What's Mine Is Mine: Why Sound Recordings Should Never Be Considered Works Made for Hire

By Dustin Osborne

I. Introduction

"[W]hen you expect anything from music, you expect too much. So you play for yourself, you play to enjoy it and you make the most of it for you, period."[1]

Playing music for a living is mercurial at best. However, the assumption that a performer can at least rely on owning his or her own song cannot be taken for granted.

"Originally, under the 1909 Copyright Act, sound recordings were not given any protection other than under state law."

This idea brings to light a confusing and esoteric question of United States Copyright Law: should sound recordings be added to the list of specially commissioned works that may be defined as works made for hire?[2] This controversy arises from the termination rights granted in the Copyright Act; that is, the rights of an artist, or his or her heirs, to reclaim his or her copyrights 35 years after a contractual license or transfer.[3] These rights disappear, however, when works are created under the "work made for hire" doctrine, and as such, record companies prefer to include clauses stating that works such as sound recordings are works made for hire.[4] Due to the fact that sound recordings were not protected by copyright law until 1978, artists' rights to terminate copyright assignments first began to vest in 2013.[5] Thus, in 2013, controversies emerged regarding whether the authors of sound recordings could terminate their copyright transfers or licenses to the record companies.[6]

Ultimately, after reviewing the pertinent law, the legislative and common law history of this contention, and the Congressional intent to emphasize the value of predictability in copyright ownership, the stronger case can be made that sound recordings do not currently fall under the definition of "work made for hire" under the 1976 Copyright Act. It should never again be considered as such.

II. Legal Background

A. Sound Recordings

Originally, under the 1909 Copyright Act, sound recordings were not given any protection other than under state law.[7] The 1909 Act granted a 28-year term of copyright protection for other types of works with the ability to renew the protection for an additional 28 years.[8] Finally, in 1972, a new right was created to protect artists,[9] and in 1976, the new Copyright Act passed.

B. Work Made for Hire

The issue of whether sound recordings should fall under the realm of works made for hire is quite convoluted. As far as general copyright protection is concerned, according to the United States Copyright Office, "[f]rom the moment [a work] is set in a print or electronic manuscript, a sound recording, a computer software program, or other such concrete medium, the copyright becomes the property of the author who created it."[10] However, the glaring exception to this principle is in the case of "works made for hire."[11] Generally speaking, an employer is considered the author of a work made for hire, regardless of whether the employer is a firm, organization, or individual.[12]

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Section 101 of the 1976 Copyright Act (the 1976 Act) defines a "work made for hire" in two different ways. First, if an employee prepares a work within the scope of his or her employment, it clearly is a work made for hire. Where it gets more difficult is the second part; under the statute, a work is a work made for hire if the work is "specially ordered or commissioned for use: (1) as a contribution to a collective work, (2) as a part of a motion picture or other audiovisual work, (3) as a translation, (4) as a supplementary work, (5) as a compilation, (6) as an instructional text, (7) as a test, (8) as answer material for a test, or (9) as an atlas, [and] if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[13]

These nine categories were proposed by certain copyright industries and fully debated at the time of their enactment.[14] The rationale behind allowing these specific categories is to prevent works created by independent contractors, at the direction and risk of the publisher or employer, from reverting in ownership back to the creator after the commissioning party assumed all of the risk.[15] Significantly, sound recordings "were *never* proffered as a category to be added to the list of commissioned works."[16]

C. Termination Rights

In enacting the 1976 Act, Congress made it a point to ensure that artists would retain their crucial termination right. Under the 1976 Act, "[i]n the case of any work other than a work made for hire, the exclusive or nonexclusive

grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under [certain] conditions."[17] One of the crucial conditions is that "[t]ermination of the grant may be effected at any time during a period of five years beginning at the end of 35 years from the date of execution of the grant[.]"[18]

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Thus, termination rights allow for an artist who has voluntarily transferred his or her sound recording right to a record company to terminate that transfer and reclaim his or her copyright ownership after 35 years. However, as Congress stated in the beginning of §203, these termination rights held by creators disappear when the works are made for hire.

III. 1999 and 2000 Amendments

In November of 1999, the termination rights were briefly ripped away from artists. At that time, Congress was partaking in last-minute consideration of the Satellite Home Viewer Improvement Act.[19] During these considerations, a technical amendment was added to the legislation.[20] While technical amendments are typically meant to make minor corrections, such as spelling or grammar, this "technical" amendment vastly changed an important piece of the 1976 Act—essentially, it changed the wording to include "sound recordings" in the list of commissioned works eligible for work for hire status, thereby prohibiting sound recording artists from ever regaining control over their musical creations from the record companies.[21] This shook the balance of power between record labels and the recording artists, as under the typical recording contract language, the artists would not legally be recognized as the authors and proprietors of their sound recordings.[22]

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Fortunately, within a few weeks of finding out about this severe alteration, a group of furious recording artists called on Congress to immediately repeal the law.[23] The Subcommittee on Courts and Intellectual Property held a crucial hearing in May of 2000, at which the artists and record labels made their arguments.[24] The recording artists fought the change, because it essentially was an act of appropriation that was snuck into the law through a "technical" amendment, whereas the industry maintained that the technical amendment properly clarified the predominant practice.[25] Ultimately, on September 20, 2000, Congress passed the Work Made for Hire and Copyright Corrections Act of 2000, repealing the law "without prejudice."[26]

IV. Analysis

A. Sound Recordings Are Not Included in the Nine Categories…for Good Reason

First, while although courts generally interpret the 1976 Act in a way that emphasizes the importance of predictability in making copyrighted works marketable,[27] the current status of sound recordings in the realm of works made for hire is anything but predictable. As previously mentioned, sound recordings are not specifically included in the nine categories of specially commissioned works listed in the 1976 Copyright Act, not taking into account the aforementioned repealed amendment. Additionally, courts have rejected the idea that sound recordings fall into the category of motion picture or other audiovisual work[28] and clearly do not fall under the categories of translations, supplementary works, instructional texts, tests, answer materials for a test, or an atlas. In furtherance of this interpretation, on March 5, 1999, a judge in a district court in New Jersey found that "sound recordings are not a work-for-hire under the second part of the statute because they do not fit within any of the nine enumerated categories."[29]

Apart from that district court decision, however, many in the recording industry continue to argue that sound recordings could potentially fall under the categories of either as a contribution to collective works or compilations.[30] According to the 1976 Act, a collective work is "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."[31] A compilation is defined as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship…[including] collective works."[32]

In support of the industry's position, it makes sense to consider something such as a seasonal album compiled of pre-existing sound recordings by several different artists as a case where the sound recording is a compilation. This meets the definition to a tee; as a work such as a Christmas album, formed by collecting and assembling

many artists' pre-existing works together to form the compilation.

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However, the record labels go too far. The recording industry position is that *all* sound recordings are either collective works or contributions to compilations.[33] It argues that there are several separate contributions made in creating a sound recording.[34] Similarly, its position is that the record labels rearrange the master sound recordings of the individual contributions made by the artist, thereby creating the collective whole.[35]

The best analogy to debunk the record companies' argument is that of a book. The fact that a book publisher might edit an author's novel or rearrange how the chapters in the book are set up does not render it a compilation created by the book publisher.[36] As such, were the record label permitted to rearrange the order of compositions created by the artist and take claim to the "compilation," it would cut against the plain meaning of the statute. The compilation argument holds even less water when considering that the digital release of singles versus albums is growing as a worldwide trend.[37]

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Finally, this scenario cuts even deeper against the purpose of copyright law, as "[i]t is well settled that the purpose of copyright law is to promote the progress of the useful arts and sciences by protecting the rights of authors, creating an incentive for authors to keep creating, and therefore, for science to continue evolving and society to reap these benefits."[38] Thus, if artists could potentially lose their works due to the record labels moving around the order of the sound recordings, the 1976 Act would be doing anything but creating an incentive for these artists to keep creating.

Unfortunately, the uncertainty will remain until the Supreme Court chooses to address the issue. This is the approach preferred by Congress in repealing the sound recordings amendment in 2000, and such Congressional intent should not be taken lightly. While some consider maintaining the status quo to be the "worst way to address the sound recordings issue[,]" even they acknowledge that "[i]f the trend of current case law continues, the courts will ultimately hold that sound recordings cannot be contractual works for hire under § 101…[T]his resolution is not inevitable, but it is reasonable and perhaps even persuasive, as a matter of statutory interpretation."[39] Considering legislative intent is crucial in interpreting statutes. Congress was clear in its intent by repealing the sound recordings amendment in 2000 and choosing against replacing its provisions.

B. 2013 Termination of Assignments of Copyright in Sound Recordings

Heading into the pivotal year of 2013, the first year when artists could hypothetically revert the ownership of the sound recordings back to themselves, no one seemed to know what to expect.[40] While some advocates opined that this new era of termination would be cataclysmic for the record industry,[41] others believed that any disputes that did arise would be quickly settled due to a shared interest to keep the peace, financial logicality, and the lack of a ripened case for the artists to litigate.

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Ultimately, many artists promptly filed their notices of termination, either for a handful of albums or for their entire catalogs recorded between 1978 and 1988, including high-profile names such as Billy Joel, Pat Benatar, Journey, and Devo.[42] The artists had a five-year window in which to file the notices; thus, artists with sound recordings from 1978 had to file their termination notices between 2003 and 2011.[43] However, they also had until 2016 to file termination notices for reclamation of their records in 2018.[44]

While the best music industry example does not deal precisely with sound recordings, it is easily the most appropriate analogy to establish future precedent. Victor Willis, the original lead singer of the Village People, appeared to be the first artist who had a hit song from the 1970's disco era, and publicly announced his use of his termination rights to reclaim several of his musical compositions, including "Y.M.C.A."[45] Originally, he had transferred his copyright interests to Can't Stop Productions, Inc., which then assigned Scorpio Music S.A., its parent French publisher, its rights in the lyrics.[46]

Accordingly, in January of 2011, Willis filed his notice of termination both to Scorpio and Can't Stop with regard to his grants of copyright.[47] Scorpio and Can't Stop responded by filing suit, challenging the validity of this termination claim.[48] The Southern District Court of California ultimately found that because Willis granted his copyright interests to Scorpio and Can't Stop independently from the other co-authors, under §203 of the 1976 Act, he could rightfully unilaterally terminate his grants of copyright.[49] As explained above, although this case study deals with musical compositions as opposed to sound recordings, one cannot help but draw the analogy and think that this may serve as an important precedential case in the future.[50]

V. Conclusion

Congress took the appropriate course of action in choosing not to further amend the 1976 Act. If the purpose of U.S. copyright law remains to incentivize creative masterminds to create quality music as they have in the past, threatening to revoke termination rights as in the "sneak" amendment in 1999 will do nothing but fight that purpose. Ideally, in the near future, the Supreme Court will have the opportunity to answer this question once and for all. Hopefully, the Justices will consider legislative intent and the case of Victor Willis, and rule that sound recordings should never be included in the categories of specially commissioned works.

Endnotes

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