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Whose Song Is That? Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act

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Whose Song Is That? Searching For Equity and Inspiration For Music Vocalists Under the Copyright Act

Tuneen E. Chisolm[†]

19 YALE J.L. & TECH. 274 (2017)

This article examines some of the inherent inequities that exist for music vocalists under the United States Copyright Act and related music industry practices, due to the limited scope of protection given to sound recordings and the absence of an express inclusion of nondramatic music performance as a protected work under Section 102(a). It argues for expansion of the rights afforded to include, for music vocalists with respect to nondramatic works, an inalienable copyright, separate from the sound recording copyright, based upon a sole right of authorship in their performance as an applied composition, once fixed. It also argues for a restriction of the sound recording copyright to limit derivative works thereof to use of the integrated whole, thereby enabling the vocalist to control the use of an isolated vocal performance and the resulting applied composition embodied therein.

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I. INTRODUCTION

For music-related works, the Copyright Act has worked most favorably toward music composers/songwriters,¹ while working to the disadvantage of music vocalists in a number of significant respects. At the core of this disparity is the limited recognition and treatment of the vocalist's performance; instead of being treated as a copyrightable work that can subsist on its own, the performance is viewed only as a creative contribution to a sound recording.² But, of course, the success of even the best written lyrical song depends upon the music vocalist's performance of it. The talent-specific vocal stylings of certain recording artists have been responsible for astronomically propelling sales and public recognition of songs written and sometimes even previously recorded by other artists with limited or no commercial success.³ That point is readily illustrated by gauging public recognition based upon which song version begins playing mentally when one is presented with this list: "Hound Dog"⁴; "Nothing Compares 2 U"⁵; "Tainted Love"⁶; "Respect"⁷; "Try a Little Tenderness"⁸;

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- ¹ The author acknowledges that the term "composer" may refer to the person who underscores music for a film, and that such persons are treated differently than songwriters who compose music and/or lyrics apart from a film. Nonetheless, for purposes of this article, the term "composer" or "music composer" is used interchangeably with songwriter.
 - ² Lay people, however, routinely misidentify the singer of a song as the source of the song, irrespective of the fact that the song may have been created by a songwriter/composer who is not the music vocalist who performs the song.
 - ³ See, e.g., Fred Bronson, *20 Billboard Hot 100 Hits You Didn't Know Were Covers*, BILLBOARD (June 10, 2016), <https://perma.cc/4SUW-SST9> ("In every case listed [in the article], the remake far exceeded the first release of each title, especially Billboard's most successful Billboard Hot 100 entry of all time"); *Cover Songs More Famous Than Originals: 20 Tunes That Fit The Bill (VIDEOS)*, THE HUFFINGTON POST (April 22, 2013, 08:51 AM), <https://perma.cc/368Y-25PS>; *The Popdose 100: The Greatest Cover Songs of All Time* (Aug. 31, 2011, 12:30 PM), <https://perma.cc/NX29-MZL4>.
 - ⁴ "Hound Dog," largely known as a song performed and first recorded by Elvis Presley in 1956, was written by Don Dearid Robey and Willie Mae Thornton, in or about 1952, and originally recorded by Big Mama Thornton. See Copyright registration RE0000059284 ("Hound Dog")(May 13, 1980)(renewal for Composition registration EU000028724 (Sept. 9, 1952)).
 - ⁵ "Nothing Compares 2 U," largely known as a song performed by Sinéad O'Connor in 1990, prior to Prince's subsequent live recording release in 1993, was written by Prince Rogers Nelson and originally recorded by The Family in 1985. See Copyright registration PA0000261000 ("Nothing Compares 2 U/Prince")(Aug. 27, 1985) (Composition copyright by Controversy Music); Copyright registration SR0000064133 ("The Family")(Aug. 28, 1985)(Family recording copyright by Warner Brothers Records, Inc. as employer for hire); Copyright registration SR0000114910 ("I do not want what I haven't got / [performed by] Sinéad O'Connor")(March 30, 1990)(Sinéad O'Connor album recording copyright by Chrysalis Records, Inc.); Copyright registration SR0000172034 ("The hits/the B-sides / Prince")(Oct. 18, 1998)(Prince recording copyright by Warner Brothers Records, Inc.). The Family's original

and “I Will Always Love You.” For each of these, a cover eclipsed the original recording in popularity and sales.

Yet, non-composer music vocalists typically end up with no copyright from their performance. The Copyright Act is currently construed to recognize only two nondramatic music-related works for protection: the musical composition and the sound recording. The composition copyright in the musical arrangement and lyrics is owned by the songwriter and affiliated publishing company, and—absent an independent artist scenario or extraordinary bargaining power that may only come after an artist has proven substantial commercial worth—the sound recording copyright in the artist’s recorded performance is typically owned by the record label that arranges to fix the performance in a recording. Under the Copyright Act as it now stands, the rights provided for music composers—those who create the score and lyrics of musical works—far outweigh the rights provided for music vocalists, to the extent any rights are provided to vocalists at all due to the limited protections for sound recordings.

Consider, for example, the song “I Will Always Love You.” Ask the average person who sings the song and, undoubtedly, the answer is likely to be: (the late) Whitney Houston. Alternatively, ask anyone bold enough to sing that same song aloud and what you hear is most likely to be an

version was included on an album, but never released as a single; O’Conner’s cover “spent 4 weeks at No. 1” on the Billboard Hot 100. Bronson, *supra* note 3.

- 6 “Tainted Love,” largely known as a song performed by Soft Cell, was written by Ed Cobb and originally recorded by Gloria Jones in 1964. *See* Copyright registration RE000090674 (“Tainted love. w & m Ed Cobb.”)(Dec. 23, 2004)(renewal for Composition registration EU0000718047 (Aug. 30, 1976)); Copyright registration SR0000039670 (“Tainted love / Ed Cobb ; [performed by] Gloria Jones”)(June 6, 2001)(Gloria Jones sound recording copyright by A.V.I Records, Inc. as employer for hire); Copyright registration SR0000031154 (“Tainted love/Where did our love go? / [Performed by] Soft Cell”)(Nov. 27, 1981)(Soft Cell recording by Phonogram Ltd as employer for hire).
- 7 “Respect,” largely known as a song performed by Aretha Franklin in 1967, was written and originally recorded by Otis Redding in 1965. *See* Copyright registration RE0000685032 (“Respect. w & m Otis Redding.”)(Jan. 09, 1995)(renewal for Composition registration EU0000882318)(May 11, 1965); ARETHA FRANKLIN, I NEVER LOVED A MAN THE WAY THAT I LOVE YOU (Atlantic Records 1967). Redding’s original version “peaked at No. 35 [on the Billboard Hot 100] in 1965; Franklin’s 1967 cover reached No. 1. Bronson, *supra* note 3.
- 8 “Try a Little Tenderness,” largely known as one of Otis Redding’s signature songs, was written by Jimmy Campbell, Reg Connelly and Harry M. Woods, and originally performed by Ray Noble Orchestra and Val Rosing. *See* Copyright registration RE0000635362 (“Try a little tenderness. w & m Harry Woods, Jimmy Campbell & Reg. Connelly, arr. Ray Conniff, m editing: Frank Metis”)(Feb. 09, 1993)(renewal for Composition registration EP0000205630 (July 29, 1965)).

attempt at the rendition performed by Houston for her first motion picture film, “The Bodyguard.” Then ask who wrote the song and chances are that, of the percentage of people who realize the composer was someone other than Houston, few will know that “I Will Always Love You” was written and even first performed by renowned country singer-songwriter Dolly Parton. Parton penned the song and originally released it as her own single in 1974.⁹ Billboard—the industry’s leading source for music trends and innovation—reports that Parton’s single “did fairly well, topping the country songs chart” and eventually reached the Hot 100 when Parton re-released the single in 1982, having included the song on the soundtrack of her film “The Best Little Whorehouse in Texas.”¹⁰ Houston’s iconic cover ten years later, however, catapulted the song to everlasting mainstream recognition.¹¹ Billboard reports that Houston’s rendition reached number one on the Billboard Hot 100 and stayed there to top the chart for fourteen weeks in 1992, making the single the longest-running No. 1 single in history at that time.¹² The day after Houston’s death in February 2012, the song, known as her “signature hit,” reentered the Billboard Hot 100 at No. 7, due to an “enormous resurgence in digital sales...and radio airplay.”¹³ Such posthumous sales and airplay is not uncommon.

Radio stations routinely dedicate hours of airplay to songs sung by recently deceased music vocalists, in tribute to

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- ⁹ *Dolly Parton: Whitney, I Will Always Love You*, BILLBOARD (Feb. 11, 2012, 11:10 PM), <https://perma.cc/7WL5-4WWH>.
- ¹⁰ *Id.*; see also Copyright registration SR0000037330 (“The Best little whorehouse in Texas: music from the original motion picture soundtrack.”)(Aug. 12, 1982). Billboard Hot 100 historically ranked singles based upon physical single sales and terrestrial radio airplay; the modernized formula for chart rankings also considers “terrestrial radio airplay, on-demand audio streaming[.] online radio streaming” and, as of March 2013, “official videos on YouTube captured by Nielson’s streaming measurement, including...user-generated clips that utilize authorized audio.” Billboard Staff, *Billboard Charts Add YouTube Views: Data Will Enhance Rankings to reflect Online Video Activity*, BILLBOARD (March 2, 2013) 2013 WLNR 5533326.
- ¹¹ See *id.* (reporting that “I Will Always Love You” earned Houston both a Record of the Year Grammy and a Best Pop Vocal Performance Grammy in 1994, and the song “remains her most beloved performance.”); see also Howard Chua-Eoan, *The Voice: Whitney Houston (1963-2012)*, TIME (Feb. 11, 2012), <https://perma.cc/T3HZ-S8WB> (Houston’s “foray into the movie industry in ‘The Bodyguard’ (1992)... produced...a version of ‘I Will Always Love You’ on the cosmos that will reverberate until its sound waves make contact with extraterrestrial intelligence.”).
- ¹² Billboard staff, *Whitney Houston’s 20 Biggest Billboard Hits: A Look at Her Legendary Chart Career*, BILLBOARD (Feb. 11, 2014, 8:36 AM), <https://perma.cc/BZ5X-6NGB>.
- ¹³ Gary Trust, *Whitney Houston Returns to Hot 100’s Top 10 with “I Will Always Love You,”* BILLBOARD (Feb. 15, 2012), <https://perma.cc/A4GS-XF6R>.

the vocalist's "legacy" or "body of work." Such was the case when Elvis Presley passed away in August of 1977, and it continues to be so, as illustrated by the back-to-back airplay of songs by Prince Rogers Nelson upon the news of his passing in April of 2016. Elvis and Prince were both internationally renowned recording artists; however, Elvis sang songs written by others, while Prince wrote most of the songs he performed and also wrote for other vocalists. Such a distinction significantly impacts the magnitude of the passive income streams available to music vocalists in either position. Although Elvis was able to acquire a shared copyright interest in songs he sang but did not write,¹⁴ thereby accessing royalties reserved for composers, that scenario is more the exception than it is the rule.

The vocalist is seen as the song's source because it is the vocalist's embodiment of the song with which the public identifies. Dancers cannot dance to sheet music. Concert goers won't respond to a lead sheet. Certainly, no musical composition can come alive until a musician plays it and no lyrical composition can truly come alive until a music vocalist sings it. The vocalist serves that function, but often also makes a creative contribution by interpreting the song to deliver a unique performance that could even qualify as a new arrangement of the composition.

The talent-specific vocal stylings of Houston resulted in an original creative contribution responsible for propelling Parton's composition beyond the field of country music recognition to international acclaim.¹⁵ Houston's version reportedly earned Parton millions of dollars, far surpassing what Parton's own version had earned her. While the "enormous resurgence" in digital sales and radio airplay following Houston's death was a symbolic tribute to her artistry, it is quite possible that Parton and Houston's record label benefitted more financially from the resurgence than did

¹⁴ According to one composer who wrote for Elvis, writers would "write for him, show the songs to Hill and Range and demo the songs they chose." Elvis' manager had struck a deal making Hill and Range Elvis' exclusive publisher, such that, if a composer wanted a song recorded by Elvis, he or she had to go through that publisher and agree to assign a one-third share of royalties and writing credit to Elvis for any songs by the writer that Elvis recorded. Many composers, although not all, including "a shocking group of successful New York writers," signed such a blanket agreement to have their songs recorded by Elvis. Paul Evans, *Elvis! That's The Way It Was*, PAULEVANS.COM, <https://perma.cc/LA66-783T> (last visited April 5, 2017).

¹⁵ See, e.g., Hashim Khalid, *RIP Whitney Houston – II*, Letters to the Editor, DAILY TIMES (Pakistan), Feb. 14, 2012, 2012 WLNR 19491333 ("When I heard 'I Will Always Love You' by Whitney Houston years ago, it sent shivers down my spine because her voice was hauntingly beautiful and it just touched your soul....Her fans all over the world are in mourning.").

Houston's estate. As the composer, Parton owns the copyright in the original music and lyrics;¹⁶ consequently, Parton got paid for every unit of sales and radio play. As for Houston's performance that was fixed in the sound recording for her single—available as physical and digital singles and on no less than six albums¹⁷—Houston's record label owns that copyright and thus was paid for each unit of sale and digital performance.

The availability of passive income streams from the sale or licensing of copyrights is a prime economic incentive for the creation of artistic works. But under the Copyright Act and typical music industry contractual arrangements, music royalties are primarily routed to composers, publishing companies, and record labels, with mere cents on each dollar of certain sound recording copyright revenues going to the non-composer music vocalist who made the song popular and fueled sales. Due to the lack of passive income, it is not unheard of for music vocalists with millions of records sold to live a financially strapped existence,¹⁸ and even die in poverty, after they are unable to maintain a career of touring. As currently written and applied, the Copyright Act effectively affords no rights to music vocalists, particularly those who perform songs written by someone else.

This article examines the inequities that result for music vocalists and argues for expansion of the rights afforded under the Copyright Act to include, for music vocalists, an inalienable, sole right of authorship in their performance as an

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- ¹⁶ See Recorded Document V1774P268 (Assignment between Owepar Publishing Company and Velvet Apple Music for musical compositions including “I will always love you / By Dolly Parton”)(Mar. 11, 1980)(referencing Composition registration EP314105 (Jul. 9, 1973)(for “I Will Always Love You”). Parton and her uncle, Bill Owens, started Owe-Par Publishing Company. See *Dolly Parton and Uncle Bill Owens start Owe-Par Publishing Company*, DOLLYPARTON.COM, <https://perma.cc/72F4-ZQB7> (last visited April 18, 2017). Velvet Apple Music is Parton's company, through which “she has long owned the copyrights and publishing for her own songs”). Rebecca Sun, *Dolly Parton Signs With APA*, HOLLYWOOD REPORTER (Feb. 3, 2014, 6:00 AM), <https://perma.cc/PC2Q-PQ5E>.
- ¹⁷ Original single included on WHITNEY HOUSTON & VARIOUS ARTISTS, THE BODYGUARD: ORIGINAL SOUNDTRACK ALBUM (Arista Records 1992), and on the following compilation albums: WHITNEY HOUSTON, I WILL ALWAYS LOVE YOU: THE BEST OF WHITNEY HOUSTON (RCA 2012); WHITNEY HOUSTON, THE ULTIMATE COLLECTION (Sony Music/Arista Records 2007); WHITNEY HOUSTON, LOVE, WHITNEY (Arista Records 2001); WHITNEY HOUSTON, WHITNEY: THE GREATEST HITS (Arista Records 2000). Live recording included on WHITNEY HOUSTON, WHITNEY HOUSTON LIVE: HER GREATEST PERFORMANCES (Sony Music Entertainment 2014).
- ¹⁸ See, e.g., *In re Watkins*, 210 B.R. 394, 399 (Bankr. N.D. Ga. 1997) (finding that the three members of multi-platinum recording artist group TLC were “experiencing bona fide financial distress and creditor pressure that warranted Chapter 11 relief”).

“applied composition,” separate from the sound recording copyright, once fixed. The argument focuses on vocalists with respect to nondramatic musical works only,¹⁹ although it may also be applicable to musicians in some respects. Part II provides a foundation for understanding the pertinent rights under the Copyright Act of 1976, with respect to music compositions and sound recordings, and the concepts of authorship and fixation. Part III identifies the protection gap based upon the historical disregard of musical performance, the prejudicial impact of the fixation requirement, and the effect of limited protections for transformational covers and sound recordings. It also examines the authorship of music vocalists, giving consideration to the psychological attributes of music. Part IV discusses the inequities that befall music vocalists as a result of the limitations of the Copyright Act and the attendant industry contract practices, focusing on the implications of artist bargaining power and critical recording contract terms, as well as on the sources of passive income for recording artists versus songwriters. Part V explains why the protection gap and associated inequities must be addressed through modification of the Copyright Act. Finally, Part VI proposes statutory amendments to address the issues identified, and the article concludes by explaining why the proposed amendments are consistent with the purpose of copyright law and equitable with respect to sound recording copyright owners and songwriters.

II. OVERVIEW OF THE CURRENT SCHEME OF PROTECTION FOR NONDRAMATIC MUSIC-RELATED WORKS UNDER THE COPYRIGHT ACT

A. *Fundamental Purpose Behind Copyright*

The Constitution authorizes a legislatively sanctioned, time-limited monopoly, in the form of a bundle of exclusive rights, to certain creative and inventive individuals “to promote the Progress of Science and useful Arts,”²⁰ or, as articulated under the utilitarian/economic incentive theory for copyright, to ensure that creators are sufficiently incentivized to engage in creative activities.²¹ Essentially, the grant of exclusive

¹⁹ Copyright protection extends to dramatic musical works as well, such as music performed in connection with theater plays and opera. 17 U.S.C. § 106 (2012).

²⁰ U.S. CONST. art. I, § 8. cl. 8.

²¹ This function of intellectual property extends to the right of publicity and it includes incentivizing individuals “to invest effort and resources in the development and stylization of personal attributes and innovations, and to pursue activities and accomplishments of public and popular interest,” with

rights for a set period of time allows the creator to reap the benefits of exploiting the creation in exchange for sharing the creation with the community at large and hopefully inspiring others to create. For the most part, the reward is financial. The exploitation of protected creations generates income for the creator and, optimally, it generates passive income which then frees the creator up to do other things, like create more. The more creators create, the more works there are to be shared for the creative inspiration of some and the social benefit and enjoyment of all. The cycle of creation, enjoyment, inspiration, and financial reward is key.

B. Originality and Fixation Requirements

The Copyright Act of 1976 extends copyright protection to “original works of authorship fixed in any tangible medium of expression” in eight categories enumerated in Section 102(a), including “musical works, [with] any accompanying words,” “sound recordings,” “dramatic works, including any accompanying music,” choreographic works, pantomimes, audiovisual works, and motion pictures,²² which subset is collectively referred to as works of performing arts.²³ The Act does not define the term “musical works,” as Congress determined that definitions for musical works, among others, were unnecessary because these terms “have fairly settled meanings.”²⁴ The term has rather consistently been construed as the musical composition consisting of music score and lyrics.²⁵ “Sound recordings” are defined as “works that result

the aim of obtaining both nonmaterial and commercial rewards. Lateef Mtima, *What’s Mine Is Mine But What’s Yours Is Ours: IP Imperialism, The Right Of Publicity, And Intellectual Property Social Justice In The Digital Information Age*, 15 SMU SCI. & TECH. L. REV. 323, 350 & n.84 (2012)(citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977)(“[T]he State’s interest in permitting a ‘right of publicity’ is in protecting the proprietary interest of the individual in his act in part to encourage such entertainment.... [T]he State’s interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors.”)).

²² 17 U.S.C. § 102(a) (2012) (enumerating the subject matter of copyright, in general).

²³ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 801.2 (3d ed. 2014) (hereinafter Copyright Compendium).

²⁴ H.R. REP. NO. 941476, at 53 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5666-67; S. REP. NO. 94-473, at 52 (1975). See also 17 U.S.C. §101 (2012) (definitions).

²⁵ See, e.g., *Newton v. Diamond*, 388 F.3d 1189, 1194 (9th Cir. 2004) (referring to the musical composition as the “basis of Newton’s infringement action,” and holding that “Newton’s copyright extends only to the elements that he fixed in a tangible medium—those that he wrote on the score.”) (emphasis added); Copyright Compendium, *supra* note 23, at § 802.1 (“For purposes of copyright registration, musical works (which are also known as musical

from the fixation of a series of musical, spoken, or other sounds, [excluding] 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.²⁶

The threshold for what qualifies as an “original work of authorship” is quite low; the work need only be created independently and have a “modicum of creativity,” and, significantly, there is no judgment of artistic merit.²⁷ The copyright only attaches once a categorized work is fixed.²⁸ In fact, a work is not “created” for purposes of the Copyright Act, until it is “fixed in a copy or phonorecord for the first time,” and that fixation must be permanent or stable enough to allow it “to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”²⁹ The fixation requirement is necessary to limit exclusivity protections to actual expressions, since copyright protection does not extend to ideas.

A musical composition may be fixed in the form of either a notated copy, such as a lead sheet or sheet music, or non-audio digital files (including text files), or, as of 1978, a phonorecord. The composition may be registered as a work of the performing arts, using either a notated copy or a phonorecord for the deposit copy.³⁰ Alternatively, if the copyright ownership of the composition and sound recording is exactly the same, the composition may be registered with the sound recording, using a phonorecord for the deposit copy.³¹ Improvised works can be registered, so long as they are “fixed in tangible form, such as in a transcribed copy, a phonorecord, or an audiovisual recording.”³² That registration “will extend

compositions) are original works of authorship, consisting of music and any accompanying words.”).

²⁶ 17 U.S.C. §101 (2012) (definitions).

²⁷ *Feist Publications v. Rural Telephone Serv.*, 499 U.S. 340, 346 (1991)(citing *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879)); *see also* *L. Batlin & Sons, Inc. v. Snyder*, 536 F.2d 486, 490 (2d Cir 1976) (distinguishing the originality requirement for copyright from the novelty requirement for patents: “there must be independent creation, but it need not be invention in the sense of striking uniqueness, ingenious, or novelty...”); K.J. Greene, *Copyright, Culture & Black Music: A Legacy Of Unequal Protection*, 21 *Hastings Comm/Ent L.J.* 339, 352-353 (1999)(detailing the historical, decreasing degree of judicial judgment regarding what satisfies minimal creativity).

²⁸ 17 U.S.C. § 102(a) (2012).

²⁹ 17 U.S.C. §101 (2012) (defining, *inter alia*, when a work is “created” and when it is “fixed” in a tangible medium of expression).

³⁰ UNITED STATES COPYRIGHT CIRCULAR, CIRCULAR 56A: COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS, 2 (Reviewed Feb. 2012) (hereinafter “Circular 56A”).

³¹ *Id.*

³² Copyright Compendium, *supra* note 23, at §802.4.

only to the material that has been submitted.”³³ All *sounds* must be fixed in a phonorecord.

Once the work is fixed in a tangible way, the author of the work then obtains, for a set time period, a bundle of exclusive rights under Section 106 of the Act, which the owner may exercise or authorize others to exercise.

C. Copyright in Music Compositions and the Impact of Compulsory Licenses

For music compositions, the bundle of exclusive rights granted under Section 106 includes the rights to: (i) reproduce the work by copies (i.e. sheet music) or phonorecords (which term includes all manner of recording)³⁴; (ii) prepare derivative works based upon the work (including new music arrangements and sound recordings)³⁵; (iii) distribute copies or phonorecords to the public by sale or other transfer of ownership, or by rental, lease, or lending; (iv) perform the work publicly (whether live or by the playing or broadcast of recorded or live performances); and (v) display the work publicly.³⁶

1. Compulsory Licensing and Covers

One caveat to exclusivity is that the rights to make and to distribute phonorecords of nondramatic musical works are subject to compulsory mechanical licensing under a statutory provision which applies, under the current version of the Act, once a recorded performance of a music composition has been “distributed to the public in the United States under the authority of the copyright owner.”³⁷

By complying with the statutory notice provisions and paying the statutorily set royalties to the copyright owner controlling the music composition, any other person may lawfully make and distribute copies/phonorecords of the work if that person’s primary objective is distribution to the public for private use.³⁸ Plainly stated, the compulsory license provision

³³ *Id.*

³⁴ 17 U.S.C. § 101 (2012) defines the term as follows: “Phonorecords’ are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term ‘phonorecords’ includes the material object in which the sounds are first fixed.”

³⁵ 17 U.S.C. § 101 (2012) (“derivative work” definition).

³⁶ 17 U.S.C. § 106 (2012).

³⁷ 17 U.S.C. § 115(a)(1) (2012).

³⁸ *Id.*

allows recording artists and their labels to bypass direct negotiation with the composer, whose permission is not required so long as the statutory conditions and restrictions for the cover are satisfied.³⁹

“A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved,” so long as the arrangement does not “change the basic melody or fundamental character of the work.”⁴⁰ This license to conform the original arrangement to another style or interpretation is what allows a song originating in one genre of music to be transformed to other genres.

2. The Limited Protections for Transformational Covers

Ordinarily, a different arrangement of a musical composition would qualify as a derivative work worthy of its own copyright protection, with respect to the original, creative additions to the underlying composition, so long as the original aspects of the arrangement were more than trivial.⁴¹ Section 115(a)(2) expressly provides, however, that the resulting arrangement reflected in a cover is *not* protected as a derivative work without the express consent of the copyright owner.⁴² This limitation is said to preserve the composer’s exclusive right to make derivative works of a copyrighted composition by adaptation.

³⁹ In practice, most artists desiring to make a cover will obtain a license from the composer through the composer’s chosen third party clearing house, such as the Harry Fox Agency (“HFA”). HFA was established in 1927 by the National Music Publishers’ Association “to act an information source, clearing house and monitoring service for licensing musical copyrights,” and it “licenses the largest percentage of mechanical and digital uses of music in the United States.” *About HFA*, HARRYFOX.COM, <https://perma.cc/XKP6-9FRR>. For example, in 2008, the Copyright Office received only 274 Notice of Intent under Section 115, as compared to more than 2.44 million mechanical licenses issued through HFA. See Howard B. Abrams, *Copyright’s First Compulsory License*, 26 SANTA CLARA HIGH TECH. L.J. 215, 238 (2009). However, it is likely convenience and the availability of a compulsory license under the statute which drives the success of the HFA mechanical license arrangement.

⁴⁰ 17 U.S.C. § 115(a)(2) (2012).

⁴¹ L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976) (*en banc*) (“there must be at least some substantial variation [from the underlying work], not merely a trivial variation”).

⁴² 17 U.S.C. § 115(a)(2) (2012).

D. Copyright in Sound Recordings and its Limitations

The copyright for sound recordings is intentionally limited.⁴³ The bundle of exclusive rights granted under Section 106 for sound recordings includes the first three rights afforded music compositions—i.e. the rights to copy, adapt, and distribute copies/phonorecords of the master recording; but it excludes the general rights to publicly perform and display, and it adds the right to perform the copyrighted work publicly by means of a digital audio transmission.⁴⁴

Effective in 1972, copyright protection for sound recordings under federal law came in 1971,⁴⁵ some one-hundred or so years after musical compositions first got protection, and only after protracted lobbying and negotiations by the record industry for Congress to address concerns about record piracy.⁴⁶ The bundle of exclusive rights for sound recordings was initially limited to the exclusive right to distribute and reproduce the sound recording; it did not include performance rights of any kind, even though, since 1909, the Copyright Act has required payment of a mechanical royalty to composition copyright owners each time that a sound recording encompassing the composition is played on the radio.⁴⁷ In the wake of technological advances in music transmission, Congress enacted the Digital Performance Right in Sound Recordings Act in 1995, which created a limited performance right related to the digital transmission of sound recordings.⁴⁸ Congress later enacted the Digital Millennium Copyright Act of 1998, which, in part, expanded the limited performance right for sound recordings such that all digital broadcasters, including non-subscription internet radio broadcasters, must

⁴³ See H.R. REP. NO. 92-487, at 1 (1971), 1971 U.S.C.C.A.N. 1566 (recommending the passage of the amendment to create “a limited copyright in sound recordings [primarily] for the purpose of protecting against unauthorized duplication and piracy of sound recordings”).

⁴⁴ 17 U.S.C. §§ 106 & 114(a) (2012).

⁴⁵ The 1971 Sound Recording Amendment to the Copyright Act granted protection to sound recordings fixed on or after February 15, 1972. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (codified at 17 U.S.C. §§ 1(f), 5(n), 19, 20, 26 & 101(e) (1976) (repealed 1976; repeal effective Jan. 1, 1978)). For equivalent provisions, see 17 U.S.C. §§ 102(a)(7), 106, 114 & 115 (2012).

⁴⁶ See H.R. REP. NO. 92-487, at 2 (1971), 1971 U.S.C.C.A.N. at 1567 (estimating losses due to piracy at \$100 million in 1971 dollars). Prior to the 1971 Amendment, sound recording rights were governed by state law.

⁴⁷ Copyright Act of 1909, ch. 320, 35 Stat. 1075, 1075-1076, *repealed* by Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (current version at 17 U.S.C. § 115 (2010)).

⁴⁸ Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 2, 109 Stat. 336 (1995) (codified at 17 U.S.C. § 106(6) (2012)).

pay royalties to sound recording copyright holders.⁴⁹ Still, exclusion of a general right of public performance from the sound recording exclusive rights bundle means that once the first record of a recording has been sold, the sound recording copyright owner cannot prevent terrestrial broadcasters from playing the recording and that owner has no statutory right to compensation for traditional radio broadcast.⁵⁰

Proponents of failed legislative proposals to require terrestrial broadcasters to pay royalties to sound recording copyright holders characterized the proposed legislation—the Performance Rights Acts of 2007 and 2009—as an attempt to put recording artists on equal footing with composers with respect to copyright law.⁵¹ However, such legislation would not have directly impacted recording artists, because nothing in the proposed legislation addressed redefinition of ownership rights in the sound recordings to specifically ensure recording artists as sound recording copyright owners.

Moreover, the sound recording copyright attaches to the musical performance only as it is embodied in the actual registered sound recording; it does not attach to the performance more generally. Unlike the composition copyright, which controls any use of the music and lyrics, the exclusive right to copy the sound recording pertains only to recapture of the “actual sounds fixed in the recording.”⁵² The exclusive right to prepare a derivative work—i.e. a new work based upon the sound recording—is limited to works which include an actual part or parts of the sound recording,⁵³ such as samples or remixes or mashups. More specifically, for a sound recording, the exclusive rights to copy and to make a derivative work do not prohibit the “making or duplication” of other sound recordings intended to imitate the copyrighted sound recording by interpolation or other independent fixation of sounds in another recording.⁵⁴

E. Authorship under the Copyright Act

Copyright vests initially in the actual author(s) of an original work,⁵⁵ except for works-for-hire, as to which the

⁴⁹ Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, §§ 402, 405, 112 Stat. 2860, 2888, 2890-2902 (1998).

⁵⁰ RCA Mfg. Co. v. Whiteman, 114 F.2d 86, 88-89 (2d Cir. 1940).

⁵¹ Performance Rights Act of 2007, H.R. 4789, 110th Cong. (2007); Performance Rights Act of 2009, H.R. 848, 111th Cong. (2009).

⁵² 17 U.S.C. § 114(b) (2012).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 17 U.S.C. § 201(a) (2012). *See also* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976) (originality is a “constitutional requirement [which] must be read into the Copyright Act”).

employer or person for whom the work was made is deemed the author entitled to copyright ownership, absent a signed, express written agreement to the contrary.⁵⁶ Works-for-hire can be either works prepared by an employee within the scope of employment or works “specially ordered or commissioned” for certain uses specified under the Copyright Act.⁵⁷ Sound recordings are *not* among the specifically enumerated types of works eligible for work-for-hire status as a “specially ordered or commissioned work.”⁵⁸

Beyond the express provision that the employer or person for whom a work was made is deemed the author for purposes of the Copyright Act, the statute offers no definition of the term “author” and otherwise provides no express guidance for who is an author and who is not.⁵⁹ With regard to sound recordings, the omission of a statutory specification of the author was particularly intentional. In connection with the 1971 Amendment giving sound recordings federal copyright protection, Congress recognized that:

The copyrightable elements in a sound recording will usually, though not always, involve ‘authorship’ both on the part of the performers whose performance is captured and on the part of 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. There may be cases where the record producer’s contribution is so minimal that the performance is the only copyrightable element in the work...⁶⁰

Notably, Congress did not foresee any circumstance in which sound recordings of a musical performance would *not* give rise to a copyrightable contribution by the performing musician or music vocalist.⁶¹ However, as set forth in the House Report No. 92-487, the referenced “record producer” role actually extends beyond the role of the creative record producer to include functions performed by a sound engineer in capturing the

⁵⁶ 17 U.S.C. § 201(b) (2012).

⁵⁷ See 17 U.S.C. § 101 (2012) (“work made for hire” definition); *Community for Creative Non-violence v. Reid*, 490 U.S. 730, 739 (1989).

⁵⁸ *Id.* (“work made for hire” definition, subpart (2)).

⁵⁹ See generally 17 U.S.C. § 101 (2012) (devoid of any definition for author).

⁶⁰ H.R. REP. NO. 92-487, at 5 (1971), 1971 U.S.C.C.A.N. at 1570.

⁶¹ *Id.* (“and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer’s contribution is copyrightable”).

sounds,⁶² and to the performer's record label that may be responsible for scheduling and advancing payment for the recording session. The breadth of congressionally contemplated possibilities for sound recording authorship left the door open to development of the industry-wide practice of record labels claiming authorship. Congress, in 1971, simply left the matter to be resolved by contract bargaining between the parties and judicial interpretation of the performer's employment status.⁶³ Or so it thought.

The ambiguity surrounding authorship of sound recordings increased exponentially, after lobbying by the Recording Industry Association of America ("RIAA") led to a so-called "technical amendment" as part of the Intellectual Property and Communications Omnibus Reform Act of 1999. The amendment purported to clarify existing law by adding sound recordings to the enumerated list of specially ordered or commissioned works eligible for work-for-hire status under Section 101. Swift opposition to the amendment led to extensive hearings, which ultimately resulted in repeal of the amendment and an addition to the statutory definition of a work-for-hire.⁶⁴ The statutory definition now explicitly directs that courts and the Copyright Office shall not consider or otherwise give any legal significance to the amendment or its deletion, nor shall they interpret the amendment or its deletion to indicate "congressional approval or disapproval of, or acquiescence in, any judicial determination."⁶⁵

Composers are the actual authors of music compositions, and publishing companies get their copyright ownership by assignment from the composers. Record labels typically get their copyright ownership for sound recordings by assignment and/or by assertion of work-for-hire, confirming the

⁶² While the mechanical wonders of Auto-Tunes might justify acknowledging creative contribution of sound engineers, authorship outside of the work for hire context should not be bestowed upon persons who merely serve a technical or administrative function.

⁶³ *Id.* ("the [amendment] does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved").

⁶⁴ Mark H. Jaffe, *Defusing the Time Bomb Once Again—Determining Authorship in a Sound Recording*, 53 J. COPYRIGHT SOC'Y U.S.A. 139, 154-160 (2006) (discussing the "Millennial Flip-Flop" resulting from the RIAA's lobbying efforts and the extensive hearings before the House Judiciary Committee that resulted in the current ambiguity of the work-for-hire status of sound recordings).

⁶⁵ 17 U.S.C. § 101 (2012) ("work made for hire" definition further directing that "Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made for Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted..., were never enacted, and without regard to any inaction or awareness by Congress at any time of any judicial determinations.").

premise that the vocalists are or would otherwise be the authors of their performance. What is missing from the copyright scheme for music is adequate protection of the vocalist's creative performance and rights that generate significant passive income.

III. THE INEQUITABLE PROTECTION GAP

Because it generally is viewed as merely a contribution to a sound recording, the vocalist's performance falls into a gap in the protections extended for music-related nondramatic works. Entrenched in United States copyright law and prevailing music industry practices is the notion that the only two copyrights at issue for nondramatic music are those for music compositions and sound recordings.⁶⁶ Arrangements created for different modes of musical expression or instruments that meet the originality threshold are viewed as derivative works of the composition falling within the broader category of compositions.⁶⁷ There is no recognition of a music vocalist's performance as a copyrightable work, standing alone. In fact, the Copyright Office expressly states that it will not accept claims for registration of an individual performance that is part of an integrated sound recording.⁶⁸ This view is not inconsistent with the discounted treatment that musical performance historically received by musicologists up until the mid-1980s or so.⁶⁹ However, it is an inequitable view whose time for change has come.

A. *Era of Error—Historical Disregard of Musical Performance*

“For generations musicologists have behaved as if scores were the only real thing about music.”⁷⁰ In his book *Beyond the*

⁶⁶ See Circular 56A, *supra* note 30, at 1 (explaining “the difference, for copyright purposes, between musical compositions and sound recordings”)(emphasis removed).

⁶⁷ See Jamie Lund, *Fixing Music Copyright*, 79 BROOK. L. REV. 61, 66 n.27 (2013) (acknowledging that in addition to the two separate and distinct copyrights in the musical composition and the sound recording of a musical composition, there is possibly a third copyright in the derivative work arrangement of the composition).

⁶⁸ Copyright Compendium, *supra* note 23, at §803.3A.

⁶⁹ NICHOLAS COOK, *BEYOND THE SCORE: MUSIC AS PERFORMANCE 2 & passim* (Oxford Univ. Press 2014) (writing on a recent, but now widely shared belief that “the study of music has from the beginning been skewed, and its relevance to most people outside academia diminished, by its orientation towards music as writing”).

⁷⁰ *Id.* at 8 (quoting Nicholas Kenyon, *Performance Today*, in *THE CAMBRIDGE HISTORY OF MUSICAL PERFORMANCE* (Colin Lawson and Robert Stowell, eds Cambridge University Press 2012)).

Score, musicologist, author, and professor of music Nicholas Cook discusses, with various illustrations, how “[t]he disconnect between the discourses around music and its performance has a long history[, with] assumptions about the nature of music that marginalize performance go[ing] back at least as far as the early middle ages.”⁷¹ Performers were viewed as having either a duty to the composer, or a duty to the musical work itself, such that the role of the performer was simply to reproduce in auditory fashion what appeared on the music score;⁷² and to the extent the performer rendered any interpretation, such was limited to the “clarification of existing content rather than the generation of new insights.”⁷³

This myopic musical ontology, or definition of the nature of music, is reflected in the “legal concept of the musical work, which...developed in parallel—though not always in step—with the aesthetic concept.”⁷⁴ The Copyright Office, for example, defines music as “a succession of pitches or rhythms, or both, usually in some definite pattern,”⁷⁵ and the “main elements of copyrightable musical work authorship include melody, rhythm, harmony, and lyrics, if any,”⁷⁶ where: melody is defined as a “linear succession of pitches”; rhythm is defined as the “linear succession of durational sounds and silences”; harmony is defined as “the vertical and horizontal combination of pitches resulting in chords and chord progressions”; and lyrics are defined as “a set of words, sometimes grouped into verses and/or choruses, that are intended to be accompanied by music,” including “conventional words and nonsyntactical words or syllables, whether sung or spoken.”⁷⁷ This, again, relates to what may be reflected in sheet music and omits sufficient consideration, if any, of musical performance. Cook sums up his position on the matter as follows:

In a nutshell, musicology was set up around the idea of music as writing rather than music as performance. To think of music as writing is to see its meaning as inscribed within the score,

⁷¹ *Id.* at 10.

⁷² *Id.*, at 12-32 (discussing the approaches to examining Western art music taken by various music theorists and musicologists).

⁷³ *Id.* at 14.

⁷⁴ *Id.* at 14; see also Robert Brauneis, *Musical Work Copyright for the Era of Digital Sound Technology: Looking Beyond Composition and Performance*, 17 TUL. J. TECH. & INTELL. PROP. 1, 2 (2014) (“For over 150 years, copyright law in the United States reflected and reinforced the model of music as a two-stage art of composition and performance”; “[c]opyright law protected musical compositions embodied in scores [, but] did not protect performances.”).

⁷⁵ Copyright Compendium, *supra* note 23, at § 802.1.

⁷⁶ *Id.* at § 802.3.

⁷⁷ *Id.* at §§ 802.3(A)-(D).

and accordingly to see performance as the reproduction of this meaning. That turns performance into a kind of supplement to the music itself, an optional extra,....[which] is not a satisfactory way of thinking of a performing art like music. The experience of live or recorded music is a primary form of music's existence, not just the reflection of a notated text. And performers make an indispensable contribution to the culture of creative practice that is music....[I]n order to think of music *as performance*[,] we need to think differently about what sort of an object music is, and indeed how far it is appropriate to think of it as an object at all.⁷⁸

It bears repeating: "The experience of live or recorded music is a primary form of music's existence, not just the reflection of a notated text. And performers make an indispensable contribution..."⁷⁹ The music experience is more than the biomechanics of hearing sounds,⁸⁰ and the performer, musician or vocalist, is responsible for delivering sounds that listeners process to result in the complete experience.

B. "Nondramatic Music" and Its Psychological Attributes

Something about music and, particularly a talented vocalist's performance, causes the listener to respond on a psychological level. That likely explains why different versions of the same song can trigger different reactions, depending upon the listener. As psychologist, educator, and prolific author, Carl Seashore, put it: "Music is essentially a play upon feeling with feeling. It is appreciated only insofar as it arouses feeling and can be expressed only by active feeling."⁸¹ While an exploration of the psychology of music is beyond the scope of this article, a brief introduction to some of the basic principles helps to set the stage for understanding and appreciating the importance of music performance and the vocalist's contribution as an author.

⁷⁸ COOK, *supra* note 69, at 1.

⁷⁹ *Id.*

⁸⁰ See CARL E. SEASHORE, PSYCHOLOGY OF MUSIC 14 (Dover Publications, Inc. 1967) (describing the biomechanics of how sound is transmitted from sound waves, vibrations, and finally nerve impulses that the brain receives to "give rise to the tone that is heard).

⁸¹ *Id.* at 9.

The psychology of music concerns the “description and explanation of the operations of the musical mind, the music as a thing in itself, and the musical activities of the listener.”⁸² It seeks to explain “how and why we experience emotional reactions to music, and how and why we experience music as expressive of emotion.”⁸³ Some scholars believe there is a one-to-one correspondence between emotions and certain musical structures.⁸⁴ While others challenge that notion, there is a growing body of experimental work that demonstrates specific relationships between music—and more specifically, certain performance and composition features—and emotional expression.⁸⁵

The four components of a musical note are pitch, loudness, duration, and timbre, where duration is simply the length of time a note lasts.⁸⁶ The psychological attributes of sound are pitch, loudness, time, and timbre, which depend upon the physical characteristics of the sound wave produced, namely the frequency, amplitude or intensity, duration, and form.⁸⁷ Pitch refers to the actual frequency of the sound, that is, physically, the number of vibrations per second or musically, the particular musical note; while timbre refers to the actual description of the quality of any tone, which allows us to distinguish, for example, the sound of a guitar from a piano, or one voice from another, even if all are generating the same pitch.⁸⁸

“Every melody is made up of a string of notes of different pitches.”⁸⁹ Rhythm, harmony, volume, and tone quality are compounds of pitch, loudness, time and timbre.⁹⁰ “As a fundamental proposition...the artistic expression of feeling in music consists in esthetic deviation from the regular—from pure tone, even dynamics, metronomic time,

⁸² *Id.* at 13.

⁸³ GUERINO MAZZOLA, *MUSICAL PERFORMANCE, COMPUTATIONAL MUSIC SCIENCE, A COMPREHENSIVE APPROACH: THEORY, ANALYTICAL TOOLS, AND CASE STUDIES* 97 (Springer-Verlag Berlin Heidelberg 2011) (quoting JOHN A. SLOBODA AND PATRICK N. JUSLIN, *MUSIC AND EMOTION (AFFECTIVE SCIENCE)* 71 (Oxford Univ. Press 2001)).

⁸⁴ *Id.* at 110-113 (discussing philosopher Susan Langer’s “crucial statement” about the music as a “tonal analogue” to and “dynamic form” representation of emotional life; and evaluating Swedish psychologist Alf Gabrielsson’s isomorphism theory).

⁸⁵ *Id.* at 100-110 (discussing some of the physiological evidence of emotion-related responses to music gathered in various experiments).

⁸⁶ JOHN POWELL, *HOW MUSIC WORKS: THE SCIENCE AND PSYCHOLOGY OF BEAUTIFUL SOUNDS, FROM BEETHOVEN TO THE BEATLES AND BEYOND* 6 (2010)

⁸⁷ SEASHORE, *supra* note 80, at 2; *see also* MAZZOLA, *supra* note 83, at 108.

⁸⁸ *See* SEASHORE, *supra* note 80, at 19-21.

⁸⁹ POWELL, *supra* note 86, at 7.

⁹⁰ SEASHORE, *supra* note 80, at 29.

rigid rhythms, etc.”⁹¹ For example, “[a] good vibrato is a pulsation of pitch, usually accompanied with synchronous pulsations of loudness and timbre, of such extent and rate as to give a pleasing flexibility, tenderness, and richness to the tone.”⁹²

The emotional responses triggered by these “deviations from the regular” may be either physically induced or learned behavior.⁹³ Volume increases, for example, tend to trigger excitement, prompting an increase in heart rate and adrenaline levels, “because our subconscious links an increase in sound volume...with possible danger.”⁹⁴ Decreases in volume, tempo, and pitch have a calming effect, while increases induce excitement.⁹⁵ The timbre of violins, especially when played slowly, tends to evoke sadness or feelings of vulnerability and romance, because we have been conditioned to accept that association from film and television.⁹⁶

A change in harmony can alter the mood of a musical composition because some combinations of notes are pleasant, while others result in a dissonance that “sound[s] tense or ugly.”⁹⁷ There are twelve notes in an octave, and different combinations of seven notes out of twelve result in major keys or minor keys. Major keys are made up of one selected note and the six notes most closely related to the selected note, out of the other twelve notes in the octave.⁹⁸ Minor keys substitute a couple of the major key notes with sharp or flat notes (the black keys on a piano), resulting in music that is “generally more mysterious and vague,” and typically associated with “sadness and complex emotions.”⁹⁹

This phenomenon of harmonic dissonance is readily illustrated by recalling the sound of the notorious progression of screeching chords played during the stabbing-through-the-shower-curtain scene in the film *Psycho*.¹⁰⁰ The use of an accented dissonance that resolves into a consonance¹⁰¹ is

⁹¹ *Id.* at 9.

⁹² *Id.* at 33.

⁹³ See POWELL, *supra* note 86, at 141 (“Some of these mood effects rely on the animal responses of human beings and some depend on a shared musical culture between the composer and the listener.”).

⁹⁴ *Id.*

⁹⁵ *Id.* at 142.

⁹⁶ *Id.* at 141.

⁹⁷ *Id.* at 103 (“Composers often deliberately choose a sequence of anxious-sounding chords to build tension before releasing it with some harmonious combinations...”).

⁹⁸ *Id.* at 146.

⁹⁹ *Id.* at 143.

¹⁰⁰ *Psycho* is a classic horror film produced by Alfred Hitchcock in 1960. PSYCHO (Shamley Productions 1960).

¹⁰¹ “Consonance deals with intervals in terms of two notes only....[and] simultaneous tones in a dischord.” SEASHORE, *supra* note 80, at 125-126.

repeated many times in the song *Someone Like You*, by Adele, and the song's status as a "tear-jerker" is attributed to what is classically termed "appoggiatura resolution."¹⁰²

In sum, there is an art to musical performance, which affects how the music is received by listeners.

C. *Music Vocalist Authorship*

The vocalists' voice is their instrument and their performance is their creative contribution to a musical work. For talented music vocalists, their style is readily identifiable and their performance is impactful. Most music listeners have experienced the sensation of chills, at least once, in response to listening to a vocal performance. Although in many instances the originality of a music vocalist's performance on a particular song may be at least partially due to the producer with whom the vocalist works,¹⁰³ such is not always the case. Performance authorship is rightly credited to the vocalist.

The musical mind must be capable of discerning pitch, loudness, time and timbre, and have "the four fundamental sensory capacities in complex forms, namely the sense of tone quality, the sense of consonance, the sense of volume, and the sense of rhythm."¹⁰⁴ "Musical performance requires a musical mind, and also "is limited by certain inherent and inherited motor capacities."¹⁰⁵ A talented vocalist must have "a favorable structure of vocal organs and motor control,"¹⁰⁶ with such vocal dexterity as to allow masterful manipulation of the vocal

¹⁰² See *Another Take On The "Appoggiatura"*, NPR (Feb. 14, 2012), <http://www.npr.org/2012/02/14/146888725/another-take-on-the-appoggiatura> (interviewing composer and conductor Rob Kapilow, who pointed out the dissonant words and resolutions throughout the song).

¹⁰³ While the focus of this article is on vocalists who performs songs initially composed by others, it is noteworthy that the practice of looking to a music score sheet for definition of the music limits not only the vocalist, but also musicians and composer/vocalists who improvise and/or cannot read traditional music notation: "The traditional order of creative services goes from composer, to arranger, orchestrator, and copyist, to finished music fit for performance or recording. However, with many forms of popular music—reggae, rap, hip-hop, dance, world, rhythm and blues, country, and others—there is more spontaneous development of music by "head arrangements" or layered recordings; some of the traditional functions merge, and some may disappear entirely. When musicians cannot read music, they develop alternative means to create arrangements and orchestrations. During recording sessions producers often perform the orchestrator and arranger roles."

M. WILLIAM KRASILOVSKY AND SIDNEY SHELLEY, *THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE BUSINESS AND LEGAL ISSUES OF THE MUSIC INDUSTRY* 132-133 (Billboard Books 10th ed. 2007).

¹⁰⁴ SEASHORE, *supra* note 80, at 2.

¹⁰⁵ *Id.* at 10.

¹⁰⁶ *Id.*

chords for intentional and controlled production of pitch and duration and intensity of sound, and variations in the same.¹⁰⁷

Whitney Houston, for example, is credited by the producer of her hit cover as a “music ‘genius’ in her own right,” who performed according to her own instinct and delivered “something better than what [her producer] asked for” ninety-nine percent of the time.¹⁰⁸ From the very beginning of her singing career, Whitney Houston was hailed as an extraordinarily talented vocalist, who exerted effortless control over her “spectacular vocal instrument;”¹⁰⁹ she became known in the music industry as “The Voice.”¹¹⁰ Musician, composer, author, and professor of music Guthrie P. Ramsey, Jr.¹¹¹ described Houston’s voice as “glorious in its transcendent musicianship,” citing her three-octave range, from alto to the highest soprano, “impeccable intonation,” and “perfect vibrato.”¹¹² Professor Ramsey’s explanation of why that was illustrates the importance and uniqueness of Houston’s authorial contribution as a vocalist:

Houston seemingly had no natural break between the high and low registers of her instrument. This unique quality was highlighted because *when she did flip into the “head voice,” it was employed as a subtle garnish, a precious design element in a phrase . . .* When every note is perfectly in tune, as they were in a classic

¹⁰⁷ The author acknowledges the music industry trend of using software, such as Auto-Tunes, to mask pitch imperfections for recording artists with limited vocal abilities; this analysis is focused on vocalists with mastery over their voice, who do not require digital intervention.

¹⁰⁸ Lauren Effron, “David Foster: ‘Bodyguard’ Anthem, ‘I Will Always Love You,’ Almost Didn’t Happen” (Feb. 13, 2012), <https://perma.cc/2MJK-5GE5> (quoting from an interview with music producer-songwriter David Foster about the intricate details of his collaboration with Whitney Houston on the ballad that “became the epic anthem of Houston’s career.”).

¹⁰⁹ See, e.g., Geoffrey Himes, *Whitney Houston, In Top Voice*, WASH. POST, July 28, 1986, 1986 WLNR 1920037 (describing how then 22-year-old Houston “glided up into the stratospheric reaches of her soprano without the slightest hint of strain” and how she “took full advantage of her voice with a marvelous sense of phrasing and dynamics.”).

¹¹⁰ Guthrie P. Ramsey, Jr., *Why Whitney’s Voice Was So Wonderful*, CNN (FEB. 18, 2012, 10:25 AM), <https://perma.cc/3RA3-DGXM>; see also Steve Chagollan, *Whitney Houston: “The Voice” Overcomes Adversity to Reclaim Her Place Among Diva Pantheon*, VARIETY, Sept. 24, 2009, 2009 WLNR 18844659 (quoting Clive Davis as saying “There are just a handful who are the voices of all time.”); Keith Caufield, *The Voice Isn’t Silenced*, BILLBOARD, Vol. 124, Issue 7, Feb. 25, 2012, 2012 WLNR 4088955.

¹¹¹ Dr. Guthrie P. Ramsey is the Edmund J. and Louise W. Kahn Term Professor of Music in the School of Arts and Sciences at the University of Pennsylvania, <https://perma.cc/Y9SS-YPF7>.

¹¹² See Ramsey, *supra* note 110.

Houston performance, we relaxed and gave in to the sheer beauty of music.

Beyond the gift of her instrument, Houston's musicianship comprised an uncanny way of handling the material she was given with such expertise and attention to detail that the songs became hers and hers alone.

Her sense of musical balance allowed her [to] "*crowd*" the cadences of a song's key passages with "*just enough*" sonic information before landing coyly in the next structural part of the song.

....

And she made us feel it. Through musical economy and powerful execution, Houston could *shape the emotional contour of a song* whether in long concert-versions or on a four-minute record....¹¹³

It is well-settled that timbre or "voice is not copyrightable,"¹¹⁴ because a voice is not expression, but rather a means of expression. However, where vocalists use their voice—as Houston did—to deliver a performance which includes modes of original creative expression and sounds or effects that are not readily subject to musical notation, there is a gap between the protections afforded music compositions and the protections afforded sound recordings that leaves otherwise copyrightable expressions unprotected.

Vibrato, for instance, is said to be one of the most important modes of musical ornamentation for both voice and instrument, if not the singular most important, because: "it occurs in practically all the tones of artistic singing and in sustained tones of various instruments"; "it produces the most significant changes in tone quality"; and "it is the factor on which artistic singing and playing are most frequently judged, whether the factor is consciously recognized as vibrato or not."¹¹⁵

But while a music score can include music notation symbols to indicate pitch, tempo, the duration of a note, rests or silence, and even the general dynamics (variations ranging from very loudly, *fortissimo*, to very softly, *pianissimo*) and

¹¹³ *Id.* (emphasis added).

¹¹⁴ *Midler v. Ford Motor Co.*, 849 F.2d 460, 462 (9th Cir. 1988) (explaining why copyright law did not provide relief for Bette Midler with respect to the defendant's use of a sound-alike vocalist who mimicked Midler's style).

¹¹⁵ See SEASHORE, *supra* note 80, at 33.

changes in dynamics (e.g. crescendo, meaning to gradually become louder), the music notation symbol for the all-important vibrato does nothing more than indicate that a vibrato is to occur for the duration of a particular note. There is no symbol to direct the performer on how to vary pulsation of pitch, loudness and/or timbre, or whether to do so singularly or in combination, to achieve a good vibrato instead a bad one. The vibrato, as performed, can only be captured fully in a recording of the audio or captured partially a recording of the actual sound wave patterns produced.¹¹⁶ Similarly, the notation for trill—the rapid alternating between the written note and the one directly above or below it—simply suggests that a trill occur. And yet, vibratos and trills, along with vocal runs—a series of notes descending or ascending from one written note to the next written note—are devices of vocal embellishment commonly employed by vocalists to evoke specific emotional response and impact the listening experience.

The vocalist's choice of whether, when, and how to use these devices or otherwise vary pitch, loudness, timbre, and time certainly meets the threshold for original creative expression under copyright law.¹¹⁷ The Supreme Court has defined the work "author" to mean "he [or she] to whom anything owes its origin; originator; maker."¹¹⁸ Be it improvisation or planned, there is something vocalists do, *beyond* following the directions indicated by the notations in a musical composition with lyrics superimposed, that brings musical compositions to life; that thing they do, their performance, is a protectable creative expression worthy of standing on its own for purposes of copyright, just as a composition stands on its own.

Vocalists' authorship should not be discounted simply because the result is not fixed in a music score. Australian pianist and music theorist, Manfred Clynes put it this way:

In Western culture we have devised a singular means of killing music—writing it down in a score. It then has to be resuscitated or

¹¹⁶ *See id.* at 34-39 (providing illustration of sound wave patterns that reflect variations in pitch and intensity, and noting that the timbre vibrato is not reflected).

¹¹⁷ *See Feist Publications v. Rural Telephone Serv.*, 499 U.S. 340, 348 (1991) (even for factual compilations, independent choices as to selection and arrangement that "entail a minimal degree of creativity, are sufficiently original" for copyright protection); *but see Woods v. Bourne*, 60 F.3d 978, 992 (2d Cir. 1995) ("applying conventional rules of harmony to the melody in the lead sheet would constitute 'trivial changes'").

¹¹⁸ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

resurrected in performance. *The performer has to supply all the nuances, the microstructure that was not and could not be notated by the composer, in order to bring the music to life. Therein lies his [or her] art.*¹¹⁹

D. The Prejudicial Impact of the Fixation Requirement, as Applied

As mentioned, copyright only attaches once a categorized work is fixed. This fixation requirement, as applied, has an inherently prejudicial impact on the ability of music vocalists to copyright their creative contributions.

If, for example, an artist originally records a song in the studio to produce a master for production of compact discs for distribution, and the artist subsequently performs the composition live in concert, the copyright for the original recording does not protect the live performance. Assuming, as is often the case, that the live performance includes extended runs, varied timing, new vibratos, different trills, or other creative variations from the original recording, an authorized recording of the live performance could be protected by registering a separate copyright. But even that live performance sound recording copyright would not bar an “entrepreneurial fan” from personally recording the live performance on a hand-held device, copying it, and then distributing it via, for example, social media such as YouTube. Of course, such conduct would give rise to a claim for infringement of the exclusive rights associated with the composition performed, but only the owner or authorized agent of the composition copyright holder could make that claim—the vocalist would have no grounds to claim infringement. A 1994 amendment to the Copyright Act, Section 1101(a), scantily protects all nondramatic music performers from the unauthorized recording and broadcast of their performances by creating a right of action against persons who engage in that conduct; however, the right of action is not one for copyright infringement and no additional exclusive rights are granted to performers by Section 1101.¹²⁰

Imagine now that the composer Mozart himself was able to come back to life today for only as much time as it would take him to sit down at an electronic keyboard, figure out how the keyboard works, and spontaneously play an entirely new

¹¹⁹ MAZZOLA, *supra* note 83, at 105 (emphasis added).

¹²⁰ See 17 U.S.C. § 1101(a) (2012) (proscribing unauthorized fixation, transmission and distribution of sounds or sounds and images from a live concert, and subjecting violators to the same civil remedies available against copyright infringers).

symphony, complete with piano and all accompanying instruments one might expect to hear in an orchestra performance. Imagine also that no simultaneous recording of any kind was made. Mozart's new composition could be protected if his performance was accurately transcribed into notes and chords and play instructions, either simultaneously or thereafter by his authorized agent who happened to have excellent audio recall. Such transcription would satisfy the required fixation to establish the work as "created" and the copyright would then vest in Mozart as the author of the composition. As for Mozart's actual performance, however, there would be no copyright protection at all because the performance was not fixed in real-time and, under the Copyright Act, it cannot be fixed after the fact.

Sounds, including musical performances, simply are not protected without a simultaneous recording of some sort. The imagined Mozart example poses no real issue, because the performance itself embodied the created composition and protection of the composition does not require real-time fixation. However, the same is not true for a music vocalist's performance and creative contribution under the Copyright Act as currently written.

E. The Effect of Limited Protections for Transformational Covers and Sound Recordings

The original provision for a compulsory license, also known as a "statutory license" or "mechanical license," under the Section 1(e) of the Copyright Act of 1909 was a consequence of the development of player piano rolls, which could reproduce and play the musical notation of composition in strictly mechanical form.¹²¹ The compulsory license has evolved and persisted primarily due to the record industry's opposition to its repeal.¹²² However, the scheme did not originally anticipate vocal performances and still does not adequately account for them.

For artists and record labels, the compulsory license scheme reduces transaction costs by providing access to a ready catalog of songs available to record, without the need for one-to-one negotiations with composers. For the composers, there is a loss of control over the making of derivative works that is limited to sound recordings, but the upside of the compulsory

¹²¹ See Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215, 217-221 (discussing the origins of Section 1(e) of the 1909 Copyright Revision Act).

¹²² *Id.* at 224-225; see also Theresa M. Bevilacqua, Note, *Time to Say Good-bye to Madonna's American Pie: Why Mechanical Compulsory Licensing Should Be Put to Rest*, 19 CARDOZO ARTS & ENT. L.J. 285, 292-298 (2001).

license scheme for them is the ability to gain exposure and sales beyond the audience the composer might otherwise attract individually. That gain could be due to the stature of the cover artist and the attendant broad fan base, or cross genre recording, or a combination of the two, or some other appeal.

Using covers to transform songs from one genre to another is arguably a desirable exercise of creativity consistent with the basic purpose of copyright (to promote the development of artistic works for society's general enjoyment). However, the compulsory license scheme unnecessarily encourages mimicking, which adds limited value, if any, while the Copyright Act fails to adequately reward creative artistry of music vocalists overall.

Once Dolly Parton released "I Will Always Love You" as a country music single in 1974, anyone was free to cover the song and sell recordings of the cover, by complying with Section 115. Elvis Presley wanted to cover the song; Parton wanted him to do it, given his immense cache at the time as the "King of Rock and Roll,"¹²³ until she learned from his manager that Elvis was insisting upon a fifty percent interest in the publishing rights for the privilege.¹²⁴ After Parton declined Elvis' terms, electing to maintain her composition copyright interests in her own publishing company, Linda Ronstadt was the first major artist to cover the song, releasing a version in 1975 that closely followed Parton's original arrangement.¹²⁵ Houston's cover presented an arrangement unique to Houston's style and interpretation—from her re-imagined timing and emphasis, her unique vocal riffs, and her transitions from powerful and sultry alto to crystal clear and still strong falsetto—transforming a song that had been known as a country/soft rock ballad to a pop/R&B classic.¹²⁶ That, we

¹²³ Elvis rose to fame after he signed with RCA records, in 1955, and appeared on television programs, including the renowned Ed Sullivan variety show, in 1956, the combination of which led to guaranteed sellout recordings and numerous movie roles. MICHAEL T. BERTRAND, *RACE, ROCK, AND ELVIS* 24 (2000).

¹²⁴ According to Parton, Elvis' manager Colonel Tom Parker told her "Now you know Elvis don't record anything unless we get half the publishing," and when she told the manager "well this has already been a hit for me and this is in my publishing company and I can't give you half of it', [] he said 'well then we can't do it.'" Alexandra Gibbs & Tania Bryer, *Dolly Parton: The time I turned down Elvis*, CNBC (June 1, 2016, 6:39 AM), <https://perma.cc/9PY4-LL57>.

¹²⁵ LINDA RONSTADT, *I Will Always Love You*, on PRISONER IN DISGUISE (Asylum Records 1975).

¹²⁶ WHITNEY HOUSTON, *I Will Always Love You*, on THE BODYGUARD: ORIGINAL SOUNDTRACK ALBUM (Arista Records 1992).

know, turned out to be an extraordinary financial boon for Parton.

Such transformation of a song from one genre to another via covers was certainly nothing new. Legendary folk singer/songwriter James Taylor penned and recorded the song “Don’t Let Me Be Lonely Tonight” in 1972 as the lead single for his album “One Man Dog.”¹²⁷ Taylor’s version had a tempo and feel that might lead one to classify it as soft rock/folk/easy listening. Taylor’s single peaked at No. 14 on the Billboard Hot 100 Charts in January 1973,¹²⁸ and soon thereafter Johnny Mathis and Liza Minnelli covered the song in separate recordings released in 1973, followed by an Isley Brothers’ cover that same year. Mathis stayed close to Taylor’s original arrangement.¹²⁹ Minnelli followed Taylor’s phrasing, but added brass instruments to the arrangement, giving it a soft “big band” feel.¹³⁰ The Isley Brothers, took the song in a completely different direction, changing the timing, emphasizing percussion with a simple drumbeat and cymbal, and slightly modifying the phrasing, among other things.¹³¹

For derivative works, there is a concern that too low of a threshold for what qualifies as original creativity would give the creator of a first derivative work “considerable power to interfere with the creation of subsequent derivative works from the same underlying work.”¹³² The Ninth Circuit has held, however, that although this concern about “entangling subsequent artists...in copyright problems” may be “particularly relevant in the musical context,” the originality standard does not go so far as to require “such things as unusual voice treatment, additional lyrics of consequence, [or] unusual altered harmonies.”¹³³ It is sufficient that the composition be modified by the addition of new material of substance.¹³⁴

The Isley Brothers’ cover variations were more than trivial and likely would have qualified for protection as a

¹²⁷ See Copyright registration RE0000794983 (“One Man Dog”) (Dec. 31, 1998) (renewal for Composition registration EP0000292604 (Oct. 18, 1971)); see also James Taylor, *Don’t Let Me Be Lonely Tonight*, on ONE MAN DOG (Warner Bros. Records 1972).

¹²⁸ Hot 100, BILLBOARD (Jan. 20, 1973) at 14, <https://perma.cc/CFZ8-F6GV>.

¹²⁹ See JOHNNY MATHIS, *Don’t Let Me Be Lonely Tonight*, on ME AND MRS. JONES (CBS 1973).

¹³⁰ See LIZA MINNELLI, *Don’t Let Me Be Lonely Tonight*, on THE SINGER (Columbia Records 1973).

¹³¹ See ISLEY BROTHERS, *Don’t Let Me Be Lonely Tonight*, on 3+3 (T-Neck Records Inc. 1973).

¹³² Woods v. Bourne, 60 F.3d 978, 990 (2d Cir. 1995) (citing Gracen v. Bradford Exchange, 698 F.2d 300, 305 (7th Cir. 1983)).

¹³³ *Id.* at 990-991.

¹³⁴ *Id.* at 991.

derivative arrangement. As sung by lead of the group, Ronald Isley, with a thoughtful combination of his full tenor and raspy falsetto, the Isley Brothers' cover rendered the folk/pop song a soulful R&B love ballad. Their rendition was later imitated by Eric Clapton for his own cover in 2001,¹³⁵ confirming that the original variations contained in the Isley Brother's cover established a new version.

Although this author has not determined whether or not the Isley Brothers' cover of "Don't Let Me Be Lonely Tonight" was made pursuant to an independently negotiated license, the only discovered copyright registration for their version is that for their album sound recording.¹³⁶ Similarly, the only discovered copyright registration pertaining to Houston's cover of "I Will Always Love You" is that for the sound recording as included on "The Bodyguard: The Original Soundtrack."¹³⁷ That suggests that no consent was given for production of these particular covers as derivative works, which is typical. The composition copyright owner "rarely gives consent to copyrighting the arrangement prepared for a recording of the song, and thus no copyright is taken by anyone in the arrangement used."¹³⁸ In fact, the compulsory license "amounts to an agreement not to object, rather than a consent or grant of rights" from the composer.¹³⁹

Without express consent from the composers to make a derivative work, the transformative performances—apart from the sound recordings—are unprotected. Eric Clapton was completely free to mimic the Isley Brothers' version of Don't Let Me Be Lonely Tonight in his 2001 cover, with no authorization from nor payment to that group for their artistic transformation of Taylor's original. Similarly, Houston's reward for her spectacular performance contribution did not include ownership of any copyright in the version she created with that performance, and anyone with the requisite talent to mimic Houston's performance is free to do so under another compulsory license or with the requisite clearance from Parton for use of the composition, with no authorization from nor payment to Houston's estate. Like the Isley Brothers, Houston's performance is only protected with respect to the capture reflected in her actual recording(s), because the sound recording copyrights only apply to the sound recording itself and otherwise do not protect the underlying performance.

¹³⁵ ERIC CLAPTON, *Don't Let Me Be Lonely Tonight*, on REPTILE (Reprise Records 2001).

¹³⁶ Copyright registration SR0000295299 ("3+3") (Aug. 8, 2001).

¹³⁷ Copyright registration SR0000152583 ("The Body Guard: Original Soundtrack Album") (Feb. 2, 1993).

¹³⁸ KRASILOVSKY & SHEMEL, *supra* note 103, 33.

¹³⁹ *Id.*

Meanwhile, the original composers reap the benefit of the royalties associated with record sales, radio airplay, concert performances, digital performances, and even sheet music sales, all based on the enhanced versions of the compositions attributable to the cover artists.

IV. PREVAILING INDUSTRY PRACTICES THAT CONTROL COPYRIGHT OWNERSHIP AND ALLOCATION OF PASSIVE INCOME

Music contracts and other prevailing industry practices compound the inequities that flow from the above-described protection gap.

In terms of generating revenues, sound recordings began displacing sheet music “as the dominant source of composition royalties in the music industry,” as early as the 1920s, and by 1960, “sheet music, once the chief revenue stream for publishers, had been completely marginalized.”¹⁴⁰ Recording artists, inclusive of music vocalists and musicians, were responsible for that shift. However, recording artists typically have not had the means to produce quality recordings for duplication and distribution. Consequently, more often than not, record labels were and still are responsible for fixation of the musical performance. That fixation translates into author status for the label, with regard to the sound recording copyright, even though the record label ultimately recoups the cost of fixation from the artist’s share of record sale royalties. What results under the current copyright scheme and prevailing industry practices is an inequitable allocation of passive income.

A. Record Label Leverage Over Artists

“Historically, record companies held the keys to the kingdom,”¹⁴¹ when it came down to the emergence of new recording artists. That was so because to meet the ultimate goal of selling records in large quantity, one needed capacity, at a minimum, to: record a quality record; manufacture and distribute copies of the record for sale; promote the record for radio play; market the record via advertising, artist and product publicity, and merchandising; and finesse the necessary contract and payment arrangements.¹⁴²

¹⁴⁰ Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy That Facilitates Our Democratic Civil Society?*, 21 HARV. J.L. & TECH. 233, 248 (2007).

¹⁴¹ DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 68 (8th ed. 2012).

¹⁴² *See id.*

There are now only three major record labels left, as a result of various mergers and consolidations over the years: Sony (which includes Columbia, RCA, Epic, and Arista, among others);¹⁴³ Universal Music Group (which includes Capitol Records, Def Jam Recordings, EMI, Interscope | Geffen | A&M Records, and Virgin Records, among many others);¹⁴⁴ and Warner Music Group (which includes Atlantic Records Group, Warner Bros. Records, and Elektra, among others).¹⁴⁵ These major record labels are all distributed by their own major distributors.

Thanks to a series of technological developments ranging from widespread use of the internet, the development of web-based marketplaces, social media, and, of course, digital music formats, signing with a major record label is no longer the *sole* path to becoming a recording artist. There is now the option to self-produce, self-promote, and sell one's music digitally, with minimal associated production costs.

There is also, still, the option of signing with an independent record label, known as an "indie label." The true indie labels are financed by the label owners or investors and distributed by independent distributors.¹⁴⁶ These indie labels generally have limited resources and face challenges in promoting and marketing the artist on a scale that can compete with the major players.¹⁴⁷ Then there are independent producer labels that are actually affiliated with a major label; the producer controls the signing of their artists and the making of recordings, but otherwise relies upon the major label infrastructure for most else, including distribution.¹⁴⁸ This pseudo-indie arrangement gives the artist access to the resources of a major label, and addresses the promotion and marketing limitations that true indie labels have.¹⁴⁹ Not

¹⁴³ See SONY MUSIC, <https://perma.cc/8PRV-5WFV> (last visited April 5, 2017).

¹⁴⁴ See Our Labels & Brands, UNIVERSAL MUSIC GROUP, <https://perma.cc/24EZ-ZLTH> (last visited April 5, 2017).

¹⁴⁵ See Recorded Music, WARNER MUSIC GROUP, <https://perma.cc/QDD8-7DCJ> (last visited April 5, 2017).

¹⁴⁶ PASSMAN, *supra* note 141, at 67.

¹⁴⁷ For example, the debut album released in 1991 by Courtney Love's rock group Hole, "Pretty on the Inside," by then indie label Caroline, reportedly was "a critical hit in the alternative music community but ignored by the mainstream buying public." Joseph Ulibas, *Hole is still pretty on the inside*, AXS (Apr. 28, 2015), <https://perma.cc/9ATM-KLYE>.

¹⁴⁸ See KRAVSILOVSKY & SHEMEL, *supra* note 103, at 35; PASSMAN, *supra* note 141, at 66.

¹⁴⁹ For example, rock group Hole's second album "Live Through This," which was released by Geffen Records—an independent producer label arrangement between David Geffen and Warner Bros—entered the Billboard 200 chart at number 55, selling 19,000 units less than a month after its release in April 1994. By this time, Hole's first album, released in 1991, had still only sold a

surprisingly, however, the recording contracts for these independent producer labels closely resemble the major label recording contracts and such independent producer labels are subject to ultimately being absorbed by a major label.¹⁵⁰

As of 2012, most new artists still wanted a recording contract with a major record label, because those labels have “the resources to get [their] music heard over the noise of all the other artists out there—they have staffs of people with experience in marketing and promotion, and [most importantly,] they will put up the bucks needed to push [the artist’s] career.”¹⁵¹ Consequently, the record labels have maintained heavily weighted leverage over recording artists.

B. Critical Rights and Obligations under Recording Contracts

Record deal terms may vary significantly, depending upon the status or clout of the artist. The most critical terms of the deal concern the term or duration of the contract, ownership of the masters and sound recording copyrights, and compensation and royalty calculation. For the sake of simplicity, this article considers three distinct categories of artist clout: the “new artist,” the “mid-level artist,” and the “superstar.” “New artist” status applies to those who have never been signed to a label, or to those who have been signed before, but whose album sales have never exceeded 100,000 albums per release; however, the categorization also applies to a formerly successful artist “whose star has fallen.”¹⁵² “Midlevel artist” status applies to established artists whose last album sales were in the 200,000 to 400,000 range, as well as to artists as to whom there is a record label bidding war.¹⁵³ “Superstar” status applies to artists with album sales of 750,000 or more.¹⁵⁴ Artists falling in between these categories can expect deals that likewise fall somewhere in between.

reported “more than 27,000 units.” *Media Focus propels Hole’s high debut on Billboard 200*, BILLBOARD, Apr. 30, 1994, 1994 WLNR 5256573.

¹⁵⁰ Such was the case for Courtney Love’s band, Hole. After the debut release, the group signed with Geffen Records, which was then acquired by Universal through Virgin Records. See A. Barry Cappello and Troy A. Thielmann, *Challenging the Practices of the Recording Industry*, LOS ANGELES LAWYER, May 2002, at 14, <https://perma.cc/LN77-ZVRD>.

¹⁵¹ PASSMAN, *supra* note 141, at 69-71.

¹⁵² *Id.* at 88.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

1. Duration and Exclusivity

Typically, recording contracts require the exclusive personal services of the artist with respect to recording as a feature artist, for the duration of the contract. Recording contracts are also typically structured to require a minimal commitment on the part of the record label to actually record any albums, while reserving a considerable number of unilateral options to require additional albums. For example, a label might commit to a single album for a new artist, while reserving the right or option to require delivery of as few as five¹⁵⁵ or as many as eight studio albums, at the label's election. For a midlevel artist, the label reserves the right to at least four or, more typically, five albums.¹⁵⁶ The problem with multiple options is that it allows the record label to renew and extend the term of the recording contract on the same terms that applied at the beginning of the deal.

Compounding the multiple options issue is the time it takes an artist to actually record enough individual songs deemed "satisfactory" by the label to constitute a full album. Whether a song is acceptable depends on whether the artist's delivery requirement calls for "commercially satisfactory recordings" (i.e. whether the label thinks the recording will sell well) or "technically satisfactory recordings (i.e. recordings that are well-made, regardless of whether the label likes the songs).¹⁵⁷ A new artist's contract will require commercially satisfactory recordings, while a superstar artist's contract requires technically satisfactory recordings, subject only to the additional requirement that the recordings be of the same style and quality as the artist's previous recordings and not include specialty or novelty recordings.¹⁵⁸ The midlevel artist's delivery requirement may look more like the superstar's, with added label pre-approval of the songs and the producer.¹⁵⁹

Ultimately, the duration of a recording contract is stated in terms of delivery, instead of specific time periods, with the initial period and each option period ending "six to nine months after the delivery of the last album required for that period, but no less than a specified minimum [time period, such as eighteen months]."¹⁶⁰ Depending upon how quickly the artist can record the ten to twelve "satisfactory" songs required

¹⁵⁵ *See id.* at 104 ("a company may commit to record one album of an artist and have the option to require an additional four or five albums").

¹⁵⁶ *Id.* at 105.

¹⁵⁷ *Id.* at 110-111.

¹⁵⁸ *Id.* at 111.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 109.

for a single album,¹⁶¹ a contract requiring delivery of even five studio albums could easily span a period of more than seven years. “The reality is that no successful artist can deliver seven albums in seven years [and ‘no one expects them to’], especially considering that the record companies usually require an 18-month to two-year gap between releases.”¹⁶² This gap between record releases accommodates artist touring to promote the most recently completed album;¹⁶³ it also allows the record label to assess the profitability of the album before embarking upon the next album.

Consequently, a new artist, and even a mid-level artist, could remain trapped in an unfavorable deal for years, despite success of early albums that would otherwise give the artist enough clout to negotiate a better deal. Even California Labor Code, Section 2855—a statute prohibiting enforcement of personal service contracts against employees after seven years from commencement of services, which was successfully wielded by late actress Olivia De Haviland against Warner Bros. Pictures to free her from her onerous studio contract¹⁶⁴—does not work to rescue recording artists and free them from onerous recording contracts. That is so because, “[a]fter “extensive lobbying by the Recording Industry Association of America,”¹⁶⁵ Section 2855 was amended in 1987 to add a subsection “b”—applicable expressly and only to recording contracts—to prohibit recording artists from invoking Section 2855(a) without first giving written notice, and, worse yet, to give record labels “the right to recover damages for each phonorecord as to which the [artist] has failed to render service,” where the contract called for “production of a specified quantity of [] phonorecords.”¹⁶⁶

It is less than coincidental that record labels lobbied for the 1987 amendment adding Section 2855(b), since multiplatinum rock band Metallica had settled a lawsuit in early 1995, “seeking to be emancipated” from its original “baby

¹⁶¹ Irrespective of artist clout, the minimum number of master recordings for a single album may be ten or twelve. See KRASILOVSKY & SHEMEL, *supra* note 103, at 18.

¹⁶² Cappello & Thielmann, *supra* note 150.

¹⁶³ “[I]f an album is successful, you need to be out touring and promoting, which means you can’t be in the studio. In fact, the more successful it is, the longer you’ll be out...” PASSMAN, *supra* note 141, at 108.

¹⁶⁴ See *De Haviland v. Warner Bros. Pictures*, 67 Cal.App.2d 225, 238 (Cal. App. 1945) (holding that Warner Bros. Pictures could not enforce its studio contract against De Haviland after seven years, even where the studio still had options remaining under the contract).

¹⁶⁵ Kia Kamran, *The murky waters of the ‘Seven-Year Rule’*, BILLBOARD, Mar. 28, 1998, at 60.

¹⁶⁶ S.B. 1049, 1987 Leg., Reg. Sess. (Cal. 1987) (codified as amended at CAL. LAB. CODE § 2855(b) (West 2007)).

band' deal signed with Elektra in 1984," pursuant to Section 2855, following other lawsuits by successful recording artists (which also settled).¹⁶⁷ Despite achieving superstar status, Metallica had never renegotiated and was still receiving a 14% royalty rate, which is the mid-point of what new artists receive.¹⁶⁸

While labels may be all too eager to waive their options to extend the contract term on an artist whose early projects fail to generate the desired profits, labels will enforce their options quite zealously with respect to profitable artists. For example, when Courtney Love and Eric Erlandson of the four-member group Hole invoked Section 2855(a) in 1999 to terminate their 1992 recording contract with Geffen Records (having fulfilled their initial delivery requirement with two hit albums in 1994 and 1998),¹⁶⁹ Geffen and Universal's UMG Recording, Inc. (which had acquired Geffen) sued the artists, asserting various claims for declaratory relief, breach of contract, injunctive relief, and damages under Section 2855(b) for five undelivered albums.¹⁷⁰ Courtney Love cross-claimed, challenging the constitutionality of Section 2855(b), in addition to asserting claims for breach of contract and fraud, among others.¹⁷¹ After a nearly three-year battle, the parties settled, with UMG agreeing to release Hole from the remaining options and restore ownership of unreleased recordings to Love, in exchange for permission from Love, as "widow of Nirvana frontman Kurt Cobain," to release new Nirvana compilations.¹⁷²

To date, no recording contract termination claim under the amended Section 2855 has been litigated to decision. The uncertainty of whether and how courts will apply the Section 2855(b) damages provision creates a significant obstacle for recording artists wishing to terminate under Section 2855(a). The damages on undelivered albums under options extending years into the future are speculative; however, for profitable artists, the less speculative damages on just the very next undelivered album could amount to millions. Sufficiently

¹⁶⁷ *Seven year law benefits California artists*, BILLBOARD, Jun. 3, 1995, 1995 WLNR 5522065.

¹⁶⁸ *Metallica challenges Elektra contract*, BILLBOARD, Oct. 8, 1994, 1994 WLNR 5365158.

¹⁶⁹ See Cappello & Thielmann, *supra* note 150 (the required two albums, *Live Through This*, delivered in 1994, and *Celebrity Skin*, delivered in 1998, were each "major hit[s]...followed by successful tours").

¹⁷⁰ See First Amended Complaint, *Geffen Records, Inc. v. Love*, No. BC 223364, 2001 WL 36023388 (Cal. Sup. Ct. Jan. 21, 2000).

¹⁷¹ See First Amended Cross-Complaint, *Geffen Records, Inc. v. Love*, No. BC 223364, 2001 WL 36023388 (Cal. Sup. Ct. Jul. 3, 2001).

¹⁷² Anthony Breznican, *Courtney Love Settles Lawsuit*, ASSOCIATED PRESS (Sept. 27, 2002), <https://perma.cc/D822-WWFS>.

successful artists may extract a renegotiated contract via settlement, as did Metallica. Courtney Love, a midlevel artist at the time,¹⁷³ was fortunate to have pockets deep enough by other means to fund her protracted litigation, in addition to settlement leverage unrelated to her own band. Simply walking away from a recording contract is usually not an option for an artist trapped in a bad deal.

2. Ownership of Masters and Sound Recording Copyrights

Record labels claim outright ownership of the master recordings made under a recording contract.¹⁷⁴ The masters are the tangible recordings of the artist's performance, used to make copies for purposes of creating records for distribution.

As mentioned, *supra* Section II.E, record labels also claim ownership of the copyright in the sound recordings, either by expressly asserting that the creation was a work-for-hire or by effectively having the artist assign all copyright interests to the label.¹⁷⁵

¹⁷³ Hole was a midlevel artist when it first contracted with Geffen, as a result of a bidding war following its successful debut as an indie label artist. See Cappello & Thielmann, *supra* note 150.

¹⁷⁴ The following is an example of contract language included for that purpose: "All masters recorded by Artist during the Term from the inception of the recording thereof and all reproductions derived therefrom, together with the performances embodied thereon, shall be the property of Company for the Territory free from any claims whatsoever by Artist or any person deriving any rights or interests from Artist." M. WILLIAM KRASILOVSKY AND SIDNEY SHEL, THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE BUSINESS AND LEGAL ISSUES OF THE MUSIC INDUSTRY (Billboard Books 8th ed. 2000), CD-ROM Appendix N-2 (Artist Recording Agreement, Paragraph 5).

¹⁷⁵ An example of contract language giving the label copyright ownership as a work-for-hire (see italicized text) or by effective assignment is as follows: "Without limiting the generality of the foregoing, Company and its designee(s) shall have the exclusive and unlimited right to all the results and proceeds of Artist's recording services hereunder rendered during the Term, including, but not limited to, the exclusive, unlimited, and perpetual rights throughout the Territory: (a) To manufacture, advertise, sell, lease, license, distribute, or otherwise use or dispose of, in any or all fields of use by any method now or hereafter known, records embodying the masters subject hereto, all upon such terms and conditions as Company may elect, or at its discretion, to refrain therefrom;....(c) *To obtain copyrights and renewals thereof in sound recordings* (as distinguished from the musical compositions embodied thereon) recorded by Artist during the Term, *in Company's name as owner and employer-for-hire of such sound recordings*; (d) To release records embodying the performances to be recorded hereunder under any name, trademark, or label that Company or its subsidiaries, affiliates, or licensees may from time to time elect; (e) To perform the records publicly and to permit public performances thereof by means of radio broadcast, television, or any other method now or hereafter known, it being agreed that if Company receives royalties solely attributable to the public performance of Masters hereunder, Artist's account shall be credited with a proportionate share

Only “in rare cases, with highly successful artists” have record labels agreed to allow the artist to recover ownership of the artist’s masters and sound recording copyright.¹⁷⁶

3. Compensation and Artist Royalty Calculations

Upon signing their recording contract, recording artists typically receive an advance on their anticipated royalties from record sales. That advance may be used by the artist to live on and to pay for the expenses associated with recording the first album, or the label might front the album production costs and assess those costs and the royalty advance as amounts to be recouped from the artist’s eventual royalties. Either way, all recording artists start out in debt to their record label. The initial debt for new artists may be hundreds of thousands of dollars and it may grow to millions as the label fronts additional money for touring, subsequent album production costs, and additional advances to the artist. The recurring complaint among recording artists is that the industry is rigged to make the artist debt insurmountable, while record labels profit.¹⁷⁷

Up until 2006, record labels computed the artist royalty on records sold as a percentage of a royalty base, which was the suggested retail list price less a set packaging or container charge.¹⁷⁸ Now, most record labels compute royalty payments as a percentage of the wholesale price.¹⁷⁹ Artists are only paid on records actually sold; free goods, which can amount to 10% or more of all records shipped, are excluded, as are promotional not-for-sale copies that may be provided to radio stations or for contest giveaways.¹⁸⁰

According to music law expert Donald Passman, the industry norm for royalties on U.S. album sales as of 2012 was 13-16% of wholesale price for new artists, 15-17% of wholesale price for midlevel artists, and 18-20% of wholesale price for

thereof (i.e., in the same proportion as Artist’s basic royalty in the territory concerned hereunder bears to the corresponding amount received by Company from its distributors therefor.)” *Id.* (emphasis added).

¹⁷⁶ KRASILOVSKY & SHEMEL, *supra* note 103, at 27.

¹⁷⁷ For example, Courtney Love recounted: “Story after story gets told about artists — some of them in their 60s and 70s, some of them authors of huge successful songs that we all enjoy, use and sing — living in total poverty, never having been paid anything. Not even having access to a union or to basic health care. Artists who have generated billions of dollars for an industry die broke and un-cared for.” Courtney Love, *Courtney Love Does the Math*, SALON (Jun 14, 2000), <https://perma.cc/27VT-2PMH>.

¹⁷⁸ PASSMAN, *supra* note 141, at 78-79.

¹⁷⁹ *Id.* at 75.

¹⁸⁰ *Id.* at 74-75.

superstars, such that based upon a price of \$10 per album unit, the artist royalty rate ranged from \$1.30 to \$2.00 per unit sold.¹⁸¹ Royalty rates may increase as pre-determined sales volumes are reached, typically escalating by .5% to 1% between 500,000 and 1 million albums sold (which sales denote gold and platinum album status, respectively), and another .5% to 1% for an additional 500,000 to 1 million albums sold.¹⁸² The escalation rates top out, however, at approximately 14-15% for new artists, 18% for midlevel artists, and 20-21% for superstars.¹⁸³

For foreign album sales, the artist royalty rate is reduced, and the rates vary from label to label, and artist to artist. Royalties on Canadian sales may be 85% of the domestic royalty rate, while the rate for major territories—including United Kingdom, Australia, Italy, Japan, Holland, Germany, and France—is generally 70-75% of the domestic rate, and the rate for the rest of the world ranges from 50-66.66% of the domestic rate.¹⁸⁴

The same artist royalty rates apply to electronic transmissions, which include, but are not limited to, digital downloads, non-interactive webcasting, streaming on demand, ringtones and ringbacks, locker services (or cloud storage streaming), satellite radio, apps, podcasting, and bundled services.¹⁸⁵ For digital downloads, record labels receive 70% of the retail price, so a new artist might receive 9 to 10.5 cents per 99-cent download.¹⁸⁶ Record labels receive, as wholesale, approximately 50% of the retail price for ringtones, “60% of the advertising revenues and/or subscription fees for inter-active audio streaming, pro-rated for the each master based on the number of plays,”¹⁸⁷ 58% of full locker service revenues, 58% of bundled services, and 70% of video-streaming deals that use record-label produced videos.¹⁸⁸

The artist royalty is only payable after the record label recoups 100 percent of its costs, which include all advances paid to the artist, the royalties paid to producers (typically 3-4% of wholesale),¹⁸⁹ the hard costs of master production and video production, and tour support.¹⁹⁰ It is not uncommon for

¹⁸¹ *Id.* at 89.

¹⁸² *Id.* at 89-91.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 135-136.

¹⁸⁵ *Id.* at 139-143.

¹⁸⁶ *Id.* at 144.

¹⁸⁷ *Id.* at 146.

¹⁸⁸ *Id.* at 140-149.

¹⁸⁹ *Id.* at 92.

¹⁹⁰ *Id.* Record labels pick up tour losses as tour support; although touring is an important part of building an artist's public profile and following, new artists typically lose money on touring, because the cost of tour expenses—per

artists to remain in an unrecouped status, given the accounting practices of record labels. Thus, it can take many years before an artist sees royalties, if ever.¹⁹¹

C. The Impact of 360 Deals and the Controlled Composition Clause

Beyond the artist royalties, recording artist income is typically generated from touring (for mid-level and superstar artists), tour merchandising, fan-club fees, and, for some, acting, endorsements, songwriting, and book publishing, etc. “360 deals” are deals in which the record label gets a share of the artist’s income from all sources, regardless of the label’s non-participation in the generation of those revenue streams.¹⁹² As of 2008, 360 deals had become commonplace, with widespread use by major record labels.¹⁹³

Depending upon their clout status, an artist may be able to limit the record label’s participation in one, two, or three of the non-record income streams. Terms vary and, apparently, there is not yet an industry custom with regard to these deals; however, most record labels get from 10% to 35% of the artist’s net non-record income, “with the majority of deals falling in the

diems, lodging, equipment costs, personnel costs, insurance, and commissions to managers and agents—generally exceeds the \$250 to \$1,500 nightly fee that a new artist with a local following is able to draw. *See id.* at 372. Tour losses are less of an issue for mid-level artists, and not typically any problem at all for superstar artists. *See id.* at 375-377.

¹⁹¹ In a very public written statement, Courtney Love expressed her displeasure with music industry practices and used her personal experience with Geffen Records to illustrate how recording artists end up with nothing, while record labels bank millions of dollars in profits. Having received a million-dollar advance and a deal with a 20 percent royalty rate, Love provided a reality-based calculation of just what happens to a \$1 million advance to a 4-person group: \$500,000 spent to record their first album; “\$100,000 to their manager for 20 percent commission”; “\$25,000 each to their lawyer and business manager”; “\$170,000 in taxes”; leaving “\$45,000 per person....to live on for a year until the next record gets released.” Then, assuming the album “is a big hit and sells a million copies,” at “full price with no discounts or record clubs, then band earns \$2 million in royalties,” or \$2 per album sold, based upon their 20 percent royalty. Calculating recoupable expenses: if the band released two singles and made two videos at a cost of \$1 million and 50% of the video production costs were recoupable, that’s \$500,000; \$200,000 in 100% recoupable tour support; plus \$300,000 in recoupable independent radio promotion expenses; added to the 100% recoupable \$1 million advance yields a total of \$2 million in recoupable expenses. \$2 million in royalties minus \$2 million in recoupable expenses equals zero dollars for the band. Love, *supra* note 177.

¹⁹² See Daniel Gervais et al., *The Rise of 360 Deals in the Music Industry*, 3 No. 4 LANDSLIDE 40, 41 (2011).

¹⁹³ *Id.* at 40 (“[T]here is nary a deal being struck in the industry, especially for new artists, that does not involve a transfer of some or ‘all of 360 rights to the record company.’”).

15% to 30% range.”¹⁹⁴ As a result, an artist’s ability to generate passive and active income from non-record sources is burdened by limitations on their bargaining power, as it existed at the time of the record deal negotiations.

Compounding the impact of 360 deals for singer-songwriters, is the “controlled composition clause.” The “controlled composition clause” in a recording contract limits the amount of the mechanical royalty the record label must pay for each controlled composition, which is essentially any song written, owned, or controlled, in whole or in part, by the artist, or any song in which the artist otherwise has an earnings interest.¹⁹⁵ Record labels limit the mechanical royalties payable to singer-songwriters by reducing the rate for controlled compositions, and in some cases all compositions, to 75% of the statutory rate for general sales and to 50% for record club sales and other budget records.¹⁹⁶ If a song is used more than once on an album, the singer-songwriter only gets the mechanical royalty for a single use.¹⁹⁷ In addition, the controlled composition clause limits the total mechanical royalties for each album to ten times the 75% of statutory rate, even though the number of songs on an album typically exceeds ten.¹⁹⁸ As a result, the artist must pay the writers of non-controlled compositions their full mechanical rate from the limited pot of money available from the label, thereby reducing the singer-songwriter’s mechanical royalties even further.¹⁹⁹ The artist may be able to negotiate higher mechanical royalty rates or reduce the limit on non-controlled songs, depending again upon their clout status. But, again, the artist will be limited by the bargaining power that existed at the time of the governing recording deal negotiations.

D. Passive Income Sources for Recording Artists versus Songwriters

The argument for recognizing the music vocalist’s performance as an applied composition worthy of its own discrete copyright turns, in part, on the inequitable disparity between passive income for vocalists as compared to songwriters, in light of their respective roles in generating the revenues to be had. Accordingly, it is necessary to discuss in some detail the nature of the passive income available to

¹⁹⁴ PASSMAN, *supra* note 141, at 98.

¹⁹⁵ *Id.* at 227.

¹⁹⁶ *Id.* at 228 & 230.

¹⁹⁷ *Id.* at 230.

¹⁹⁸ KRASLOVSKY & SHEMEL, *supra* note 103, at 24.

¹⁹⁹ *Id.* at 25.

recording artists and songwriters, however tedious that may seem.

1. Passive Income Sources for Songwriters

A songwriter typically receives 50% of the revenues collected by its administering publisher,²⁰⁰ with direct payment of the writer's share of performance royalties. The majority of revenues collected by a publisher come from mechanical royalties and performance royalties.²⁰¹

Recall that mechanical royalties are the statutorily or contractually specified number of cents on the dollar paid by the record label for each record manufactured and distributed, and each digital copy downloaded. Performance royalties are the earnings generated from licensing fees collected by designated performing rights societies ("PRSs")—such as ASCAP, BMI, and SESAC—under blanket licenses issued for the right to play all songs represented by the particular PRS on radio and television, in nightclubs, elevators, restaurants, and other public spaces, at live concerts, and in foreign films. The annual license fee "can range from a few hundred dollars for a small night club to multimillions of dollars for television networks."²⁰² Foreign film performance fees are typically a percentage of the box office receipts, which means that "the composer of a major smash film score can earn hundreds of thousands of dollars in foreign performance monies alone."²⁰³ The PRS pays out to its member publishers and writers, according to the monitored volume of play of the songs covered. The PRS pays the writer's share directly to the songwriter, so the writer need not rely upon the publisher's accounting for that revenue stream.²⁰⁴

Note that because performance fees are due for live performances of a song, the songwriter collects passive income from the recording artist's active touring.

Other sources of publishing income include revenues from synchronization rights, transcription rights, print rights, digital rights, and foreign sub-publishing. Synch licenses provide for the use of music in synchronization with visual images; such uses include domestic films, television, commercials, home videos and DVDs. There is no standard fee amount, as the fees vary according to the use, placement, and importance of the song, as well as based upon the nature of the medium. For example, the synch license fee for a major motion

²⁰⁰ PASSMAN, *supra* note 141, at 275-76.

²⁰¹ *Id.* at 224.

²⁰² *Id.* at 239.

²⁰³ *Id.* at 241.

²⁰⁴ *Id.* at 277.

picture film use in all media in perpetuity can range from \$15,000 to \$250,000, depending upon whether and how the song is used within the body of the film or run during the opening or ending credits, while a television synch license could range between \$10,000 to \$50,000.²⁰⁵ The synch and transcription licenses for commercials can range from \$50,000 to \$200,000 for a one-year period of domestic usage.²⁰⁶

Additional revenues are generated by digital rights or electronic transmissions, including digital downloads, ringtones, webcasting, podcasting and subscription services such as Pandora. While permanent downloads on iTunes, for example, are treated as CD sales and subject to full mechanical royalty rates, the mechanical royalty rate for ringtones was 24 cents, as of 2012.²⁰⁷ As Passman outlined, non-interactive audio streaming generates royalties as a percentage of revenues, with minimum royalty amounts, while interactive audio streaming generates royalties based upon the greater of: (i) 10.5% of either the subscription fees paid by the consumer or of the gross advertising revenues, for advertiser supported services, or (ii) a flat rate of 15-50 cents per subscriber per month, or (iii) either 17-18% of what the record label receives for the masters and publishing combined, if the label is to pay the publisher, or 21-22% of what the record label is paid for the masters alone, if the streaming service is to pay the publisher.²⁰⁸ Omitted from this overview, are the royalties generated from locker services (i.e., cloud storage of music), video streaming, apps, and foreign sub-publishing, which includes foreign mechanicals, foreign performances, and more.

Print revenues include royalties from the sale of sheet music, instructional music, marching band, choir, and other arrangements, and hard reprints of lyrics. The standard royalty rate for single-song sheet music is 20% of the market retail price, such that the publisher receives 20 cents for every retail dollar and the songwriter receives half of that amount.²⁰⁹ Sales of folios containing songs from various songwriters or publishers yield prorated royalties on the average of 10-12.5% of the market retail price, which price is typically \$24.95.²¹⁰ The royalty for instructional music and various arrangements is generally 10% or retail, at most.²¹¹ Lyric reprints in books, greeting cards, and magazines, generate revenues as well;

²⁰⁵ *Id.* at 248-251.

²⁰⁶ *Id.* at 252.

²⁰⁷ *Id.* at 254.

²⁰⁸ *See id.* at 254-256.

²⁰⁹ *Id.* at 244.

²¹⁰ Folios containing pictures of the recording artist also generate an additional 5% royalty payable to the recording artist. *Id.* at 244-245.

²¹¹ *Id.*

“[a]dvertising uses (such as printing the lyrics in magazines, newspapers, and on billboards) are flat fees, and can run \$25,000 or more for major uses.”²¹² Digital print rights, such as the right to post lyrics on lyric websites, can yield publishers 50% of the generated website advertising revenues.²¹³

Again, songwriters receive, as passive income, 50% of the publisher’s collected revenues from the various sources mentioned above.

2. Record-related Passive Income for Recording Artists

The sources of record-related passive income for a recording artist are: (i) the advance paid upon signing, which is recoupable against artist royalties (although the advance is actually payment for their recording services and thus, arguably, not passive income at all); (ii) artist royalties on records sold, where the term “records” includes audio units, such as CDs, as well as audio-visual units, such as DVDs; (iii) master license fees; and (iv) artist royalties on electronic transmissions.

The artist royalty rates on records and electronic transmissions were discussed, *supra*, Section IV.B.3. The master license fees generated are typically 50% of the revenues received by the record label for licensing of masters for use in motion pictures, television shows, and commercials, less the fee taken off the top—as much as 15-25% of the license amount—as payment to the record label for marketing the recordings to find the master license opportunities.²¹⁴ Master license fees for video games range from \$8,000 to \$10,000 for lesser-known songs and artists, to \$30,000 to \$50,000, for hits.²¹⁵

3. Passive Income Comparisons—Songwriters versus Recording Artists

Although it is impossible to make direct comparisons of the income generated for revenues from master licenses fees versus synch licenses and other uses, without access to specific deal data, at the very least it is apparent that the sources of passive income for songwriters far exceed the sources of passive income for recording artists. In fact, the primary sources of passive income for songwriters—mechanical royalties and non-digital performance rights—are not available to recording

²¹² *Id.* at 246.

²¹³ *Id.* at 247.

²¹⁴ *Id.* at 138.

²¹⁵ *Id.* at 163.

artists at all.²¹⁶ The reduction of available passive income for music vocalists results in additional losses, such as lost opportunity for securitization using future music royalty streams.²¹⁷

Further illustrating the passive income disparity are the results of a “Money from Music” nationwide internet survey of more than five thousand music artists regarding their sources of income, conducted during the fall of 2011, as a case study toward understanding “how copyright incentives operate in a particular institutional setting.”²¹⁸ The critical survey question asked participants to indicate what percentages of their broadly-defined “music[]-based revenue” over the last twelve months that were attributable to: (1) “Money from song-writing/composing” (including the various passive income sources), (2) “Salary as an employee of a symphony, band, or ensemble,” (3) “Touring/shows/live performance fees (earned as a solo performer or by the band/ensemble the participant was a part of), (4) “Money from sound recordings” (including sales of physical or digital recordings and various passive income sources related to the sound recordings), (5) “Session musician earnings,” (6) “Merchandise sales,” (7) “Teaching,” and (8) “Other.”²¹⁹

While in the aggregate the results showed that the music artists sampled earned only an average of 12% of their income from “sources directly related to copyright” (that is, revenue from sales, licensing, and royalties from compositions and sound recordings subject to copyright protection), another

²¹⁶ To put things in sharper perspective, consider the following comparative examples of passive income for songwriters versus recording artists:

Mechanical royalties at a statutory rate of 9.1cents per unit sold:

Songwriter gets 50% of revenues, or 4.05 cents per unit manufactured; Recording artist gets nothing; Singer-Songwriter recording artist with controlled composition clause gets 50% of 75%, or 3.4 cents per unit sold for controlled composition in best case scenario (i.e., if there are no non-controlled compositions to be subsidized and if the number of songs on the album does not exceed ten).

Performance royalties for non-digital use, including live performances by recording artists: Songwriter gets 50% of revenues, ranging from a few hundred dollars to multimillions of dollars; Recording artist gets nothing.

Non-interactive audio streaming royalties: Songwriter gets 50% of 10.5% (or 5.5%) of the pro-rated gross advertising revenues; New recording artist gets 13% to 15% of 60% (or 7.8% to 9%) of the pro-rated gross advertising revenues.

²¹⁷ See Lisa M. Fairfax, *When You Wish Upon A Star: Explaining the Cautious Growth of Royalty-Backed Securitization*, 1999 COLUM. BUS. L. REV. 441, 459-468 (1999) (discussing royalty-based securitization in the music industry, its benefits, and its impediments).

²¹⁸ See Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301, 303 (2013).

²¹⁹ *Id.* at 324.

10% from “sources with a mixed relationship to copyright, and 78% from sources indirectly related or unrelated to copyright,”²²⁰ the numbers changed drastically when the survey author looked at the subgroup of composers sampled. For “the subgroup of composers in the top income bracket, 68% of their [income was] directly related to copyright, 17% [had] a mixed relationship, and 15% [was] indirectly related or unrelated.”²²¹ In contrast, “sound recording revenues [did] not exceed a 5% share for any of the income groups in the top half of the estimated-music-income distribution,” and, at its highest, accounted for only 9% of the revenue for the lowest income bracket segment.²²²

The survey participants did not reflect a scientific cross-sampling of all people engaged in music-related activities, with regard to age, race, ethnicity, music genre, etc.²²³ Nonetheless, the survey results, at least, “suggest[] that sound recording [copyrights] have greater relative importance for lower-income, part-time, and younger [music artists],” while, “[f]or higher-income [music artists] accumulating revenue streams,” composition copyrights play a “much larger role in earning revenue.”²²⁴

Perhaps it is this disparity in passive income from compositions versus sound recordings that has caused some superstar recording artists—among them, Elvis and reportedly Justin Bieber—to extract writing credits for songs they had no part in writing.²²⁵ Recognizing the artist’s performance as an applied composition and granting the copyright interests proposed, *infra* in Section VI, could reduce, if not eradicate, the impetus for this fraudulent practice.

V. WHY COPYRIGHT LAW MUST ADDRESS THESE INEQUITIES

Two recurring questions arise when considering the propriety of legislative intervention and modification of the Copyright Act to remedy the inequities discussed: Why not leave it to the artists to remedy these inequities via contract law? and Why not rely on the artists’ right to terminate contractually forced assignments of sound recording copyrights

²²⁰ *Id.* at 304-305 & 325-326.

²²¹ *Id.* at 305.

²²² *Id.* at 328.

²²³ *See id.* at 319-20 (discussing the basic survey demographics).

²²⁴ *Id.* at 329.

²²⁵ *See* Brauneis, *supra* note 74, 54 & n.178 (discussing the rarely-acknowledged practice of certain non-composer, top recording artists, to negotiate for co-writer credit and attendant shares of performance and mechanical royalties for songs they did not actually write); *see also, supra* note 14 (discussing this practice by Elvis).

under Section 203 of the Act? Discussion of the questions posed helps explain why copyright law must be adjusted to address the particular problems that flow from the Act.

A. Featured Vocalists as Distinguished from Performers in Other Performing Arts

Contract law is not the answer. The inequities that befall featured music vocalists are exacerbated and perhaps even perpetuated by the fact that, unlike performers in other areas of the performing arts, featured music vocalists have no union to negotiate minimum standards for contracts that control the predominant sources of their compensation and intellectual property interests.

Bargaining power imbalances for beginning and non-superstar actors, directors, and television/film producers are countered by collective bargaining for standard contracts with minimum pay scales and even specified credits, which apply to all members of the Screen Actors Guild, the Producers Guild of America, and the Directors Guild of America.²²⁶ For example, throughout its history, SAG has secured for its members better working conditions, minimum pay scales and standard contracts, pension and health plans, and residual royalties for television reruns of commercials, television programs, and film, and more.²²⁷

For their union choice, recording artists may become members of the American Federation of Television and Radio Artists (“AFTRA”), which represents various performers across the media industries since 1937.²²⁸ However, AFTRA’s collective bargaining on the part of recording artists does not extend to minimum standards for featured vocalist recording

²²⁶ Television, film, and new media producers and directors are unionized as members of the Producers Guild of America (“PGA”) and the Directors Guild of America (“DGA”), respectively. See *About The PGA*, PGA, <https://perma.cc/A39H-4LHV> (last visited Apr. 19, 2017); *About the DGA*, DGA, <https://perma.cc/4FYC-4CZ8> (last visited Apr. 19, 2017). Film and television actors have been unionized as members of the Screen Actors Guild (“SAG”) since 1933. SAG is now merged, as of 2012, with AFTRA. See Valerie Yaros, *SAG History*, SAG-AFTRA, <https://perma.cc/SWN2-WQ3S> (last visited Apr. 5, 2017).

²²⁷ See Ken Orsatti, *The Actor’s Road to Empowerment*, SCREEN ACTORS GUILD (1995), reprinted in Melanie Webber, *SAG History*, SAG-AFTRA, <https://perma.cc/2GGS-HTLL> (last visited Apr. 19, 2017).

²²⁸ AFTRA was the result of a merger between the American Federation of Radio Artists and the Associated Actors and Artistes of America, both of which were established in 1937. *AFTRA History*, SAG-AFTRA, <https://perma.cc/W52X-FWDE> (last visited Apr. 5, 2017). Musicians have been unionized as members of the American Federation of Musicians (“AFM”) since 1896. See *History*, AMER. FED’N MUSICIANS, <https://perma.cc/X3ZZ-A4LK> (last visited Apr. 5, 2017).

contracts with record labels overall. There is, since 1951, what is now known as the SAG-AFTRA National Code of Fair Practice for Sound Recordings (the “Sound Recording Code”), which establishes basic rates of pay for recording sessions applicable to all sound recordings using vocal performance.²²⁹ Pursuant to the Sound Recording Code, every vocalist is entitled to payment of the basic rate or “union scale”—in 2016, \$231.50 for a soloist, per hour or per 4.5-minute track—for performing at recording sessions.²³⁰ Those payments, to the recording artists and to any other session vocalists, are deemed part of the recording costs recoupable against the royalties payable to the recording artist under the recording agreement.²³¹ In other words, the recording artists ultimately pay themselves. In the absence of a union that engages in collective bargaining related to recording agreements, recording artists are left to their own individual devices.

Further distinguishing recording artists, regarding the ability to rely on contract negotiation to offset the lack of a copyright in their performance, is the fact that recording artists sign with a single record label for a set period of years, which can be quite lengthy. In contrast, television and film actors, producers, and directors move from project to project, thus enabling those performers to constantly renegotiate the terms of their performing agreements in a manner consistent with their current industry status.²³² Recording artists do not benefit from the advantages of that fluidity of relationship or collective bargaining as nascent performers or even as veteran performers.

B. Limitations of the Sound Recording Copyright Termination Clause

Termination rights are not the answer. There was much consternation about commotion and upheavals the music industry would see once the year 2013 arrived, marking the thirty-fifth anniversary of the January 1, 1978 effective date of the Copyright Act of 1976 and, with it, the first maturation of the right established under Section 203 to terminate a transfer of copyright thirty-five years after the transfer. Termination of

²²⁹ See *Sound Recordings Code*, SAG-AFTRA, <https://perma.cc/48BE-4WCC> (last visited Apr. 5, 2017).

²³⁰ *Id.*

²³¹ PASSMAN, *supra* note 141, at 85.

²³² Notably, SAG defeated the old Hollywood studio system of long-term contract players, freeing new and veteran superstar actors alike from onerous seven-year contracts which tied actors to a single studio from term to term. Ken Orsatti, *The Actor's Road to Empowerment*, SCREEN ACTORS GUILD (1995), reprinted in Melanie Webber, *SAG History*, SAG-AFTRA, <https://perma.cc/S585-QQM8> (last visited Apr. 5, 2017).

a copyright grant restores exclusive ownership of the granted copyrights in the work to the author(s), along with the right to payment of royalties for post-termination exploitation of the work subject to certain limitations. The “big issue” was believed to be “performers’ potential termination of copyrights in sound recordings that they created under contract with their record labels.”²³³

The year 2013 came and went. The stampede of recording artists seeking to regain control of their sound recording copyrights that many thought would flood the courts with litigation has not come to pass; or at least it has not as of yet it. The likely reasons that may explain the quietness also explain why reliance on the termination right is not the answer.

1. Termination under Sections 203 and 304

Congress’ intent in providing for the termination right was to restore the intended effect of the renewal term first included under the 1909 Act, which was meant to address the inequity that resulted the “inability of authors to know the true monetary value of their works prior to commercial exploitation,” by providing a “second opportunity with more bargaining power to reap the full value of the work.”²³⁴ Because that purpose was eroded by a Supreme Court decision holding “that [the] renewal rights were assignable,”²³⁵ Congress added the inalienable termination right to allow authors to recapture assigned rights.²³⁶

Two provisions of the Copyright Act provide termination rights as a result of the 1976 amendments: Section 203 and Section 304(c). Section 304(c) established, for works in their first or renewal term as of January 1, 1978, a right of termination of copyright assignments and nonexclusive copyright licenses to be effected within a five-year window following the later of January 1, 1978, or fifty-six years after or the date the copyright was first secured.²³⁷ Given that sound recordings were only protected under state laws and did not receive federal copyright protections until February 1972, the scope of applicability for Section 304 to sound recordings is limited to those copyrighted and transferred between February 15, 1972 and December 31, 1977, and the Section 304

²³³ Ben Sheffner, *Songwriters vs. Publishers: Prepare for Bruising Battles over Termination Rights under the '76 Copyright Act*, BILLBOARD, Apr. 17, 2010, at 4, 2010 WLNR 9767675.

²³⁴ Woods v. Bourne Co., 60 F.3d 978, 982 (2d Cir. 1995).

²³⁵ *Id.* (citing Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943)).

²³⁶ *Id.*

²³⁷ 17 U.S.C. § 304(c)(3) (2012).

termination right would not mature until February 2028, at the earliest.

Section 203, which applies to grants in copyrights made on or after January 1, 1978, provides for termination of copyright assignments and nonexclusive licenses to be effected within a five-year window thirty-five years after the date of execution of the grant,²³⁸ thus yielding the 2013 first maturation date.

2. Authorship Issues that Cloud the Right to Terminate for Sound Recordings

Anticipated battles between labels and artists were/are expected to revolve around the identity of the actual author of the sound recordings and whether those recordings were exempt from termination as works-for-hire.²³⁹ Statutory and legislative ambiguity is one source of the authorship issues that cloud a recording artist's right to terminate. Joint authorship is another.

a) The Unresolved Work-for-Hire Ambiguity

Standard provisions of recording agreements include a clause designating the recordings made thereunder as works-for-hire, and, as a backup, an assignment of the copyrights from the artists to the label. The assignment is subject to termination, but the termination right does not apply to works-for-hire for which authorship and copyright ownership vests in the employer or commissioning party.²⁴⁰ Thus, if recordings under a particular contract are determined to be works-for-

²³⁸ 17 U.S.C. § 203(a) (2012). For grants covering the right of publication of the work, “the period begins at the end of thirty-five years from the date of publication...or at the end of forty years from the date of execution of the grant, whichever term ends earlier.” 17 U.S.C. § 203(a)(3) (2012).

²³⁹ See, e.g., JAFFE, *supra* note 64, at 139 (discussing the issues of authorship in sound recordings, in anticipation of termination rights being in effect in 2013); Randy S. Frisch and Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 COLUM-VLA J.L. & ARTS 211 (1993) (exploring, from a practitioners’ perspective, the musicians right to terminate recording company’s copyright ownership in recordings); Ben Sheffner, *Songwriters vs publishers: prepare for bruising battles over termination rights under the ’76 Copyright Act*, BILLBOARD, Apr. 17, 2010, at 4, 2010 WLNR 9767675 (discussing both Section 203 and 204 terminations and their possible effects for recording artists and songwriters, and noting how the issue “has been well chronicled in Billboard and elsewhere”).

²⁴⁰ 17 U.S.C. § 203(a) (2012) (“In the case of any work other than a work made for hire...); 17 U.S.C. § 304(c) (2012) (“In the case of any copyright..., other than a copyright in a work made for hire...”).

hire, copyright ownership vests in the record label and artist simply has no right of termination at all.

Under the 1909 Act, which still governs pre-1978 recordings made on or after February 15, 1972, the “copyright belongs to the person at whose ‘instance and expense’ the work was created.”²⁴¹ Applying that test, at least one federal court found a work-for-hire relationship between a renowned and prolific recording artist and his record label, based upon contractual provisions that gave the label the right to accept or reject the music and lyrics to be recorded and to compel the artist’s attendance for the purpose of recording, notwithstanding any exercise of artistic control by the artist and irrespective of the fact that the contract allowed the record label to recoup expenses it advanced from artist royalties.²⁴² The artist was the late Bob Marley and the record label was Island Records.²⁴³ The court’s holding quashed Marley’s heirs’ attempt to reclaim copyright ownership of pre-1978 sound recordings embodying Marley’s performances under the reversion of renewal rights to authors under the Copyright Act of 1909.²⁴⁴ The case illustrates how the work-for-hire doctrine could thwart termination under Section 304 for pre-1978 recordings.

Under the current Copyright Act, there are only two ways to achieve work-for-hire status. Either (1) the work must be created by an employee acting within the scope of employment, or (2) the work must fit into one of the nine categories of “specially ordered or commissioned works” enumerated in Paragraph (2) of the “works made for hire” definition and the parties must designate the work, in writing, as one made for hire.²⁴⁵ The employee prong has spawned litigation with regard to various types of works, most often requiring a judicial determination of “employee” status, based on the nature of the parties’ actual relationship, irrespective of labels appearing in contracts.²⁴⁶

The “employee” standard established by the Supreme Court in the landmark case, *Community for Creative Non-*

²⁴¹ *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham*, 380 F.3d 624, 632 (2d Cir. 2004) (quoting *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567 (2d Cir.1966)).

²⁴² *See Fifty-Six Hope Road Music Ltd. v. UMG Recordings, Inc.*, No. 08Civ6143, 2010 WL 3564258, at *2-3 & 8-10 (S.D.N.Y. Sept. 10. 2000).

²⁴³ Predecessor-in-interest to Universal Music Group.

²⁴⁴ *See Fifty-Six Hope Road Music Ltd.*, 2010 WL 3564258, at *12.

²⁴⁵ 17 U.S.C. § 101 (2012)(“works made for hire” definition).

²⁴⁶ *See, e.g., Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (developing a new standard and applying it to determine that a sculptor hired to create a statue was an independent contract, rather than an employee acting within the scope of his employment).

Violence v. Reid (“CCNV”),²⁴⁷ governs recordings made in 1978 or later. The CCNV standard is quite difficult to meet with respect to establishing recording artists as employees, particularly given the lack of creative control exercised by the record label over the artist’s performance and the pay practices, which exclude benefits and tax treatment indicative of employer-employee relationships.

Failure to meet the employee prong would have been the end of the inquiry, since, historically, applicability of the “specially ordered or commissioned” prong was a matter of checking the list in Paragraph (2) to see that sound recordings are not listed there.²⁴⁸ However, for recording artists and record labels, now the matter is complicated by the amendment to the Section 101 definition of works made for hire that expressly prohibits courts from considering or otherwise giving legal significance to the addition and subsequent deletion of sound recordings to/from the list in Paragraph (2). That restriction necessarily hinders a court’s analysis of legislative intent behind the exclusion of sound recordings from Paragraph (2), and it opens the door to arguments, however specious, that sound recordings fit into one of the enumerated categories. Even without the specific inclusion of sound recordings in the enumerated list, record labels may assert that sound recordings come within Paragraph (2) as either a contribution to a collective work, or as a contribution to a compilation (i.e. the album).²⁴⁹

²⁴⁷ *Id.* at 751-752 (“whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished”; a non-exhaustive list of “factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party”) (citations omitted).

²⁴⁸ See *Staggers v. Real Authentic Sound*, 77 F.Supp.2d 57 (D.D.C. 1999); *Ballas v. Tedesco*, 41 F.Supp.2d 541 (D.N.J. 1999); *Lulirama Ltd. v. Axxess Broad. Servs., Inc.*, 128 F.3d 872, 878 (5th Cir. 1997).

²⁴⁹ See JAFFE, *supra* note 64, at 139, 156 & 166-169 (2006) (discussing Professor Paul Goldstein’s assertion, on behalf of the RIAA during the work-for-hire hearings before the House Judiciary Committee, that “a contribution to a sound recording will typically constitute a contribution to a collective work,” notwithstanding the fact that each individual song is not a collective work, and critiquing potential arguments for the sound recordings as a specially commissioned work); Peter J. Strand, *What a Short Strange Trip It’s Been: Sound Recordings and the Work Made for Hire Doctrine*, 18 ENT. & SPORTS LAW 12 (Fall, 2000) (briefly discussing and partly dismissing the possibility);

There has been speculation that the seemingly inevitable litigation over the work-for-hire issue may never occur, because the artists that can afford to mount and sustain the litigation through the probable appeals are more likely superstar artists who have the leverage to renegotiate with their record labels, and the artists who do not have such clout simply will not be able to afford the fight.²⁵⁰ If such is indeed the result, then the termination right will have achieved its legislative purpose for superstar artists. The fate of termination for non-superstars, however, will likely depend upon whether the record label believes it is worth the fight to hold onto the copyrights in the works at issue.

b) The Joint Authorship Wrench

Termination requires statutory notice from the author or, under Section 203, a majority of joint authors of the work.²⁵¹ The majority requirement complicates termination for sound recordings, because the featured recording artist(s), the producer(s), the sound engineers, musicians, and even backup vocalists, potentially could be deemed all joint authors of the sound recording.²⁵²

Although authors of a joint work must intend “that their contributions be merged into inseparable or interdependent parts of a unitary whole,” there is no requirement that the authors contribute equally.²⁵³ Irrespective of their comparative contribution, each co-author (including co-authors who did not sign the termination notice)²⁵⁴ would have an independent right to exploit the copyright, subject only to an obligation to split equally the income generated from such exploitation. In

Frisch & Fortnow, *supra* note 239, 222-224 (exploring possible record label arguments for sound recordings as specially ordered or commissioned works).
²⁵⁰ See, e.g., M. Ryder Lee, *Why the Battle Over Artists’ Termination Rights in Sound Recording Copyright Transfers Hasn’t Happened (and Probably Won’t)*, MONDAQ, Jun. 22, 2015, 2015 WLNR 18333785 (further surmising that most cases are likely to settle quickly, with the label opting to quietly renegotiate and preserve the status quo regarding the unanswered work-for-hire status).

²⁵¹ 17 U.S.C. §§ 203(a)(1) & 304(c)(1) & (4) (2012).

²⁵² See *Systems XIX v. Parker*, 30 F.Supp 2d 1225, 1228 (N.D. Cal. 1998) (holding that sound engineer who recorded, mixed, and equalized live performance by Lawrence Parker p/k/a/ “KRS-One” was potential joint author of sound recording); *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409, 411 (S.D.N.Y. 2004) (finding that vocal phrase spontaneously created by an unsigned singer visiting during a recording session by Sean Carter p/k/a “Jay-Z” was potentially a copyrightable expression that would support joint authorship in the recording into which vocal phrase was incorporated).

²⁵³ 17 U.S.C. § 101 (2012)(definition of “joint works”).

²⁵⁴ 17 U.S.C. §§ 203(b) & 304(c)(6) (2012).

addition to the income share imbalances that would exist, that creates issues in terms of competing same or similar works for new use opportunities. Moreover, assuming that a majority of joint authors agreed to terminate, recording artists would not have sole control of their captured performances because, for instance, a sound engineer or backup vocalist might extract the featured recording artist's recorded performance from a sound recording to generate new derivative works featuring that vocal performance. Examination of the argument for granting certain moral rights to performers to prevent that scenario is beyond the scope of this article, but the uncontrolled exploitation of an individual's vocal performance is certainly cause for concern.

3. Ownership of the Master Recordings versus Ownership of Copyrights

Termination only restores ownership of the copyrights in sound recordings. It does not transfer the right to possess the master recordings, because “[o]wnership of a copyright... is distinct from ownership of any material object in which the work is embodied.”²⁵⁵ Without a copy of the masters to use, recording artists would be limited in their ability to exploit the recovered copyright in their sound recordings. Control of the physical masters gives record labels continuing leverage and the result is most likely to be renegotiation of royalties or, alternatively, some split of income from new post-termination, exploitation of the sound recordings. Such renegotiation is consistent with Congress' purpose in granting a termination right in the first instance. But once again, artists who have achieved sufficient clout or financial means may have the leverage or necessary buy-back funds to obtain control of their masters, while those without such clout or financial means will likely remain subject to the label's control of the masters.

4. The Derivative Works Limitation

After decades without control, termination would not restore meaningful exclusivity with respect to the artist's captured performance, because of the label's continuing right to exploit derivative works made prior to termination. Under Sections 203 and 304, all copyright interests that were transferred under the terminated grants revert to the original author(s), *except* that “a derivative work prepared under authority of the grant before its termination may continue to be

²⁵⁵ 17 U.S.C. § 202 (2012).

utilized *under the terms of the grant* after its termination.”²⁵⁶ “The purpose of the [e]xception was to ‘preserve the right of the owner of a derivative work to exploit it, notwithstanding the reversion.’”²⁵⁷ The Supreme Court has held that “utilized under the terms of the [terminated] grant” means the exception preserves to the grantee and any of its pre-termination licensees the continuing right to exploit the derivative work, along with the continuing contractual right/obligation to receive or pay royalties consistent with the terms of the terminated grant.²⁵⁸ Consequently, the termination right provides absolutely no relief to the author with respect to derivative works made pre-termination and use licenses for such derivative works granted pre-termination, even if the terms of the grants and/or the licenses were “manifestly unfair” to the author.²⁵⁹

The wait to regain control of a transferred copyright—whether thirty-five or fifty-six years—is long; much too long. Such a long time gives the record label more than ample opportunity to create greatest hits compilations, remixes, and remastered recordings,²⁶⁰ or to license others to create derivative works, such as videos, commercials, television shows, or films including the sound recordings,²⁶¹ even right up to the moment just before maturation of the termination right, sticking the recording artist with whatever allocation of royalties he or she was able to bargain for prior to termination. These prior derivative works may also compete with any new derivative works, or worse, they could decrease market demand for new exploitations.

²⁵⁶ 17 U.S.C. §§ 203(b)(1) & 304(c)(6)(A) (2012)(emphasis added).

²⁵⁷ *Mills Music Inc. v. Snyder*, 469 U.S. 153, 173 (1985).

²⁵⁸ *Id.* at 169 (“The contractual obligation to pay royalties survives the termination and identifies the parties to whom the payment must be made.”).

²⁵⁹ *Id.* at 173.

²⁶⁰ According to the United States Copyright Office’s Circular No. 56, Copyright Registration for Sound Recordings, derivative sound recordings include remixes from multitrack sources and remastering that involves “adjustments of equalization, sound editing, and channel assignment,” even without otherwise editing the performance captured. UNITED STATES COPYRIGHT CIRCULAR, CIRCULAR 56: COPYRIGHT REGISTRATION FOR SOUND RECORDINGS, <https://perma.cc/97ZN-6MTV> (last visited April 5, 2017). One federal district court just recently relied upon the Circular definition to find that such remastered sound recordings made using pre-1972 sound recordings were new works entitled to federal copyright protection. *ABS Entertainment, Inc. v. CBS Corp.*, No. CV15-6257-PA-AGR (C.D. Cal. May 30, 2016).

²⁶¹ Although there is no general public display right, use of sound recordings in audiovisual works videos, commercials, television shows, or films does require a license to create copies of the sound recording under Section 106(1), as well as a license to distribute, under Section 106(3).

VI. PROPOSED SOLUTION

To address the protection gap and related inequities discussed, this author proposes amendment of the Copyright Act for addition of an “applied music composition” to the list of copyrightable subject matter in Section 102(a) and a further limitation of the derivative use of sound recordings in Section 106 as described herein.

A. Treat the Music Vocalist’s Auditory Performance as a Discrete Copyrightable Work

Where the requisite original creative contribution threshold is met, a music vocalist’s performance should be recognized under Section 102(a) as an “applied music composition” in which the music vocalist is entitled to an inalienable copyright that coexists with, but is otherwise is separate from, the copyright in the sound recording.

The applied composition work should consist of the auditory aspects of the vocal performance, but omit visual aspects, such as facial expressions and gestures, such that the subject matter is limited to actual music.²⁶² The existing body of case law provides the necessary benchmark for determining whether the minimum threshold for original creativity is satisfied.

The new right should be inalienable—i.e. not subject to transfer—for the same reasons the termination rights under Sections 203 and 304 are inalienable: a new transferable right would be subject to the same bargaining power imbalances and result in the same inequities that result when an artist does not know “the true monetary value of their works prior to commercial exploitation.”²⁶³ Making the new right inalienable would eliminate ownership claims under the work-for-hire doctrine, since, by definition, the applied composition copyright could only vest in the vocalist. Inalienability is also critical for setting this right up as one that could also support or substitute for limited moral rights for music vocalists.²⁶⁴

²⁶² Although gestural expression is a recognized part of music performance, and although it may in fact be a crucial part of an entertaining performance, it is not itself sound and thus it is not music. *See passim*, MAZZOLA, *supra* note 82, at 115-133 (discussing gesture theory in music performance).

²⁶³ *Woods v. Bourne Co.*, 60 F.3d 978, 982 (2d Cir. 1995).

²⁶⁴ The Copyright Act only provides for limited moral rights of attribution and integrity to authors of narrowly defined works of visual arts. As a result, recording artists who have no control over the use of their recorded performances have no remedy when, for example, the record label controlling the sound recording copyright licenses use of the vocalist’s recorded performance for political campaigns or for use in a sexually explicit or graphically violent film, over the artist’s objections. The need for expansion

B. Treat Fixation of the Applied Music Composition as Fixation of Compositions is Treated

The applied music composition copyright would vest in the vocalist as soon as it is fixed. The allowable forms of fixation for the applied music composition would be the same as it is for a music composition: either notated copy, or non-audio digital files, or a phonorecord. Acceptable registration deposit copies would be any of these three for registration as a work of performing arts, or a phonorecord for simultaneous registration, where ownership of the sound recording and applied composition are the same.

C. Afford the Applied Composition All Rights Available Under Section 106

The copyright bundle for the applied composition should include all rights available under Section 106, which are the rights: (i) to reproduce the copyrighted work in copies and phonorecords; (ii) to prepare derivative works based upon the copyrighted work; (iii) to distribute copies or phonorecords of the copyrighted work to the public by sale to other transfer of ownership, or by rental, lease, or lending; (iv) to perform the copyrighted work publicly by any means (whether live or by playing or broadcast of recorded or live performances, as well as by digital transmission); and (v) to display the work publicly.

D. Subject the Exclusive Right to Copy Applied Compositions to Compulsory Mechanical License and Modify the Statutory Royalty Rate for "Mimicking Covers"

Once fixed, the applied composition would be protected beyond any sound recording encompassing the audio performance, subject to a compulsory mechanical license, just as compositions are treated. The compulsory license would allow any other person to lawfully make and distribute copies/phonorecords of the resulting musical structure embodied by the applied composition, if that person's primary objective is distribution to the public for private use. Modified statutory royalties would apply to enable compensation for composers *and* vocalists where applicable. In the instance where the composer is the performer, the modified royalty would collapse to the original composer royalty scheme.

of the moral rights afforded under the Copyright Act, however, is left for another day.

For example, recorded covers that mimic the copyrighted performance would owe royalties to both the composer and the vocalist. To account for this, the statutory royalty rate on mimicking covers could be increased by 25-30%, with the split between composer and vocalist set at 85% of the regular rate for composer, the balance of the increased rate going to the vocalist. The lowered royalty amount for the composer on covers mimicking the applied composition acknowledges that the performer's enhancement is the driving force behind the mimicking cover, rather than the original composition.

To the extent the increase in the overall royalty rate works to discourage mimicking covers and to encourage more original takes on composition or, better yet more new and overall original music, that would be a desirable outcome which is consistent with the incentive theory for copyright.

E. Limit the Current Right to Make Derivative Works of Sound Recordings

In addition to creating the new applied composition right, this author also proposes a restriction on the right to make derivative works from sound recordings.

First, derivative works from sound recordings should require use of the integrated whole, and not allow for vocals to be isolated for separate use. The aim here is to curtail the ability of the record label and non-feature-vocalist joint authors of the sound recording (i.e. producers, sound engineers, back-up vocalists, etc.) to create or license others to create derivative works of the sound recording that make use of the vocalist's audio performance isolated from the contributions of the back-up vocalists, musicians, and/or sound engineer. Only the vocalist would have the right to create derivative works from the artist's isolated recorded performance. This restriction is consistent with the objective of joint works, since joint authors must intend for their contributions to be merged into "inseparable and interdependent parts of a unitary whole,"²⁶⁵ and thus there is no basis for anyone besides the vocalist to own rights in the isolated vocal performance.

Further, the right to make derivative works from a sound recording should be subject to consent from the vocalist, as owner of the applied composition copyright, just as it is subject to consent from the composer/publisher, as owner of the composition copyright. This restriction recognizes the applied composition as a musical work and not merely a recorded performance. It also affords the music vocalist more control

²⁶⁵ 17 U.S.C. § 101 (2012) (definition of "joint works").

over the content (political, artistic, or otherwise) with which the sound recording may be associated by later licensing and use.

The proposed amendments would also address the termination problems and inequities resulting from requiring the “majority of joint authors” to terminate under Section 203, discussed, *supra*. With these modifications of the sound recording derivative works right, the applied composition copyright could coexist with the sound recording copyright.

VII. CONCLUSION

The proposed creation of an alienable copyright in an applied composition and clear designation of the music vocalist as author and owner is consistent with the purpose of copyright law, in terms of providing more substantial economic incentives for creation of original renderings, thus promoting a greater body of non-duplicative works. Moreover, although discussion of a proposed extension of moral rights to music vocalists is beyond the scope of this article, the rights argued for herein are a necessary precursor to remedying the music vocalist’s lack of control over creative works that are essentially an extension of their person.

This article has been framed via discussion of vocalists who perform covers of songs written and previously recorded by others strictly for ease of illustrating the arguments; this author believes that context makes the disparities in how copyright law treats vocalists versus composers and the justifications for change easier to see. However, the arguments apply to music vocalists more broadly, where the artists meet the threshold requirements of original creativity, and the arguments may even be extended to musicians who are similarly situated.