their own, it is now more than ever easier for them to do so in this new digital distribution environment. While there are now countless musicians who are eligible to exercise these copyright termination rights, only a small proportion of them have actually taken steps to do so. Examples include Prince, Billy Joel, Pat Benatar, and Joni Mitchell.<sup>19</sup>

### D. *Record Company Interests*

From a record company's perspective, these contract provisions are an attempt to retain control over the musician's sound recordings for as long as

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<sup>18</sup> Bob Donnelly, *Everything You Need to Know About Copyright Reversions*, LOMMEN.COM, 2012, <http://www.lommen.com/wp-content/uploads/2016/03/Everything-You-Need-to-Know-About-Copyright-Reversions-5-12-version.pdf> (on file with the Harvard Law School Library), [<https://perma.cc/EGU4-JYGP>].

<sup>19</sup> Ed Christman, *Inside the Secretive, Difficult Struggle Between Artists & Labels Over Album Copyrights*, BILLBOARD.COM, Sep. 28, 2017: <https://www.billboard.com/articles/business/7981597/album-copyrights-master-recordings-1976-law> (on file with the Harvard Law School Library), [<https://perma.cc/AEK8-HACY>].

possible. For this reason, and to prevent musicians from exercising their copyright termination rights, record companies want sound recordings to be classified as works for hire in order to retain indefinite ownership under the copyright statute. Otherwise, if sound recordings cannot be classified as works for hire, it is in the record companies' best interests to renegotiate with artists to retain ownership over their catalog of sound recordings. Given the new opportunities to exploit longtail catalogs in the digital distribution environment, it is important for record companies to retain ownership over these copyrights in order to do so.

### III. APPROACHES AND STRATEGIES

While the copyright statute does provide musicians with an opportunity to reverse the grant of their sound recording copyrights to record companies, the window to take advantage of this opportunity only lasts for five years. It is therefore very important for musicians who are approaching this window to have a specific plan to overcome the obstacles that record companies will often put in place to exercise these rights. In considering their strategies to exercise their copyright termination rights, artists may consider a range of approaches including the legal angle, the business angle, and the policy angle.

#### A. *Legal*

Even if musicians properly meet the requirements to exercise their copyright termination rights by serving the correct notice within the applicable window of eligibility, that is unfortunately not a guarantee for them to recapture their sound recording copyrights. One reason for this is that record companies often ask artists to waive their termination rights (which are not waivable), or ignore the artists' attempts to exercise those rights altogether.<sup>20</sup> In such cases, musicians may need to seek legal recourse in the courts in order to exercise these termination rights.

The courts must resolve several questions to determine how effective the copyright statute can be in helping musicians to exercise their termination rights. As previously stated, these questions revolve around defining if sound recordings made during record contracts can be considered works for hire under the copyright statute. First, can sound recordings made during record contracts be considered works for hire under the employment prong of § 101 of the copyright statute? Can musicians under a record contract be

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<sup>20</sup> See *id.*

considered employees of record companies, thus making the record companies the legal author of the sound recordings produced during the recording agreement? Second, can sound recordings made during record contracts be considered works for hire under the independent contractor prong of § 101 of the copyright statute? Can music albums be considered “compilations” or “collective works” thus qualifying them as works for hire under this prong? In order to prevail on the legal front, musicians will need to convince courts that the answer to all of these questions is no.

In addressing the employment prong, the primary Supreme Court case that defines what types of relationships generally qualify as employment relationships is *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). In that case, the Court laid out several factors to consider in determining whether a hired party is an employee under the common law. These factors include the hiring party’s right to control the product, the skill required, the source of the tools, the location of the labor, the duration of the relationship, the right of the hiring party to assign additional projects, the hiring party’s control over the hours of work, the method of payment, the hiring party’s right to hire assistants, the business of the hiring party, employee benefits, and the tax treatment of the hired party.<sup>21</sup> Using these factors, musicians should generally be able to convince a court that the location of the labor, the method of payment, employee benefits, and tax treatment are not such that would qualify their relationship with record companies as employer-employee relationships under recording contracts. However, because none of these factors are determinative, it is unclear how courts might rule. Unfortunately, there are not many cases that address the specific question of employment relationships as they relate to musicians and record companies.

There is one unreported case that is helpful for musicians. In *Eliscu v. T.B. Harms Corp.*, 151 U.S.P.Q. 603 (N.Y. Sup. Ct. 1966), the New York Supreme Court noted that the use of the phrase “we engage and employ you” found in written instruments is not enough to make an artist an employee.<sup>22</sup> While this case concerned musical compositions instead of sound recordings, the logic should still be helpful to support musicians’ sound recording copyrights. On the other hand, in a more recently unpublished case, *Fifty-Six Hope Road Music v. UMG Recordings, Inc.*, No. 08 Civ. 6143(DLC), 2010 WL 3564258 (S.D.N.Y. Sept. 10, 2010), the Southern

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<sup>21</sup> See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989).

<sup>22</sup> Ryan Ashley Rafoth, *Limitations of the 1999 Work-For-Hire Amendment*, 53 VAND. L. REV., 1030 (2000), <http://rafothlaw.com/VLR%20Note.pdf>, [<https://perma.cc/RMT4-Z4SR>] (citing *Eliscu v. T.B. Harms Corp.*, 151 U.S.P.Q. 603, 603-04 (N.Y. Sup. Ct. 1966)).

District Court of New York applied the 2nd Circuit “instance and expense” test to determine that Bob Marley’s pre-1978 sound recordings did qualify as work for hire.<sup>23</sup> Given this unclear case law, musicians may need to consider courts in the 9th Circuit in an effort to resolve the employment prong in their favor.

In addressing the independent contractor prong, the copyright statute already establishes that sound recordings cannot categorically be considered works for hire because they are excluded from one of the nine enumerated categories that are automatically considered works for hire. However, among other arguments, record companies may attempt to convince courts that albums of sound recordings should be considered “compilations” or “collective works” under the copyright statute. The case law concerning these specific questions is similarly scarce. In *Ballas v. Tedesco*, 41 F. Supp. 2d 531 (D.N.J. 1999), the District Court of New Jersey held that the sound recordings under consideration did not qualify as works for hire because they do not fit into one of the nine enumerated categories and there was no written agreement to consider them as works for hire.<sup>24</sup> However, unlike most recording arrangements today, there was no signed agreement in that case explicitly claiming that the sound recordings were considered works for hire.<sup>25</sup> In *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57 (D.D.C. 1999), the District Court of Washington, D.C. further confirmed that a sound recording does not fall within one of the nine enumerated categories in § 101 of the copyright statute.<sup>26</sup> In this case, there was a written contract between the parties, but the agreement did not specify which party owned the sound recording’s copyright.<sup>27</sup> Thus, while *Ballas* and *Staggers* reiterate that sound recordings cannot categorically be considered works for hire because they do not fit into one of the nine enumerated categories in the copyright statute, they do not consider the question in light of an explicit written agreement to the contrary. They additionally do not consider the specific question of whether music albums can be considered “compilations” or “collective works” under the copyright statute.<sup>28</sup>

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<sup>23</sup> See *Fifty-Six Hope Road Music Ltd. v. UMG Recordings, Inc.*, No. 08 Civ. 6143(DLC), 2010 WL 3564258, at \*7–8 (S.D.N.Y. Sept. 10, 2010).

<sup>24</sup> See *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999).

<sup>25</sup> See *id.*

<sup>26</sup> See *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999).

<sup>27</sup> See *id.*

<sup>28</sup> Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. Cal. L. Rev. 375, 382 (2001), available at <http://www-bcf.usc.edu/~usclrev/pdf/075202.pdf>, [<https://perma.cc/Y6CW-VLLQ>].



While the case law is quite scarce concerning whether recorded albums of sound recordings can be considered “compilations” as they relate to works for hire, there is more case law concerning whether recorded albums of sound recordings can be considered “compilations” as they relate to statutory damages. In these cases, record companies ironically argue against the consideration of recorded albums of sound recordings as “compilations” in an attempt to maximize potential statutory damages available to them for infringement under § 504 of the copyright statute.<sup>29</sup> For example, “in *UMG Recordings, Inc. v. MP3.com, Inc.*, the plaintiff record label argued that each individual track on a CD should constitute a separate work for the purpose of determining statutory damages [. . .] The [Southern District Court of New York] rejected that argument, holding that a music CD is a ‘compilation,’ and thus constitutes a single work for purposes of § 504(c). *UMG Recordings, Inc.*, 109 F. Supp. 2d at 225. [(S.D.N.Y. 2000)]”<sup>30</sup> In *Bryant v. Media Right Productions*, 603 F.3d 135, the 2nd Circuit Court of Appeals followed the District Court’s decision to treat albums of sound recordings as “compilations” for the purpose of calculating statutory damages.<sup>31</sup> However, in a later unreported case in *Arista Records LLC v. Lime Group LLC*, the Southern District Court of New York distinguished *Bryant* by noting that unlike in *Bryant*, the plaintiffs in this case had issued individual sound recordings and compilation albums, holding that “[n]othing in the Copyright Act bars a plaintiff from recovering a statutory damage award for a sound recording issued as an individual track, simply because that plaintiff, at some point in time, also included that sound recording as part of an album or other compilation.”<sup>32</sup> It therefore seems like it is possible for recorded albums to be considered “compilations” under the copyright statute in the 2nd Circuit. Musicians may again need to consider courts in the 9th Circuit in an effort to gain clarity and to resolve the independent contractor prong in their favor.

Given that the first window for musicians to exercise copyright termination rights only opened in 2013, case law regarding termination-specific disputes is similarly still rare. Many musicians settle these disputes outside of court, making it difficult to understand the legal landscape for these disputes. Indeed, while most of the cases that have gone to court do not deal with sound recordings but rather musical compositions, they may be instructive to musicians considering the court system to resolve termination

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<sup>29</sup> See 17 U.S.C. § 504(c)(1).

<sup>30</sup> LaFrance, *supra* note 28, at 382.

<sup>31</sup> See *Bryant v. Media Right Productions*, 603 F.3d 135, 142 (2nd Cir. 2010).

<sup>32</sup> See *Arista Records LLC v. Lime Group LLC*, 2011 WL 1311771, \*3 (S.D.N.Y. 2011).

disputes in the sound recording context. In 2012, the Southern District Court of California affirmed the right for Victor Willis, a songwriter and lead singer of The Village People, to terminate his copyright assignment to his publishing companies and regain control of his share of that copyright.<sup>33</sup> In this case, the publishing companies tried to argue that Willis was an employee and thus that his musical compositions were works for hire, but they then withdrew that argument.<sup>34</sup> In 2015, the 9th Circuit Court of Appeals confirmed that the Ray Charles Foundation has standing to challenge copyright termination notices filed by Ray Charles' heirs.<sup>35</sup> In 2017, Paul McCartney filed a lawsuit in the Southern District Court of New York against Sony/ATV Music Publishing to exercise his copyright termination rights to his musical compositions, but that case was then settled outside of court.<sup>36</sup>

It is unfortunate that case law specific to the exercise of sound recording copyright termination rights is so rare. Given the expense and potential risk associated with litigating such cases, musicians may consider initiating a class action suit against record labels who ignore or refuse their copyright termination claims. In this way, a bigger group of musicians can bear the risk of litigation costs. This strategy also provides a larger opportunity than individual cases to set a wide-ranging precedent for the music industry moving forward.

### B. Business

As mentioned above, musicians who have reached the window of eligibility to exercise their copyright termination rights may consider renegotiating for better recording agreements with higher royalty rates with their record labels. Assuming the record companies are willing to enter into a negotiation with them instead of refusing or ignoring their claims, this option may be ideal for musicians who would like to stay in a relationship with their record labels and who would like those labels to continue to manage

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<sup>33</sup> *Village People Frontman Wins Court Battle to Reclaim Song Rights*, Rolling Stone, May 8, 2012, available at <https://www.rollingstone.com/music/news/village-people-frontman-wins-court-battle-to-reclaim-song-rights-20120508>, [<https://perma.cc/Z59E-GGHJ>].

<sup>34</sup> *The New York Times*, "A Copyright Victory, 35 Years Later," September 10, 2013: <https://www.nytimes.com/2013/09/11/arts/music/a-copyright-victory-35-years-later.html>, [<https://perma.cc/7XYD-T95M>].

<sup>35</sup> See *Ray Charles Foundation v. Robinson*, 795 F.3d 1109, 1111 (9th Cir. 2015).

<sup>36</sup> See Don Gorder, *A Paul McCartney / Sony-ATV Brief*, BERKLEE C. OF MUSIC MUSIC BUS. J., Aug. 2017, at <http://www.thembj.org/2017/08/a-paul-mccartney-sony-atv-brief/>, [<https://perma.cc/43TW-TJH2>].

and exploit the musicians' sound recordings on their behalf. In order to minimize their risk of lawsuits, record companies may additionally be more willing to negotiate with musicians: "[f]or whatever reason, some suggest the labels are hesitant to risk a losing court fight, and would rather negotiate with artists to settle the rights upcoming for reversion."<sup>37</sup> The record labels can additionally offer some attractive benefits to musicians who are willing to renegotiate: "[w]e can offer a higher royalty rate for the expiring copyright, and we can sweeten the pot by offering to pay a higher royalty rate for albums that have not yet hit the 35-year point, and we can offer a higher royalty rate on records outside the U.S.' And don't forget big advances, too."<sup>38</sup> One major artist for whom this strategy has worked is Prince, who was able to reclaim ownership over his sound recordings after renegotiating his record deal with Warner Bros. Records in 2014.<sup>39</sup>

While renegotiating with record companies on an individual basis may be an ideal solution for individual musicians, one drawback for the artist community as a whole is that this approach encourages record companies to fight, on a case-by-case basis, to retain the copyrights to sound recordings. Additionally, individual negotiations with record companies give those companies more leverage to require musicians to sign Non-Disclosure Agreements (NDAs) in order to keep the results of those negotiations secret.<sup>40</sup> This secrecy will serve to keep the power in the record labels' hands and thwart the copyright statute's attempt to "safeguard authors against unremunerative transfers" and "address the unequal bargaining position of authors."<sup>41</sup> Thus, one-on-one negotiations with record labels, while a potential individual solution, does not seem to be an ideal industry-wide solution.

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<sup>37</sup> Ed Christman, *Reversion Rights: Will 2013 Be A Game-Changer?*, Dec. 27, 2012, <https://www.billboard.com/biz/articles/news/1483926/reversion-rights-will-2013-be-a-game-changer>, [<https://perma.cc/DN9E-9JF5>].

<sup>38</sup> *Id.*

<sup>39</sup> See Ed Christman, *Prince Gets Masters Back, Which Labels Say 'Scares Us Silly,'* BILLBOARD, Apr. 25, 2014, <https://www.billboard.com/biz/articles/news/legal-and-management/6069987/prince-gets-masters-back-which-labels-say-scares-us>, [<https://perma.cc/Q7FX-MYPW>].

<sup>40</sup> See Ed Christman, *Inside the Secretive, Difficult Struggle Between Artists & Labels Over Album Copyrights*, BILLBOARD, Sep. 28, 2017, <https://www.billboard.com/articles/business/7981597/album-copyrights-master-recordings-1976-law>, [<https://perma.cc/GFY7-U6YD>].

<sup>41</sup> Rolling Stone, *supra* note 33.

### C. Policy

Another approach that musicians can take in order to more easily and effectively exercise their copyright termination rights is to seek a policy solution by lobbying Congress to get clearer statutory language in favor of artists. Potential policy remedies could include eliminating the termination window such that once musicians become eligible to exercise copyright termination rights, the window is open indefinitely. This change would allow artists more freedom, flexibility, and an opportunity to exercise these rights outside of a restrictive five-year window.

A more difficult and controversial remedy could be asking Congress to make clear in the copyright statute that musicians cannot be considered employees of record companies under recording agreements, or that sound recordings are categorically and definitively not works for hire. This collective approach, similar to the class action litigation approach, is likely to have a much more favorable impact than individual negotiations with record companies. There are several groups that will resist this policy action by Congress. Of course, the RIAA has already demonstrated its willingness to pressure Congress to act in the record industry's interests, as demonstrated by the 1999 Technical Amendment.<sup>42</sup> The record industry also spends significant amounts of money on PACs and other Congressional contributions.<sup>43</sup> In addition to the record industry, other groups like ASCAP, BMI, and the National Music Publishers' Association (NMPA) are also likely to oppose these types of policy efforts in Congress.

In order to make any meaningful change on the policy front, it is thus imperative for artists to have a coordinated approach in Congress to counter the efforts of the record and publishing industry organizations. The Recording Academy is one organizational candidate that already participates in lots of activity in Congress that could act on musicians' behalf in the policy arena. Indeed, the Recording Artists Coalition, the group responsible for the repeal of the Technical Amendment in 2000, is now a part of The Recording Academy and could be reignited as a powerful force for artists' copyright termination rights.<sup>44</sup> The Recording Academy has also housed a Termina-

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<sup>42</sup> See Eric Boehlert, *Four little words*, SALON.COM, Aug. 28, 2000, [https://www.salon.com/2000/08/28/work\\_for\\_hire/](https://www.salon.com/2000/08/28/work_for_hire/)

<sup>43</sup> See *id.*

<sup>44</sup> See Jay Cooper, *With High Stakes Music Reforms Looming, Is It Time For a Recording Artists Coalition 2.0?*, BILLBOARD, Feb. 7, 2018, available at <https://www.billboard.com/articles/business/8098394/recording-artists-coalition-music-reform-jay-cooper>, [https://perma.cc/QH25-XRBT].

tion Rights Working Group in the past, which could be revived to assist with this lobbying purpose.<sup>45</sup>

In addition to The Recording Academy, technology companies like Spotify, Google, Apple, Amazon, and Pandora may also be supportive partners for artists in lobbying Congress. Not only would lobbying in support of artists for a policy remedy help them strengthen historically tenuous relationships with the artist community, it would also be in these companies' best interests to remove record labels from the equation as much as possible. Record labels charge high content costs for these services to license their content, so if musicians are able to recapture their sound recording copyrights, these technology companies are less likely to be required to pay such premiums for their content. At the same time, because they could pay directly to artists instead of through record labels, artists could stand to capture a bigger portion of royalty rates on these re-captured copyrights without the label first taking its portion.

#### IV. CONCLUSION

While it will likely be a difficult battle, musicians have several options to more effectively exercise their copyright termination rights in the future. While it may be tempting to negotiate with record companies on an individual basis, any coordinated and collective action from a legal or policy approach is likely to have a better impact. Collective action is also likely to come with an additional advantage in media coverage. The media arguably played a crucial role in the repeal of the Technical Amendment in 2000,<sup>46</sup> and the artist community would certainly be a more sympathetic subject than record companies in this dispute. This paper has by no means considered all possible courses of action, and the subject of copyright termination rights is still much more complicated (for example, joint authorship adds another level of complexity to copyright termination rights).<sup>47</sup> Additionally, record labels may still be able to use sound recordings even after musicians have exercised their copyright termination rights under the derivative works

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<sup>45</sup> See Larry Rohther, *Record Industry Braces for Artists' Battles Over Song Rights*, NEW YORK TIMES, Aug. 15, 2011, available at <https://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html>, [https://perma.cc/7D45-U9KG].

<sup>46</sup> See Boehlert, *supra* note 15.

<sup>47</sup> See Bobby Rosenblum, *A Very Welcome Return: Copyright Reversion and Termination of Copyright Assignments in the Music Industry*, 17 Ent. & Sports Law 3, 3–5 (1999).

argument.<sup>48</sup> Ultimately however, musicians are more likely to achieve an optimal solution with a proactive and coordinated strategy to ensure they can exercise their copyright termination rights in a way that works best for them.

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<sup>48</sup> See Aaron Samuel Fischer, *Avoiding Termination: How the Music Industry Should Deal With the Imminent Battle Over Copyright termination Rights*, May 1, 2013, available at [http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1343&context=student\\_scholarship](http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1343&context=student_scholarship), [<https://perma.cc/9W2C-RXAW>].