

TERMINATION RIGHTS IN MUSIC: A PRACTICAL FRAMEWORK FOR RESOLVING OWNERSHIP CONFLICTS IN SOUND RECORDINGS

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I. INTRODUCTION

Musicians are entrenched in the cultural fabric of American society. It is impossible to live in the United States of America without exposure to the works of one or more of these artisans, as evidenced by the strong demand for music in the United States—the overall unit sales of music albums in the United States grew by 7.2% between 2010 (1.1 billion units sold) and 2011 (1.18 billion units sold).¹ Even in the digital age, the music industry has a strong potential for profit.

According to the U.S. Constitution, the “author” of a musical work is the initial beneficiary of the profits in this market.² Congress has interpreted the Copyright Clause of the U.S. Constitution to grant the authors of musical compositions the rights that allow them to control the reproduction and use of their creations.³ While the goal of copyright law seems fairly straightforward, applying it in practice has proven difficult for both the legislative and the judicial branches of government. This difficulty is most apparent in the area of termination rights.

Although authors of musical compositions are granted a copyright, they must work with record labels to finance, produce, and sell their creations.⁴ This seemingly collaborative relationship has allowed record labels and

1. Ed Christman, *2011 U.S. Album Sales Still Strong After Three Quarters*, BILLBOARD (Oct. 6, 2011), <http://www.billboard.biz/bbbiz/retail/2011-u-s-album-sales-still-strong-after-1005392822.story>.

2. See U.S. Const. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .”).

3. See generally 17 U.S.C. §§ 101–810 (2006) (Title 17 of the United States Code is the embodiment of Congress’s exercise of the powers granted to it by the U.S. Constitution under U.S. Const. art. I, § 8, cl. 8).

4. *In re Antone’s Records, Inc.*, 445 B.R. 758, 779 (Bankr. W.D. Tex. 2011) (“When an artist enters into a contract with a record label, the performance generally does not exist. The record label pays for the cost of creating the performance, including an advance to the artist, payment of the musicians who perform the song and payment of the costs of creating the master recording. In return, the artist agrees that the copyright to the performance (as opposed to the words and music themselves) belongs to the record label.”).

musicians to profit from the marketing and distribution of music. In exchange for their services, record labels are usually assigned the copyrights to the artists' works.⁵

A major complication to the business arrangement discussed above arises from an "obscure revision to copyright law enacted in 1978."⁶ That "obscure revision" allows authors that have previously assigned their works to others to terminate these assignments and regain full ownership of their works thirty-five years after the initial assignment.⁷ This right is popularly called the "termination right." But, it is not available for authors who created music under "work-for-hire" contracts.⁸

Notably, the first set of works that musicians may reclaim ownership through the exercise of their termination rights become eligible in 2013.⁹ Due to the tremendous amount of profit and ownership interests at stake here, several famous musicians have already begun filing notices to regain their works pursuant to the requirement that "notice . . . be served not less than two or more than ten years before [the effective termination] date."¹⁰ These musicians include Bob Dylan, Tom Petty, Bryan Adams, Loretta Lynn, Kris Kristofferson, Tom Waits, Charlie Daniels, and Victor Willis—the original lead singer of the Village People.¹¹

Termination rights have the potential to allow many musicians to regain ownership of works that they had originally assigned to their record labels.¹² However, before these musicians can recover these works, they will most likely have to engage in litigation with their record labels over whether they (the artists) or the record labels are the true owners of the music.¹³

Due to the litigation that is likely to arise as musicians try to regain their works, courts must determine the true owner of each sound recording that is

5. *Id.* ("Because the record label pays for the creation of the master [recording], record contracts provide that the master [recording] belongs to the label.")

6. 17 U.S.C. § 203; Matthew Perpetua, *Village People Singer Files to Regain Copyright Control*, ROLLING STONE (Aug. 17, 2011, 2:50 PM), <http://www.rollingstone.com/music/news/village-people-singer-files-to-regain-copyright-control-20110817> (explaining that this case will "test the possibilities of 'termination rights' for artists" under 17 U.S.C. § 203).

7. See *supra* note 6 and accompanying text.

8. 17 U.S.C. § 203(a); see also *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 742 (1989) (explaining that a work-for-hire is a work created by an employee as part of his or her job, or as a work created on behalf of a client where all parties agree in writing to the work-for-hire designation).

9. MARK S. LEE, ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW § 7:52 (Thomson Reuters/West 2010).

10. 17 U.S.C. § 203(a)(4)(A); see Larry Rohter, *Record Industry Braces for Artists' Battles Over Song Rights*, N.Y. TIMES, Aug. 15, 2011, <http://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html> (explaining that Bob Dylan, Tom Petty, Bryan Adams, Loretta Lynn, Kris Kristofferson, Tom Waits, and Charlie Daniels have all filed notices to exercise their termination rights); see also Perpetua, *supra* note 6 (noting that Victor Willis has also filed papers to exercise his termination rights as lead singer of the Village People).

11. See *supra* note 10 and accompanying text.

12. See *supra* note 10 and accompanying text (identifying artists who have filed to exercise their termination rights).

13. See John P. Strohm, *Writings in the Margin (of Error): The Authorship Status of Sound Recordings Under United States Copyright Law*, 34 CUMB. L. REV. 127, 130 (2003) (noting that the artists' exercise of their termination rights will likely lead to a "hailstorm of litigation").

subject to the exercise of termination rights.¹⁴ However, the jurisprudence surrounding the process of making these determinations is both inadequate and inconsistent—only three cases have ever dealt with the issue of termination rights, and all three cases used different rationales to support their conclusions.¹⁵ Clearly, courts have no definitive framework to deal with the “hailstorm of [up-coming] litigation”¹⁶ surrounding termination rights, despite extensive scholarly treatment of the issue.¹⁷ The need for such a framework is also timely because the first group of songs that are eligible for termination become ripe in 2013 since “[t]ransfers made by an author after January 1, 1978 may be terminated by the author during a five year period beginning 35 years after execution of the grant or publication under the grant, or 40 years from the date of execution of the grant, whichever occurs first.”¹⁸

To resolve these problems, this Note proposes a framework that will help courts determine if an artist’s work is a work-for-hire and consequently, whether an artist should be allowed to exercise their termination rights under Sections 101 and 203 of the Copyright Act.¹⁹

Part II of this Note will provide the background of the legal environment that surrounds termination rights. This includes discussion of the history of the copyright system, its driving policy goals, the circumstances that led to the amendment granting artists with termination rights, and the principles and rules

14. See *id.* at 138–39 (noting that the Supreme Court first determined the issue of true ownership of a work under the 1976 Copyright Act in *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)).

15. See *Lulirama Ltd., Inc. v. Access Broad. Servs., Inc.*, 128 F.3d 872, 877–78 (5th Cir. 1997) (“The district court concluded that Lulirama acted as an independent contractor for Access . . . and none of the parties dispute this conclusion A work created by an independent contractor can constitute a work for hire only if it fits one of the nine narrowly drawn categories of works delineated in the second part of § 101’s definition of ‘works made for hire.’”); *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999) (“Plaintiff did not employ Defendants at the time the sound recordings were created. Plaintiff does not contend that Defendants were his employees when the sound recordings were created. Furthermore, the 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, and because there was no signed written agreement between the parties.”); *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999) (“In determining whether a hired party is an employee within the meaning of § 101, a court must look to the general common law of agency. The court does not have sufficient information at this time to determine as a matter of law whether Staggers was McLarty’s employee or whether he was an independent contractor. Finally, the Court finds that . . . the contract between [plaintiff] and McLarty is not dispositive of who owns the copyright in the sound recording.”).

16. Strohm, *supra* note 13 and accompanying text.

17. See generally Daniel Gould, *Time’s Up: Copyright Termination, Work-for-Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91, 112 (2007) (describing the conceptual and practical difficulties that arise in determining ownership of copyright, especially for purposes of exercising termination rights); Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375 (2002); Ryan Ashley Rafoth, *Limitations of the 1999 Work-for-Hire Amendment: Courts Should Not Consider Sound Recordings to Be Works-for-Hire When Artists’ Termination Rights Begin Vesting in Year 2013*, 53 VAND. L. REV. 1021 (2000); Strohm, *supra* note 13; Stephen W. Tropp, *It Had to Be Murder or Will Be Soon - 17 U.S.C. § 203 Termination of Transfers: A Call for Legislative Reform*, 51 J. COPYRIGHT SOC’Y USA 797 (2004); Lara Pearson, *The Importance of Work for Hire Agreements Under the 1976 Copyright Act*, NEV. LAW., April 2003, at 8.

18. See LEE, *supra* note 9, § 7:52 (construing 17 U.S.C. § 203(a)); see also *supra* note 10 and accompanying text (identifying artists who have filed to exercise their termination rights).

19. 17 U.S.C. §§ 101, 203. See generally HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* § 1:28 (2012) (describing the legislative history of the 1976 Copyright Act, and difficulties in its construction and application).

of three components of U.S. substantive law—labor law, agency law, and contract law—that can be used to determine if an artist’s creation is a work-for-hire.

Part III will focus on the application of the currently existing rules and principles of labor law, agency law, and contract law to the relationships between musicians and their record labels to determine if artists may exercise their termination rights. Part III will also analyze evidence, as well as accompanying rationales for this evidence, to show that the use of termination rights by artists advances the goals of the U.S. Copyright system.

Finally, Part IV will present the details of the proposed framework and show how this new framework will alleviate the disadvantages associated with allowing the use of termination rights in the U.S. Copyright system.

II. BACKGROUND

To provide a workable framework, it is useful to explain, in detail, the circumstances surrounding the inclusion of termination rights in U.S. copyright law. This section will begin by looking at the history of the copyright system and the circumstances that led to the amendment granting artists termination rights. It will then shift its focus to examine the policy goals of the U.S. copyright system and the theoretical justifications for having a copyright system that grants its artists termination rights. Finally, this section will conclude with a discussion of the legal principles and rules from three existing components of American substantive law—labor law, agency law, and contract law—that can be used to determine if an artist’s creation is a work-for-hire.

A. *The Addition of Termination Rights to the 1976 Copyright Act*

1. *History and Development of Termination Rights*

To understand where termination rights came from and why Congress chose to grant artists these rights, it is necessary to look at the history and development of the 1976 Copyright Act.

For the purposes of this Note, the discussion will be limited to the 1976 Copyright Act because no other Copyright Act included termination rights. The legislative history of this Act is important to the framework proposed by the Note because “[t]he [1976] Copyright Act . . . is a far more complete and structured approach to copyright than any of its predecessors and has an unusually detailed legislative history.”²⁰

20. ABRAMS, *supra* note 19, § 1:28 n.3 (“The initial copyright act was adopted in 1790. Act of May 31, 1790, 1st Cong., 2d Sess., ch. 15, 1 Stat. 124 (Peters ed. 1845). Relatively complete revisions were enacted in 1831, 1870 and 1909. Act of February 3, 1831, 21st Cong., 2d Sess., ch. 16, 4 Stat. 436 (Peters ed. 1846); Act of July 8, 1870, 41st Cong., 2d Sess., ch. 230, §§ 85–111, 16 Stat. 212 (Sanger ed. 1871), codified at title 60, ch. 3, §§ 4948–4971, Rev. Stat. 957 (2d ed. 1878); Act of March 4, 1909, 60th Cong., 2d Sess., ch. 320, 35 Stat. 1075 (1909), codified at 17 U.S.C.A. §§ 1 to 215, Act of July 30, 1947, 80th Cong., 1st Sess., ch. 391, Pub. L. 281, 61 Stat. 652 (1947).”); *see* Pub. L. 94-553, 90 Stat. 254 (1976) (codified as amended at 17 U.S.C.A. §§ 101–810) (establishing the scheme under discussion).

The 1976 Copyright Act can be divided into two distinct phases: “first, a non-congressional phase which culminates with the introduction of the 1965 Revision Bill and the Register of Copyrights’ Supplementary Report, and second, a congressional phase which starts with the hearings on the 1965 Revision Bill and culminates with the passage of the 1976 Act.”²¹

Termination rights were included in both the initial and final versions of the 1976 Copyright Act because of Congress’s extensive reliance on the opinions of experts and other entities that were interested in copyright law during the non-congressional phase.²² It should be stressed that “the evolution of the termination provisions in Sections 203 and 304(c) were the result of a great deal of negotiation that took place in the advisory committee meetings.”²³

The most notable form of the initial provisions governing termination rights came in the 1961 Report of the Register of Copyrights.²⁴ That report clearly stated that the goal of providing artists with such rights was “to protect the author and his family against his unprofitable or improvident disposition of the copyright. The renewal copyright was intended to revert to them so that they could negotiate new contracts for the further exploitation of the work.”²⁵

The 1964 Revision Bill was introduced to Congress with some changes to the 1961 Report of the Register of Copyrights.²⁶ The relevant change stated that “[g]rants made by an author after the effective date of the statute would be subject to reversion after thirty-five years, subject to an exception for derivative works.”²⁷ Following that change was the 1965 Revision Bill, which made some inconsequential changes to the wording of the bill regarding termination rights.²⁸ The 1965 Revision Bill became the final version of the termination rights provision included in the 1976 Copyright Act.²⁹

Based on the history of the origin of termination rights, this Note will next discuss the specific provision within the 1976 Copyright Act that deals with termination rights.

21. ABRAMS, *supra* note 19, § 1:29. See generally THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT: A COMPENDIUM AND ANALYTICAL INDEX OF MATERIALS LEADING TO THE COPYRIGHT ACT OF 1976 (Alan Latman & James F. Lightstone eds., 1985) (compounding and indexing the legislative history of the 1976 Copyright Act); The Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101–810) (establishing the scheme under discussion).

22. ABRAMS, *supra* note 19, § 1:30.

23. *Id.* § 1:32 n.8; see also Howard B. Abrams, *Who’s Sorry Now? Termination Rights and the Derivative Works Exception*, 62 U. DET. L. REV. 181, 204–223 (1985) [hereinafter Abrams, *Who’s Sorry Now*] (explaining the initial introduction of termination rights into the draft of the current Copyright Act).

24. See Abrams, *Who’s Sorry Now*, *supra* note 23, at 209 (discussing the formation of termination provisions and reversionary rights).

25. *Id.* at 210–11 (quoting HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 53 (Comm. Print 1961)) (emphasis added).

26. *Id.* at 219 (construing H.R. 12354, 88th Cong. § 20(a) (1964) (identical bills)).

27. See *id.* (construing H.R. 12354, 88th Cong. § 20(a) (1964) (identical bills)).

28. See *id.* (discussing 17 U.S.C. §§ 203, 304 (2006)); see also 17 U.S.C. §§ 203, 304 (providing the statutory language).

29. See *id.* (discussing 17 U.S.C. §§ 203, 304); see also 17 U.S.C. §§ 203, 304 (providing the statutory language).

2. *Section 203 of the 1976 Copyright Act*

With regards to musicians and their sound recordings, the provision of the 1976 Copyright Act that controls their ability to exercise their termination rights is in the language of Section 203.³⁰ This provision also carves out an exception for the exercise of termination rights on creations that resulted from a work-for-hire relationship, a distinction which will be discussed in detail in the subsequent sections of this Note.³¹

Section 203(a) deals with the termination of works created on or after the effective date of the Act, January 1, 1978.³² Specifically, § 203(a) allows all grants of works created by the author to be terminable, except those that were granted other “than by will” and those that are defined as “work(s) . . . for hire.”³³

Sections 203(a)(1) and 203(a)(2) lay out who may exercise the termination rights.³⁴ The parties who may exercise these rights are the authors of the works or “the person or persons who control more than one-half of [an] author’s termination interest.”³⁵

Sections 203(a)(3) and 203(a)(4) specify when and how the termination right should be exercised.³⁶ Section 203(a)(5) states that a “[t]ermination of the grant may be effected [in spite of] any agreement to the contrary”³⁷ In other words, terminations rights are not waivable by any agreement, written or otherwise.

Section 203(b) explains the scope of the effect of an exercise of a termination right—“all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests.”³⁸ Once a termination is effected, all the rights associated with the copyright of a piece of music revert back to the authors or their successors.³⁹

30. *See id.* (discussing 17 U.S.C. § 203); *see also* 17 U.S.C. § 203 (providing the statutory language).

31. 17 U.S.C. § 203(a); *see also* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT VOL. 3 § 11.02 [A][2] (Lexis 1999) (explaining that 17 U.S.C. § 101 is used to define the types of works that are considered works-for-hire under § 203(a)).

32. 17 U.S.C. § 203(a); *see also* NIMMER & NIMMER, *supra* note 31, at § 11.02[A][1] (explaining that 17 U.S.C. § 304 “provides for termination of grants only of works in which there was a ‘copyright subsisting in either its first or renewal term on January 1, 1978.’” (quoting 17 U.S.C. § 304(c)).

33. 17 U.S.C. § 203(a).

34. 17 U.S.C. §§ 203(a)(1)–(2).

35. Tropp, *supra* note 17, at 809 (explaining in further detail the different entities that may exercise termination rights depending on whether the work was created and granted by a single author or joint authors); *see also* 17 U.S.C. §§ 203(a)(1)–(2) (listing the parties who may exercise termination rights).

36. 17 U.S.C. §§ 203(a)(3), 203(a)(4); *see also* Tropp, *supra* note 17, at 809 (explaining in further detail when and how the termination should be effectuated under § 203).

37. 17 U.S.C. § 203(a)(5); *see also* NIMMER & NIMMER, *supra* note 31, § 11.01[B] (“[17 U.S.C. § 203(a)(5)] pre-empts attempts to delay the author’s right to terminate past that maximum time.”).

38. 17 U.S.C. § 203(b); *see also* Tropp, *supra* note 17, at 810–11 (explaining in further detail the effect and scope of an exercise of a termination right under § 203).

39. 17 U.S.C. § 203(b); *see also* Tropp, *supra* note 17, at 810–11 (explaining in further detail the effect and scope of an exercise of a termination right under § 203).

3. *The Current State of “Termination Rights” Legislation*

The only entities that may exercise termination rights are the authors themselves or any persons who control a majority of an author’s interest in the work.⁴⁰ Section 203 specifically states that works created as work-for-hires are exempt from the scope of termination rights.⁴¹ This exception is of critical importance because a determination that a musical piece was created as a work-for-hire effectively bars the creator from exercising the termination right granted by Section 203.⁴²

A work-for-hire is defined as:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.⁴³

The unusual legislative history surrounding the definition of the types of works that are covered, but not expressly stated as works-for-hire, does not clarify whether sound recordings are to be considered works-for-hire.⁴⁴ The legislative history of the Copyright Act of 1976 reveals that “sound recordings were never even debated as a potential category” to be included in nine categories of Section 101,⁴⁵ and further research seems to indicate that the list of the types of works that are to be considered works-for-hire was intended to be an exhaustive list.⁴⁶ However, the language from the legislative history is not definitive on the issue of whether sound recordings can be considered works-for-hire.

To further complicate the issue of whether a sound recording can be considered a work-for-hire, a 1999 “technical amendment” drafted on behalf of the Recording Industry Association of America (RIAA) was included in an unrelated omnibus bill that expressly stated that sound recordings of musicians were to be considered works-for-hire under the 1976 Copyright Act.⁴⁷ This

40. 17 U.S.C. §§ 203(a)(1)–(2); *see also*, Tropp, *supra* note 17, at 809 (explaining in further detail the different entities that may exercise termination rights depending on whether the work was created and granted by a single author or joint authors).

41. 17 U.S.C. § 203(a).

42. *See* Tropp, *supra* note 17, at 815 (quoting *Dumas v. Gommerman*, 865 F.2d 1093, 1097 (9th Cir. 1989) (“Designating a work as ‘made for hire’ irrevocably takes away more than just the artist’s copyright; it also deprives him or her of the opportunity to renegotiate the transfer after the market value of the work has been more precisely determined.”)).

43. 17 U.S.C. § 101.

44. Abrams, *Who’s Sorry Now*, *supra* note 23.

45. Strohm, *supra* note 13, at 143.

46. *See* H.R. REP. NO. 94-1476, at 121 (1976) (“The work-made-for-hire provisions of this bill represent a carefully balanced compromise, and as such they do not incorporate the amendments proposed by screenwriters and composers for motion pictures.”).

47. LaFrance, *supra* note 17, at 375–76; *see* Larry Rohter, *Legislator Calls for Clarifying Copyright*

bill was approved by Congress with very little opposition.⁴⁸ However, strong lobbying efforts by recording artists, spearheaded by Don Henley of the Eagles and the singer Sheryl Crow, eventually led Congress to exclude songs and sound recordings from the list of creations that are considered works-for-hire.⁴⁹ With that action, Congress “return[ed] the law to the status quo, and expressly refus[ed] to resolve the dispute over the status of sound recordings.”⁵⁰ This left it to judges to resolve the uncertainty surrounding the status of sound recordings as works-for-hire.⁵¹

4. *Judicial Resolution of the “Termination Rights” Issue*

By leaving the resolution of this issue to the courts without any direction on how the law should proceed, a definitive judicial framework is still lacking because of the relatively few cases that have considered the “question of whether sound recordings qualify as works-for-hire.”⁵² To date, only three courts have ruled on this issue, and they all held that sound recordings do not qualify as works-for-hire.⁵³

The first case to deal with the question of whether sound recordings qualify as works-for-hire was *Lulirama Ltd., Inc. v. Axxess Broadcast Services, Inc.*⁵⁴ The court held that “[a] work created by an independent contractor can constitute a work for hire only if it fits one of the nine⁵⁵ narrowly drawn

Law, N.Y. TIMES, Aug. 28, 2011, <http://www.nytimes.com/2011/08/29/arts/music/representative-john-conyers-wants-copyright-law-revision.html?pagewanted=all> (detailing the history of the Copyright Act).

48. Rohter, *supra* note 47.

49. *Id.*

50. LaFrance, *supra* note 17, at 380–81; *see also* 17 U.S.C. § 101 (2006) (“In determining whether any work is eligible to be considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, nor the deletion of the words added by that amendment—(A) shall be considered or otherwise given any legal significance, or (B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination, by the courts or the Copyright Office. 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 by section 1000(a)(9) of Public Law 106-113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.”)

51. LaFrance, *supra* note 17, at 381.

52. Phillip W. Hall Jr., Comment, *Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 HASTINGS COMM. & ENT L.J. 189, 213 n.191 (2002) (“The judicial record is limited because the vast number of cases will not become ripe for adjudication until the year 2013, when the artists can begin to try and recapture their works under the termination right.”).

53. *Id.* On May 7, 2012, the singer, Victor Willis successfully terminated “his post-1977 grants to Can’t Stop Music of his copyright interests in 33 musical compositions (“Compositions”), including the hit songs, ‘YMCA,’ ‘In the Navy,’ and ‘Go West.’ *Scorpio Music S.A. v. Willis*, 11CV1557 BTM RBB, 2012 WL 1598043 (S.D. Cal. May 7, 2012). It should be noted that this case was not decided on the issue of whether Victor Willis’s compositions were works made for hire under 17 U.S.C. § 203 because “[a]t oral argument, counsel for Plaintiffs [Scorpio Music S.A.] represented that they were withdrawing this claim.” *Id.* at *5.

54. *Scorpio Music*, 2012 WL 1598043, at *5.

55. 17 U.S.C. § 101; *Lulirama Ltd., Inc. v. Axxess Broad. Servs., Inc.*, 128 F.3d 872, 877 (5th Cir. 1997); *see also* NIMMER & NIMMER ON COPYRIGHT, *supra* note 31, § 5.03[B][2][a][i] (explaining that the nine categories of works considered works-for-hire are specially ordered or commissioned works that are to be used as (1) a part of a collective work; (2) a translation; (3) as a supplementary work; (4) a part of a motion picture or audiovisual work; (5) an instructional text; (6) a compilation; (7) a test; (8) answer material for a test; and (9) an atlas).

categories of works delineated in the second part of [17 U.S.C.] Section 101's definition⁵⁶ of 'works made for hire.'⁵⁷ Specifically, *Lulirama* held that sound recordings do not fit into the category of "audiovisual works" under Section 101(2)'s definition of works-for-hire because they were purely audio works.⁵⁸

The second case to tackle the issue was *Ballas v. Tedesco*, where the court held that sound recordings could not be considered works-for-hire because there was no evidence of an employer-employee relationship between the parties under Section 101's definition of works-for-hire.⁵⁹ The *Ballas* court also held that sound recordings do "not fit within any of the nine enumerated categories" of Section 101.⁶⁰

The third case to take on the question was *Staggers v. Real Authentic Sound*, which held that because a "sound recording does not fit within any of the nine categories of 'specially ordered or commissioned' works" under Section 101, a court must use the common law of agency to determine if "a hired party is an employee within the meaning of Section 101."⁶¹

Two approaches are taken by the three cases discussed above—(1) artists who can show under the common law of agency that they are not employees will be able to exercise their termination rights and regain full ownership of their works,⁶² and (2) sound recordings may never be considered works-for-hire because they do not fit within any of the classifications listed in Section 101.⁶³ These varying approaches highlight the lack of a uniform method for courts to determine if sound recordings are works-for-hire, and consequently, whether an artist may properly exercise his termination rights under Section 203.⁶⁴ This uncertainty needs resolution.

The goal of this Note is to create a framework to be used by courts in litigation that arises because of a musician's exercise of his or her termination rights. To achieve a meaningful framework, this Note will now turn and consider the objectives of the U.S. copyright system.

B. *The Opposing Goals of a U.S. Copyright System with Termination Rights*

Copyright law is commonly justified based on two differing theories: (1) the utilitarian justification theory and (2) the natural rights theory.

American copyright law seeks to increase the number of works that are created by the people who are subject to its laws.⁶⁵ This goal can be attributed

56. 17 U.S.C. § 101(2).

57. *Lulirama*, 128 F.3d at 877 (construing Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 748 (1989) ("[O]nly enumerated categories of commissioned works may be accorded work for hire status.")).

58. *Lulirama*, 128 F.3d at 878.

59. *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999).

60. *Id.*

61. *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999).

62. *Id.*

63. *Ballas*, 41 F. Supp. 2d at 541.

64. See LaFrance, *supra* note 17, at 382 (explaining that *Lulirama*, *Ballas*, and *Staggers* do not explain why sound recordings are not covered by any of the categories listed in § 101).

65. See RAYMOND T. NIMMER, INFORMATION LAW VOL. 1 § 2:18 (Thomson Reuters/West 2012)

to the fact that American copyright laws are based on a utilitarian justification which seeks to provide the largest amount of benefit for the largest number of people.⁶⁶

Even though American copyright laws are mainly based on a utilitarian justification, some scholars use a natural rights theory to explain copyright law.⁶⁷ Generally, the natural rights theory posits “that human beings have fundamental interests, which should not be sacrificed for public benefit, and that society’s well-being does not override those interests.”⁶⁸ This theory maintains that individual interests should be protected because they ensure the existence of “individual autonomy, independence, and security.”⁶⁹

There are two forms of the natural rights theory—Lockean Labor theory and Hegelian Personality theory.⁷⁰ Labor theory was created by John Locke, and it defines a copyright as a form of property that entitles an individual “to ownership of that which she creates through her own labor.”⁷¹ On the other hand, personality theory assumes that “a person’s control over assets expresses that person’s personality and inner will, and that these are necessary for the realization of autonomy, freedom, and confidence.”⁷² In other words, an author should be given copyright protection for his creations because they represent the external expressions of his personality, will, and identity.⁷³

[hereinafter NIMMER, INFORMATION LAW] (“Copyright law seeks not to restrict the flow of ideas and facts, but to promote it.”).

66. See Orit Fischman Afori, *Human Rights and Copyright: The Introduction of Natural Law Considerations into American Copyright Law*, 14 *FORDHAM INTEL. PROP. MEDIA & ENT. L.J.* 497, 498 (2004) (“[C]opyright is aimed to benefit society as a whole. The main projection of utilitarian justifications for copyright in U.S. law is in the U.S. Constitution, according to which Congress has the power to legislate copyright laws in order ‘to promote the Progress of Science and useful Arts.’”); see also NIMMER & NIMMER, *supra* note 31, § 1.03[A] (“The primary purpose of copyright is not to reward the author, but is rather to secure ‘the general benefits derived by the public from the labors of authors.’” (citing *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 519 (2001))).

67. See, e.g., Benjamin G. Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 *YALE L.J.* 1179, 1179 (2003) (“Courts also have a long history of using natural law justifications in intellectual property cases.” (citation omitted)); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 *COLUM. L. REV.* 1865, 1874–75 (1990) (“[T]hroughout the nineteenth century and into the twentieth, the concept of original authorship embraced both original labor and original creative activity.”); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 *MICH. L. REV.* 1197, 1199 (1996) (“Early American enactments also focused on these twin goals: assuring authors their just deserts and encouraging authors to create and disseminate works of social value Over the ensuing two centuries, as copyright protection has expanded, each expansion has been accompanied by rhetoric championing the needs of the deserving author, emphasizing the need to induce creative activity, or both.” (citation omitted)); Diane Leenheer Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 *WM. & MARY L. REV.* 665, 690–703 (1992) (discussing the strong natural law influence on early intellectual property law in the United States and England).

68. Afori, *supra* note 66, at 503.

69. *Id.*

70. See Lawrence C. Becker, *Deserving to Own Intellectual Property*, 68 *CHI.-KENT L. REV.* 609, 610 (1993) (describing the Lockean labor theory and the Hegelian personality theory as strong justifications for intellectual property); see also Michael D. Birnhack, *Copyright Law and Free Speech After Eldred v. Ashcroft*, 76 *S. CAL. L. REV.* 1275, 1293 (2003) (describing the Lockean labor theory as “a ‘just rewards’ intuition” and the Hegelian personality theory as emphasizing a “personal connection between a person and a physical object that embodies his or her free will” (citation omitted)).

71. R. Anthony Reese, Note, *Reflections on the Intellectual Commons: Two Perspectives on Copyright Duration and Reversion*, 47 *STAN. L. REV.* 707, 708 (1995).

72. Afori, *supra* note 66, at 504.

73. *Id.*

While it seems that the utilitarian justification of the U.S. copyright system is at odds with the natural theories that also seek to explain the system, both justifications infer that the U.S. Copyright laws have a primary and secondary goal.⁷⁴ This inference is based on the concept that “[t]he primary purpose of copyright is not to reward the author, but is rather to secure ‘the general benefits derived by the public from the labors of authors.’”⁷⁵ The primary goal is to promote the creation of works that will benefit the American public.⁷⁶ The secondary goal focuses on granting authors the right to control works that were created by their labor.⁷⁷

The primary goal (utilitarian theory) could conflict with the secondary goal (personality theory). If the law heavily favors the primary goal by refusing to recognize termination rights, it may not provide adequate compensation to artists who undertake the arduous task of creating musical pieces.⁷⁸ On the other hand, laws that focus too heavily on the secondary goal may have the effect of granting artists unlimited monopolies over their creations to ensure that these artists maintain control over their work.⁷⁹ These monopolies could lead to the stifling of innovation and thus, a reduction in the creation of new works that will benefit the public.⁸⁰

It is evident that termination rights granted by the 1976 Copyright Act seek to strike a balance between these competing objectives. With these goals in mind, this Note shall now consider three areas of substantive law that may resolve the issues associated with termination rights.

C. *Defining Ownership Rights Under Existing Legal Rules and Principles*

To resolve the issue of ownership over the music, three legal disciplines—agency law, labor law, and contract law—offer meaningful guidance on how to decide who the “true” owner of the music is, and therefore, who may exercise termination rights over the music.

1. *Agency Law and Labor Law*

As discussed in Part II(A)(4), *Staggers* held that because a “sound recording does not fit within any of the nine categories of ‘specially ordered or commissioned’ works” under Section 101, a court must use the common law of agency to determine if “a hired party is an employee” within the meaning of

74. NIMMER & NIMMER, *supra* note 31, § 1.03[A].

75. *See id.* (citing *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 519 (2001)).

76. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (explaining that copyright law is intended to “motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired”); *see also Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

77. *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (“[C]opyright law, like the patent statutes, makes reward to the owner a secondary consideration.”).

78. *Id.*

79. *See supra* notes 66–67 and accompanying text.

80. *See supra* notes 66–67 and accompanying text.

Section 101.⁸¹

Under the 1976 Copyright Act, agency and labor law are used to determine the employment status of an individual.⁸² The definitive case for deciding the employment status of a laborer is *Community for Creative Non-Violence v. Reid*, where the Supreme Court laid out a framework that uses thirteen factors to decide whether an individual is an employee or an independent contractor.⁸³ The *Reid* framework can help determine whether an individual was engaged in the creation of works within the scope of his employment or the creation of works-for-hire.⁸⁴ Individually, none of the thirteen *Reid* factors are dispositive, but they are all relevant to the determination of an individual's status as employee or as an independent contractor.⁸⁵ The thirteen *Reid* factors are:

- (a) the hiring party's right to control the manner/means by which the project is accomplished;
- (b) the skill required to complete the project;
- (c) the source of the instruments and tools needed to complete the project;
- (d) where the work is being completed;
- (e) the duration of the relationship between the parties;
- (f) whether the hiring party can assign additional work to the hired party;
- (g) the extent of the hired party's discretion over when and how long to work;
- (h) the method of payment;
- (i) the hiring party's role in hiring and paying assistants;
- (j) whether the work is the regular business of the hiring party;
- (k) whether the hiring party is in business;
- (l) whether there is any provision of employee benefits to the hired party; and
- (m) the tax treatment of the hired party.

If the author is an employee, the work is "made for hire." If the author is not an employee, and there is no written work for hire agreement, then the author remains the copyright owner with all the inherent rights thereof, from which he can exclude all others,

81. *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999).

82. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) ("Congress' intent to incorporate the agency law definition is suggested by § 101(1)'s use of the term, 'scope of employment,' a widely used term of art in agency law."); *see also* Pearson, *supra* note 17, at 9 ("When the commissioned work does not fall into one of these categories and there is no written agreement indicating that the work is a work made for hire, then common law agency principles apply to determine if the author was an employee" (citing *Reid*, 490 U.S. at 740)).

83. *Reid*, 490 U.S. at 751–52.

84. *See id.* at 750–51 ("To determine whether a work is for hire under [Section 101], a court first should ascertain, using principles of general common law of agency, whether the work was prepared by an employee or an independent contractor.").

85. *Id.*

including the purchaser.⁸⁶

Aymes v. Bonelli is a well-known Second Circuit decision that attempts to apply the *Reid* framework to a copyright dispute of the ownership of a piece of software.⁸⁷ In *Aymes*, the court held that the thirteen factors laid out in *Reid*⁸⁸ were to be used to determine if an alleged employee or his employer owns the copyright to a contested piece of work. However, one commentator points out that “it is important to remember that *Aymes* is a Second Circuit decision, and many recording contracts are made in California and would be litigated in the Ninth Circuit.”⁸⁹ This comment is important because the eleven circuit courts, the United States Court of Appeals for the District of Columbia Circuit, and the United States Court of Appeals for the Federal Circuit are not bound by each other’s decisions. Predictably, it is likely that *Aymes* will have no effect on how ownership disputes over sound recordings are resolved outside of the Second Circuit. Furthermore, it is likely that the sparse judicial treatment of the issues associated with termination rights will lead to conflicting interpretations of the law by the various circuit courts. Thus, the framework proposed by this Note could resolve any potential circuit splits that may occur.⁹⁰

With this background, this Note will now shift to the third discipline of law that operates in conjunction with agency law, labor law, and contract law.

2. *Contract Law*

Applying contract principles to resolve ownership disputes involving sound recordings may also shed some light on who is the true owner of music.”. Because many artists are financially incapable of marketing, distributing, and selling their music, artists often sign contracts with record labels to perform the capital-intensive tasks of marketing, distributing, and selling their music.⁹¹ Usually, artists assign the copyrights in their music to the record labels in exchange for the services provided by the label. Therefore, interpreting an individual artist’s record label contract will be relevant to the determination of the true owner of a musical piece.⁹²

Generally, contract law focuses on the express terms of the agreement existing between the parties. It seeks to resolve disputes by interpreting the contract to ascertain the parties’ intentions based on each party’s “reasonable

86. Pearson, *supra* note 17, at 8–9.

87. *Aymes v. Bonelli*, 980 F.2d 857, 861–62 (2d Cir. 1993).

88. *Reid*, 490 U.S. at 751–52.

89. Gould, *supra* note 17, at 109.

90. *See id.* (explaining that recording contracts will be litigated in a different circuit than the *Aymes* decision.)

91. *In re Antone’s Records, Inc.*, 445 B.R. 758, 779 (Bankr. W.D. Tex. 2011) (“When an artist enters into a contract with a record label, the performance generally does not exist. The record label pays for the cost of creating the performance, including an advance to the artist, payment of the musicians who perform the song and payment of the costs of creating the master recording. In return, the artist agrees that the copyright to the performance (as opposed to the words and music themselves) belongs to the record label.”).

92. *Id.*

perception . . . as conveyed by [their] words or actions”⁹³ In addition to the common law of contracts that already exists, the enactment of the Uniform Commercial Code (U.C.C.)—which was expressly intended to govern only the sale of goods—has had a “strong influence” on how contracts are interpreted.⁹⁴ In particular, U.C.C. § 2A-103(1)(j), which governs the judicial determination of whether a contract between two or more parties is a lease⁹⁵ or a security interest,⁹⁶ can be used to guide courts engaged in the process of determining whether a piece of work created by a musician is owned by him or by another entity as a work-for-hire.⁹⁷

Also, several commentators have argued that clauses in record contracts, which state that the artist is hired to produce works-for-hire should be struck down as substantively and procedurally unconscionable because these clauses are “oppressive and outrageous clauses.”⁹⁸

The doctrine of unconscionability was developed by courts to deal with those “contract situations where the contract is so unjust that it shocks the conscience of the court”⁹⁹ The unconscionability doctrine is well suited to the artist-record company relationship because courts have applied this doctrine in a broad manner of various types of commercial transactions.¹⁰⁰ In applying the unconscionability doctrine, courts require the contract to “exhibit both bargaining unfairness (referred to as procedural unconscionability) and result [in] unfair or oppressive terms (called substantive unconscionability)”¹⁰¹

Procedural unconscionability focuses on the unfair use of a difference in bargaining power between the parties to a contract during the negotiation of the contract terms.¹⁰² Courts seek to determine “whether [the accused party] abused its power to impose its will on the other party.”¹⁰³ The scope of procedural unconscionability extends to the accused party’s control over the

93. BRIAN A. BLUM, *EXAMPLES AND EXPLANATIONS: CONTRACTS* 59 (5th ed. 2011).

94. *Id.* at 444; see also Richard L. Barnes, *Distinguishing Sales and Leases: A Primer on the Scope and Purpose of UCC Article 2A*, 25 U. MEM. L. REV. 873, 878 (1995) (noting that even though Article 2A of the U.C.C. is significantly focused on sales, “it does so with an implicit purpose to resolve contractual tensions”).

95. U.C.C. § 2A-103(1)(j) (2007) (defining a lease as “a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including . . . [the] retention or creation of a security interest is not a lease”).

96. U.C.C. § 1-201(b)(35).

97. JAMES BROOK, *SECURED TRANSACTIONS: EXAMPLES AND EXPLANATIONS* 31 (Aspen Law & Business 5th ed. 2011) (“A transaction that purports to be a lease of goods is not a true lease when it is in reality and in substance a present sale of goods coupled with the seller’s retention of a security interest in the goods sold to secure the buyer’s obligation to make the installment payments due. The transaction that purports to be a lease but really isn’t is sometimes referred to . . . as a ‘lease intended as a security.’”); see also U.C.C. § 1-203.

98. NIMMER & NIMMER, *supra* note 31, § 11.02[A][2], 11-11; see Hall, *supra* note 52, at 210–11 (arguing that this practice is used by record labels to “defy the express determination of Congress in the 1976 Copyright Act that sound recordings are not works-for-hire”); see also Ann Chaitovitz, *The Need for a Performance Right*, HUFFINGTON POST (Jan. 7, 2009, 10:37 AM), http://www.huffingtonpost.com/ann-chaitovitz/the-need-for-a-performanc_b_155898.html (making the case for performance rights for artists).

99. Hall, *supra* note 52, at 192.

100. AMY HILSMAN KASTELY ET AL., *CONTRACTING LAW* 650 (1st ed. 1996).

101. Hall, *supra* note 52, at 194 (quoting BLUM, *supra* note 93, § 13.11.3, 367).

102. *Id.* at 196.

103. BLUM, *supra* note 93, § 13.11.4, 447.

marketplace, as well as the negotiation of the contract in question.¹⁰⁴

Substantive unconscionability relates to oppressiveness of the contract terms.¹⁰⁵ The court has discretion to determine if the contract or the terms are “harsh, unfair, oppressive, or unduly favorable to one of the parties.”¹⁰⁶

While these areas of American substantive law do not present a clear method for courts to resolve the issues related to copyright ownership and termination rights, they provide the foundational concepts for the recommendation of this Note.

This Note focuses its proposal for the resolution of ownership issues under the work-for-hire doctrine because this resolution is the single most important factor that will determine if a musician can exercise his termination rights under Section 203.¹⁰⁷

This Note will now shift its focus onto the use of these already-established legal rules and principles to resolve music ownership issues under the work-for-hire doctrine.

III. ANALYSIS

Record companies, who continue to profit from the back catalog sales of albums, will most likely oppose the artists who choose to exercise their termination rights.¹⁰⁸ This conflict is important because the music industry is having difficulty adapting to the digital age, and the new musical landscape will likely be profitable only to those entities that have direct ownership and control of copyrighted works.¹⁰⁹

In defense of their copyright control, record companies will likely argue that the musicians signed to their labels were hired to create music as works-for-hire, so the companies have complete ownership of the works.¹¹⁰ The artists will contend that their creations do not fit any of the definitions of a work-for-hire under Section 101, so they should be allowed to exercise the termination rights that are granted to them by the termination rights provision of the 1976 Copyright Act.¹¹¹

Courts should be cautious in interpreting Section 203 because the determination of whether a musician signed to a label was an employee or an

104. *See id.* (describing how procedural unconscionability addresses situations where one party is in a position of dominance).

105. Hall, *supra* note 52, at 195.

106. *Id.*

107. *See* Rafoth, *supra* note 17, at 1033 (“The finding that an artist’s work is not a work-for-hire is the indispensable prerequisite to the artist’s right to terminate because a work-for-hire is not subject to termination under the copyright law.”).

108. *See* Strohm, *supra* note 13, at 130 (discussing how the debate over whether a recording can be made under a work-for-hire scheme will “inevitably become the subject of a hailstorm of litigation”).

109. *See* *Steve Jobs and the Age of iTunes*, HUFFINGTON POST (Oct. 6, 2011, 6:38 PM), http://www.huffingtonpost.com/2011/10/06/steve-jobs-itunes_n_999014.html (discussing changes in the music industry as a result of digitization and alternative market arrangements).

110. *See* Perpetua, *supra* note 6 (noting that the record company’s attorneys claim that Mr. Willis was a company “employee” and thus he is not authorized to exercise termination rights).

111. Rohter, *supra* note 10. *See generally* 17 U.S.C. §§ 101, 203 (1996) (“In the case of a grant executed by one author, termination of the grant may be effected by that author . . .”).

independent contractor will have significant ramifications on the musician's ability to exercise his termination rights—and on the American music industry at large. In other words, a judicial determination that a work was created as a “work made for hire” (work-for-hire) in the employ of a record label will determine whether an artist can successfully exercise his termination rights under Section 203.¹¹² If artists are allowed to exercise their termination rights, it may cause dramatic changes to the employment relationships between musicians and record labels. Conversely, if the record labels prevail and artists are barred from exercising their termination rights, the principles that led to the creation of termination rights may be frustrated.

This section seeks to determine who should prevail as the true owner of the sound recordings. This analysis will apply rules and principles from previously established legal doctrines while also respecting the policy goals of U.S. Copyright laws.

This section begins by determining who owns the music according to these traditional doctrines, and this is done by evaluating the relationships between the parties, the terms of their agreements, and the presence of any undue influence or excessive leverage in the creation of these agreements. This section will then evaluate the benefits and drawbacks that arise from allowing termination rights to be a part of U.S. copyright law.

A. *Who Owns the Music (According to Traditional Legal Rules and Principles)?*

Congress, through its enactment and subsequent repeal of the 1999 amendment, clearly left the issue of determining whether artists may exercise their termination rights to the judiciary.¹¹³ Using the principles of agency law, contract law, and labor law in conjunction with the legislative history of the 1976 Copyright Act and the subsequent enactment and repeal of the 1999 amendment, this Note will try to decide who owns the music—the musicians or the record labels—by looking at arguments that support the positions of both sides using several sources.¹¹⁴

In the context of litigation over a musician's ability to exercise the termination rights granted by Section 203, a court's finding on the true owner of a work will be the outcome-determinative issue.¹¹⁵ Specifically, courts will have to determine if a copyrighted piece of work was made as a work-for-hire

112. See generally 17 U.S.C. §§ 101, 203 (explaining conditions for termination).

113. See LaFrance, *supra* note 17, at 380–81 (explaining that by “returning the law to the status quo, and expressly refusing to resolve the dispute over the status of sound recordings, Congress has returned the issue to the federal courts”).

114. See generally *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989); *Lulirama Ltd., Inc. v. Access Broad. Servs., Inc.*, 128 F.3d 872, 877 (5th Cir. 1997); *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992); *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999); *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999); *NIMMER & NIMMER*, *supra* note 31, § 11.02[A][2]; *Gould*, *supra* note 17; *Hall*, *supra* note 52, at 210–11; *LaFrance*, *supra* note 17, at 382; *Pearson*, *supra* note 17, at 8–9.

115. *Rafoth*, *supra* note 17, at 1033 (“The finding that an artist's work is not a work-for-hire is the indispensable prerequisite to the artist's right to terminate because a work-for-hire is not subject to termination under the copyright law.”).

under the definitions in Section 101.¹¹⁶

Initially, a court may look to the terms of the contract between the artists and record company to determine who is the owner of a piece of work. Most, if not all, contracts between record companies and musicians contain clauses that state that all works created by the artist under the contract are deemed to be works-for-hire.¹¹⁷ Despite the language of these contracts, a court must still perform the task of determining whether the contested work is, in fact, a work-for-hire because “[s]uch an avoidance device would be contrary to the statutory provision that ‘[t]ermination of the grant may be effected notwithstanding any agreement to the contrary.’”¹¹⁸

A court will most likely go about this process in one of three ways—(1) by scrutinizing the employment relationship between the parties under *Reid*; (2) by scrutinizing the terms of the contract and the intentions of the parties that are bound to said contract; and (3) by determining if the existence of undue oppression by either party affects how each party may exercise its rights.

1. *Does the Employment Relationship Between the Parties Reveal the True Owner?*

As noted in Part II(A)(2) of this Note, there are two forms of works that are considered works-for-hire under Section 101—(1) “a work prepared by an employee within the scope of his or her employment,”¹¹⁹ or (2) nine types of works that must be “specially ordered or commissioned.”¹²⁰ The question of whether an artist is an employee of a record label will be answered by reference to federal agency and labor law as laid out in *Reid*.¹²¹

In *Reid*, the Supreme Court held that “[t]o determine whether a work is a ‘work made for hire’ within the Section 101 definition, a court should first apply general common law of agency principles to ascertain whether the work was prepared by an employee or an independent contractor, and, depending upon the outcome, should then apply either Section 101(1) or 101(2).”¹²²

Specifically, the Supreme Court noted that if a court determines that an author is an employee under Section 101(1), then his employer will be deemed the author of the creation if the creation was made within the scope of the

116. 17 U.S.C. § 101 (2006).

117. See Hall, *supra* note 52, at 210 (noting that clauses stating that an artist’s works are to be considered works-for-hire are common and can be found in “virtually every single recording contract”); see also Rafoth, *supra* note 17, at 1030 (“The law clearly indicates that these work-for-hire clauses have no effect regarding whether the objective work-for-hire requirements are met; courts instead look to the actual relationship between the parties.”).

118. NIMMER & NIMMER, *supra* note 31, § 11.02[A][2] (“The parties to a grant may not agree that a work shall be deemed one made ‘for hire’ in order to avoid the termination provisions if a ‘for hire’ relationship (within the meaning of Section 101) does not, in fact, exist between them.”).

119. *Supra* Part II.A.2.

120. 17 U.S.C. § 101; see also NIMMER & NIMMER, *supra* note 31, § 5.03[B] (explaining the different types of works made for hire under 17 U.S.C. § 101).

121. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740–42 (1989).

122. *Id.* at 731.

employee's duties.¹²³ On the other hand, if a court determines that an author is an independent contractor, then the independent contractor will be deemed the owner of the works he created unless those works fit within one of the nine enumerated categories of Section 101(2), and unless those works are "prepared at the instance, direction, and risk of a publisher or producer."¹²⁴ The Supreme Court provided a non-exhaustive list of thirteen factors that should be used by courts to determine if an artist is an employee or independent contractor.¹²⁵

In construing the *Reid* opinion, it is important to note that the thirteen factors used to determine if an author is an employee or an independent contractor will also reveal whether a work-for-hire was created under Section 101(1) or 101(2). In *Reid*, the Supreme Court held that the plaintiff was an independent contractor because the work he created was based on the skilled expertise of his occupation; he supplied the tools used in the creation of the work; the work was created in a workplace that he owned; he was not supervised by the entity that hired him; he was hired for a limited period of time; the entity that hired him "had no right to assign additional projects" to him; he "had absolute freedom to decide when and how long to work"; he was paid based on a compensation schedule that was contingent on his completion of the work he was hired to create; he was solely responsible for the hiring and paying of the people that assisted him in the creation of the work; and, the entity that hired him "did not pay payroll or Social Security taxes, provide any employee benefits, or contribute to unemployment insurance or workers' compensation funds."¹²⁶

Musicians should have few problems showing that their relationships with the record labels are very similar to the relationship between the two parties in *Reid* and, therefore, they should be considered independent contractors. Even though the *Reid* factors will likely lead to most musicians being deemed independent contractors,¹²⁷ those determinations will depend on a case-by-case factual analysis because of the many differing relationships that exist between record labels and artists.¹²⁸

Most notable is the fact that under Section 101(2), record companies must satisfy two requirements before they can be deemed the owners of a work—(1) a musician's creations must fit into one of the enumerated categories of Section 101(2), and (2) the record companies must show that they had the

123. *Id.* at 738; *see also* Rafoth, *supra* note 17, at 1032 ("The finding that a laborer is an employee results in the conclusion that the copyright in the work of that laborer is a work-for-hire copyright . . .").

124. *Reid*, 490 U.S. at 741; *see also* Rafoth, *supra* note 17, at 1032–33 ("The finding that a laborer is an independent contractor may result in the conclusion that the copyright is a work-for-hire copyright, provided additional statutory requirements are met.").

125. *Reid*, 490 U.S. at 751–52; *see also* Pearson, *supra* note 17, at 8–9 (construing *Reid*, 490 U.S. at 751).

126. *Reid*, 490 U.S. at 753.

127. Rafoth, *supra* note 17, at 1030 ("Recording artists' works are not works-for-hire because the typical artist is not a record company employee.").

128. Gould, *supra* note 17, at 94–95 ("Recording industry contracts come in a variety of forms and are usually heavily negotiated. There is no standard deal, but there are common clauses related to the grant of rights that typically are non-negotiable. Labels demanded exclusive rights not only to the recordings, but also to the artist's services, name[,] and likeness for either a fixed time period or a fixed number of albums.").

music created at their “instance, direction, and risk” as required by *Reid*.¹²⁹ Under the traditional doctrines, it is unlikely that a piece of music created by artist could ever qualify as a work-for-hire under Section 101(2) because “a party who hires a ‘specially ordered or commissioned’ work by definition has a right to specify the characteristics of the product desired, at the time the commission is accepted, and frequently until it is completed.”¹³⁰ Even though a record company may be able to show that it incurs a significant risk by entering into a commercial relationship with a musician, it will be difficult to show that the music was created under its “instance [and] direction.”¹³¹

To counter this argument, the record companies might show that they determine the “instance [and] direction” of the music because record contracts typically contain explicit language about the number of records or songs to be created by the artist, as well as the right to assign additional work to the artists.¹³² However, one commentator notes that “[n]othing in the Restatement of Agency, from which the *Reid* factors are derived, requires all factors to provide symmetrical inferences. Although a brief term of employment weighed in favor of finding contractor status in *Reid*, a lengthier engagement will not always signal the opposite.”¹³³

Adding weight to the argument that music created by artists does not qualify as a work-for-hire under Section 101(1) or Section 101(2) are the three cases discussed in Part II(A)(4) of this Note.¹³⁴ Cumulatively, *Lulirama*,¹³⁵ *Ballas*,¹³⁶ and *Staggers*¹³⁷ suggest that the judiciary will likely favor musicians by ruling that their creations are not works-for-hire under Section 101(1) or 101(2) and allow them to exercise their termination rights under Section 203.¹³⁸ This is because those cases follow the logical steps described in the

129. *Reid*, 490 U.S. at 741.

130. *Id.*

131. *Id.*; see Gould, *supra* note 17, at 109 (explaining that record labels hardly make decisions about the characteristics or creation of music because the artists contribute nearly all the skill and typically make all the decisions related to manner and means of creating the music); see e.g., Michael P. Matesky II, *Whose Song Is It Anyway? When Are Sound Recordings Used in Audiovisual Works Subject to Termination Rights and When Are They Works Made for Hire?*, 5 VA. SPORTS & ENT. L.J. 63, 83 (2005) (explaining that film scores are examples of works that are “composed ‘at the instance direction, and risk’ of a film production studio or its representatives” (citing F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 29 UCLA L. REV. 225, 309 (2001))).

132. *Reid*, 490 U.S. at 753.

133. Gould, *supra* note 17, at 110. See generally RESTATEMENT (SECOND) OF AGENCY § 220 (1958).

134. See *Lulirama Ltd., Inc. v. Axxess Broad. Servs., Inc.*, 128 F.3d 872, 877 (5th Cir. 1997) (“A work created by an independent contractor can constitute a work for hire only if it fits one of the nine narrowly drawn categories of works delineated in the second part of Section 101’s definition of ‘works made for hire.’” (citing *Reid*, 490 U.S. at 748)); *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999) (holding that sound recordings could not be considered works-for-hire because there was no evidence of an employer-employee relationship between the parties under Section 101(1) and because the sound recordings did “not fit within any of the nine enumerated categories” of Section 101(2)); *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999) (holding that a “sound recording does not fit within any of the nine categories of ‘specially ordered or commissioned’ works” under Section 101 (citing *Lulirama*, 128 F.3d at 878)).

135. *Lulirama*, 128 F.3d at 877.

136. *Ballas*, 41 F. Supp. 2d at 541.

137. *Staggers*, 77 F. Supp. 2d at 64.

138. Rafoth, *supra* note 17, at 1030 (“Recording artists’ works are not works-for-hire because the typical artist is not a record company employee . . .”).

preceding paragraphs.

2. *Do the Terms of the Contract or the Intentions of the Parties Reveal the True Owner?*

As noted above, courts must determine if a musical piece is, in fact, a work-for-hire despite explicit contract terms to the contrary.¹³⁹ Because “sound recordings” do not fit under any of the definitions of works-for-hire under Section 101, a party to a suit involving an exercise of termination rights might argue that the express terms of the contract should control.¹⁴⁰

Courts generally treat the intentions of the parties to a contract as controlling its interpretation.¹⁴¹ However, courts have historically been averse to upholding contract terms that purport to disguise the true nature of a transaction.¹⁴² This practice is very prevalent in transfers of real property where parties may attempt to disguise a sale or security interest as a lease to avoid taxes.¹⁴³ The Uniform Commercial Code has strict distinctions between leases and security interests which must be adhered in all transactions that fall under its rules.¹⁴⁴ For example, in *Meeker v. Beeson*, the court found that in determining whether a contract was a lease or a security interest that was disguised as a lease, “the courts will disregard the mere form and the words and will endeavor to reach the substance of the agreement.”¹⁴⁵

Security interests under the U.C.C. can be likened to a work-for-hire because both assignors do not retain a reversionary interest in the property

139. See NIMMER & NIMMER, *supra* note 31, § 11.02[A][2] (“The parties to a grant may not agree that a work shall be deemed one made “for hire” in order to avoid the termination provisions if a “for hire” relationship (within the meaning of Section 101) does not in fact exist between them.”); see also Rafoth, *supra* note 17, at 1030 (“The law clearly indicates that these work-for-hire clauses have no effect regarding whether the objective work-for-hire requirements are met; courts instead look to the actual relationship between the parties.”).

140. See Hall, *supra* note 52, at 190 (explaining that the use of a standard industry-wide contract within the recording industry is beneficial to recording companies because it “requires the artist to sign over all authorship rights in the work to the label[]” and because it allows the record labels to profit off the artists’ works while ensuring that the artists are in debt due to the advances which must be paid back to the record labels); see also Rafoth, *supra* note 17, at 1029 (“[R]ecord contracts frequently include clauses stating that the artist is a record company employee and/or that all the artist’s work is commissioned as work-for-hire.”).

141. *E.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1774 (2010) (“[A]s with any other contract, the parties’ intentions control.” (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985))).

142. *E.g.*, *Meeker v. Beeson*, 395 N.E.2d 698, 700 (Ill. App. 1979) (“[T]he courts will disregard the mere form and the words and will endeavor to reach the substance of the agreement.”); see, *e.g.*, U.C.C. § 2A-102 (2004) (“This Article applies to any transaction, regardless of form, that creates a lease.”); cf. JAMES BROOK, SALES AND LEASES 23 (5th ed. 2009) (explaining that Article 2A of the Uniform Commercial Code, which has been adopted in forty-eight states, was included to deal with parties who disguise sales contracts as leases for tax and accounting purposes).

143. See *Meeker*, 395 N.E.2d at 700 (holding that the parties entered into an installment sales contract and not a lease); see also ELDON H. REILEY, SECURITY INTERESTS IN PERSONAL PROPERTY § 4:11 (3d ed. 2011) (“When a lease is intended as security, the form of a lease is being used to disguise a sale of goods. The “lessee” is really acquiring an equity in the leased goods [which is generally realized at the end of the lease by exercising an “option to purchase” for a nominal consideration]. The “lessor” seeks to protect its interest in the leased goods against the lessee’s creditors by retaining ownership as lessor.”).

144. REILEY, *supra* note 143, § 4:11.

145. *Meeker*, 395 N.E.2d at 700. See generally REILEY, *supra* note 143, § 4:11.

being assigned.¹⁴⁶ Courts have used at least two benchmarks to determine when a security interest is being disguised as a lease; in *In re JII Liquidating, Inc.*, the court found a lease to be a disguised security interest because the alleged equipment lessees were responsible for the costs of insurance and payment of equipment's taxes.¹⁴⁷ Musicians will likely draw similarities between a security interest and a work-for-hire. They would argue that the courts can easily apply the already developed principles used to decide if an agreement transfers a security interest or a lease to disputes involving recording contracts which purport to classify a musician's creations as works-for-hire when they may, in fact, be truly owned by the musician.

Musicians can point to two prevalent practices in the recording industry as evidence that musicians truly own their creations: (1) recording industry contracts generally require musicians to pay back all the money given to them by the record label for the creation of their records (popularly known as an advance);¹⁴⁸ and (2) the record label generally does not withhold any taxes from the payments or royalties it makes to artists, leaving the artists entirely responsible for the payment of taxes and their own health insurance.¹⁴⁹ Musicians would argue that the risks they adopt in recording contracts are similar to the situation found in cases like *In re JII Liquidating, Inc.*, where courts found that the risk taken on by alleged lessees meant they were not really lessees but were in fact owners of a security interest.¹⁵⁰

Nevertheless, this comparison can be used in favor of the record companies. If the record companies can show that the terms of the contract actually represent the intentions of the parties, the work-for-hire provisions will likely be upheld despite any hardship that musicians have suffered due to their contractual obligations.¹⁵¹ For example, in *In re Double G Trucking of the Arklatex, Inc.*, the court held that a lease was a true lease, despite the

146. *Compare* Assembly Techns., Inc. v. Phoenix Elec. Mfg. Servs., LLC (*In re* Phoenix Elec. Mfg. Servs., LLC), 429 B.R. 195, 199 (Bankr. D.S.C. 2010) (finding that the lessor "retained a meaningful reversionary interest," which among other things, proved that the agreement between the lessor and the lessee was a true lease (internal quotation marks omitted)), *with* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 730 (1989) (holding that under 17 U.S.C. § 101, a work-for-hire "vests copyright ownership . . . in the employer or other person for whom the work is prepared, unless there is a written agreement to the contrary.>").

147. *Mason v. Heller Fin. Leasing, Inc. (In re JII Liquidating, Inc.)*, 341 B.R. 256, 268 (Bankr. N.D. Ill. 2006) (holding that an alleged equipment lease was a security interest partly because of the risk taken on by the alleged lessees). *But see* *Legends Gym v. ABCO Leasing, Inc.*, 383 F. Supp. 2d 911, 912 (W.D. Tex. 2004) (noting that if the contract terms clearly state that a lease will transform into a security interest once certain conditions are met, it will be enforced by the court).

148. *Hall*, *supra* note 52, at 213 ("The artist receives an advance to cover the costs of the recording process, but under the recoupment clause of the contract, the artist pays back the advance in full through their royalties.>").

149. Marci A. Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1313 (1987) (explaining that employers should be defined as an entity that "withholds taxes from [the] salary" that is paid to its workers).

150. *JII Liquidating, Inc.*, 341 B.R. at 268 (Bankr. N.D. Ill. 2006) (holding that an alleged equipment lease was a security interest partly because of the risk taken on by the alleged lessees). *But see* *Legends Gym*, 383 F. Supp. 2d at 912 (W.D. Tex. 2004) (noting that if the contract terms clearly state that a lease will transform into a security interest once certain conditions are met, it will be enforced by the court).

151. *See* *Legends Gym*, 383 F. Supp. 2d at 912 (noting that if the contract terms clearly state that a lease will transform into a security interest once certain conditions are met, it will be enforced by the court).

provision that prohibited the lessee from terminating the lease early and the inclusion of severe liquidated damages provisions, because the agreement repeatedly denied that the lessee had an option to purchase.¹⁵² Following *Arklatex*, record labels may argue that the work-for-hire provisions in recording contracts should be respected because the parties bargained at arms' length and record labels should not be required to become pseudo-indemnifiers of musicians simply because they have more resources and are more sophisticated.¹⁵³

If the courts accept this theory creating a parallel between security interests and sound recordings, then, depending on the facts of the case, musicians and record labels should have few problems providing the necessary evidence to prove whether a piece of work is to be considered a work-for-hire. Even though this argument seems to favor finding many musicians to be the true owners of their sound recordings,¹⁵⁴ those determinations will depend on a case-by-case factual analysis because of the many differing relationships that exist between record labels and artists.¹⁵⁵

3. *Does the Presence (or Lack) of Unfair Contract Terms Reveal the True Owners?*

A court's decision to uphold the explicit terms of the contract will be detrimental to musicians trying to exercise their termination rights if record companies can prove that contract terms that classify the artists' creations as works-for-hire represent valid manifestations of the parties' intentions. In this situation, musicians will likely claim that the contract terms are unconscionable.¹⁵⁶ Courts have typically found unconscionability in cases involving "gross overall one-sidedness."¹⁵⁷ A finding of unconscionability regarding a record contract is beneficial to musicians because it will have the effect of making the contract voidable, and thus ratifiable.¹⁵⁸

Due to the varied nature of relationships within the record industry, it is difficult to provide a "one-size-fits-all" solution for unconscionability cases.¹⁵⁹

152. *In re Double G Trucking of the Arklatex, Inc.*, 432 B.R. 789 (Bankr. W.D. Ark. 2010).

153. *Id.*

154. Raftery, *supra* note 17, at 1030 ("Recording artists' works are not works-for-hire because the typical artist is not a record company employee.")

155. Gould, *supra* note 17, at 94-95 ("Recording industry contracts come in a variety of forms and are usually heavily negotiated. There is no standard deal, but there are common clauses related to the grant of rights that typically are non-negotiable. Labels demanded exclusive rights not only to the recordings, but also to the artist's services, name and likeness for either a fixed time period or a fixed number of albums.")

156. *See supra* note 142 and accompanying text.

157. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.40 (6th ed. 2009) (explaining that a seller, in this case a record company, who deals with a group of people, in this case musicians, that are generally susceptible to oppression because of their limited economic means will typically be found to have engaged in unconscionable practices if there is a lack of meaningful choice due to industry-wide contracts that are "heavily weighted in favor of one party and offered on a take it or leave it basis, or a situation where freedom of contract is exploited by a stronger party who has control of the negotiations due to the weaker party's ignorance, feebleness, unsophistication as to interest rates or similar business concepts, or general naiveté").

158. *Id.*

159. *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401 (9th Cir. 1996). The

However, standard form contracts, which are used extensively within the recording industry, are generally “set up in such a way that a label can make a profit off an album, while the artist is left indebted to the label on the very same album.”¹⁶⁰ Usually, artists assign the rights to their creations to the record labels in exchange for a royalty rate which usually varies between 7–12% of the retail price of the sound recording, for new artists.¹⁶¹ As one commentator vividly put it:

Imagine a musical artist just starting out in the business. They spend hours practicing, trying to create a sound that will make them stars. Night after night, they perform in bars, clubs, and cafés with the hope that they will be noticed. Then one night it happens, a record company representative offers the artist a chance to record an album. As an artist, that first recording contract could be the most important agreement she makes in her career. The artist, desperate for the recording agreement, will typically sign a deal for a lower royalty rate, sometimes even as low as 7%.¹⁶²

However, just because artists sign deals that entitle them to low royalties that does not mean that the record labels engaged in unconscionable behavior. Courts require parties claiming unconscionability to show both procedural and substantive unconscionability.¹⁶³ A majority of jurisdictions view the procedural element of unconscionability as the unfair surprise that results from the terms of a contract, and the substantive element of unconscionability as “the drafting party’s exacting [of] harsh or unreasonable terms from the other party”¹⁶⁴

For example, in *Martin v. Joseph Harris Co., Inc.*, several farmers brought a suit, against a national distributor of cabbage seed, claiming a breach of the implied warranty of merchantability.¹⁶⁵ The *Martin* court found the seed distributor liable for unconscionable practices during its course of business with farmers because the seed distributor limited the remedy available to the farmers in the case of breach and disclaimed its implied warranty of

plaintiff sued defendant for conversion after defendant terminated plaintiff’s eligibility to sell or service mortgages, and repossessed certain loan portfolios. *Id.* Plaintiff alleged inter alia that certain contractual provisions permitting termination “were unconscionable terms of contracts of adhesion.” *Id.* at 1412. The court, assuming that the contracts were indeed adhesive in nature, noted that adhesion contracts are enforceable unless unconscionable and that the burden of raising facts that would support a legal finding of unconscionability rested on the plaintiff, and ruled that the plaintiff had failed to meet that burden since it had not established the absence of meaningful choice, containing a good discussion of that aspect of unconscionability. *Id.* at 1413.

160. Hall, *supra* note 52, at 190. The article also notes that “[t]he judicial record is limited because the vast number of cases will not become ripe for adjudication until the year 2013, when the artists can begin to try and recapture their works under the termination right.” *Id.* at 213 n.191.

161. M. WILLIAM KRASILOVSKY & SIDNEY SHEL, THIS BUSINESS OF MUSIC 19 (8th ed. 2000). See *supra* note 135, for a more complete discussion of artists’ royalty rates.

162. Kathryn Starshak, Note, *It’s the End of the World as Musicians Know it, or Is it? Artists Battle the Record Industry and Congress to Restore Their Termination Rights in Sound Recordings*, 51 DEPAUL L. REV. 71, 71 (2001).

163. See *supra* Part II.B(2).

164. RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 1999).

165. *Martin v. Joseph Harris Co., Inc.*, 767 F.2d 296, 296 (6th Cir. 1985).

merchantability.¹⁶⁶ The concurring judge explained that procedural unconscionability was exhibited by the seed distributor because “the plaintiff farmers did not understand the meaning of an ‘implied warranty of merchantability,’ did not have its meaning explained to them, and could not have ‘bargained’ concerning the disclaimer of implied warranty even if they had understood its import because the clause is contained in a standard seed order form which . . . [c]ompany seed salesmen must use and cannot modify.”¹⁶⁷ The concurring judge also explained that the element of substantive unconscionability was satisfied because the seed distributor “used this gross disparity in knowledge, and hence bargaining power, to shift the risk of loss from diseased seeds to the party least able to discover and take precautions against disease.”¹⁶⁸

If musicians can show parallels between their situations and those of the farmers in *Martin*, a court will likely accept their unconscionability claims. For example, a musician may argue that his record company took advantage of his lack of knowledge and understanding of termination rights, and consequently, he was unable to bargain at arms’ length for a fair recording contract. However, it should be stressed that unconscionability decisions are highly fact-specific and these outcomes will depend entirely on the facts of the relationship between each musician and his or her record label.¹⁶⁹

Artists who argue that the contract terms which designate their creations as works-for-hire are voidable due to the doctrine of unconscionability will have to show that the terms were both procedurally and substantively unconscionable.¹⁷⁰ For those artists in particularly egregious situations, these two elements will not be difficult to satisfy. However, artists in less egregious situations may also be able to show that all the elements of unconscionability are present in their recording contracts.¹⁷¹

4. *The True Owners (According to Traditional Principles and Rules)*

Applying the traditional rules and principles of agency law, contract law,

166. *Id.* at 298.

167. *Id.* at 304. (Merritt, J., concurring).

168. *Id.* (Merritt, J., concurring).

169. *See, e.g.,* Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp., 75 F.3d 1401, 1411–13 (9th Cir. 1996). In this case, plaintiff sued defendant for conversion after defendant terminated plaintiff’s eligibility to sell or service mortgages, and repossessed certain loan portfolios; plaintiff alleged inter alia that certain contractual provisions permitting termination “were unconscionable terms of contracts of adhesion.” *Id.* at 1411. The court, assuming that the contracts were indeed adhesive in nature, noted that adhesion contracts are enforceable unless unconscionable and that the burden of raising facts that would support a legal finding of unconscionability rested on the plaintiff, and ruled that the plaintiff had failed to meet that burden since it had not established the absence of meaningful choice, containing a good discussion of that aspect of unconscionability. *Id.* at 1411–13.

170. Hall, *supra* note 52, at 194.

171. *See id.* at 202 (arguing that procedural unconscionability exists because most musicians have “no option but to sign with a major label if the band wants to achieve any commercial success” because “five major labels [have] achieve[d] control over almost all commercially produced music”); *see also id.* at 213 (arguing that substantive unconscionability exists because “[t]he recoupment clause and the work-for-hire clause [that exists in most recording contracts] have left artists in a position where they have paid for everything but own nothing”).

and labor law, courts will likely allow musicians to exercise their termination rights if their creations do not fall under the work-for-hire definitions of Section 101. Based on the directions taken by the Supreme Court in *Reid* and the other lower courts, it seems that few, if any, works would be considered works-for-hire under traditional record company-artist relationships.¹⁷² Additionally, musicians may try to claim that the contracts do not represent the actual agreement between the parties. If courts accept this argument, it will bolster the musicians' positions with regard to being considered the true owners of their works.

In furtherance of proposing a practical framework, this Note will show that the use of termination rights by artists is beneficial to the two opposing goals of the U.S. copyright system.

B. Are Termination Rights Beneficial to the U.S. Copyright System?

This part of the Note will try to determine if termination rights are beneficial to the two goals of the U.S. copyright system, as defined in Part II(B) of this Note: "The primary goal is to promote the creation of works that will benefit the American public and the secondary goal focuses on granting authors with the right to control works that were created by their labor."¹⁷³

Based on the large amount of litigation that is likely to occur, a framework that resolves these problems by focusing on the goals of the U.S. copyright system is necessary.¹⁷⁴ The arguments in favor of and against allowing artists to exercise termination rights are presented below.

I. Arguments in Favor of Termination Rights

The first two arguments in favor of termination rights work together as a compound incentive argument. First, if artists know that they can regain the ownership rights to records in the future, they will be incentivized to produce works that benefit the U.S. public.¹⁷⁵ Second, the fact that termination rights may not be exercised until after the "end of thirty-five years from the date of execution of the grant" ensures that the utilitarian goals of the copyright system are achieved by requiring financially incapable artists to assign their works to entities that are better positioned to exploit them.¹⁷⁶

172. Rafoth, *supra* note 17, at 1052 ("The argument that artists' works are not works-for-hire is strongly supported by legal doctrine, and the legislative policy underlying the right of termination forcefully supports the legal argument.")

173. See *supra* Part II.B (describing the goals of the U.S. copyright system).

174. Rafoth, *supra* note 17, at 1031 ("Litigation between record companies and artists concerning valuable streams of copyright royalty revenue could arise as early as 2003, the beginning of a ten year period during which artists must serve notice of their intent to terminate.")

175. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare . . ."); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("[Copyright law] is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.")

176. 17 U.S.C. § 203(a)(3) (2006).

In other words, the thirty-five-year period mandated by Section 203 temporally ensures that the primary goal of the U.S. copyright system is achieved before the secondary goal.¹⁷⁷ In this case, the record labels will use the artists' works to benefit the public by making these works available for sale. The process of placing these works on the market also benefits the public by creating an entire industry that provides jobs for the public during a period when an artist will most likely be unable to provide similar benefits for the American public.¹⁷⁸

There are also non-incentive arguments that support the use of termination rights in the U.S. copyright system. First, a utilitarian justification for the existence of termination rights is that these rights may help resolve the problem of orphan works¹⁷⁹ that are not currently being exploited by recording companies. Orphan works are created when businesses or other corporate entities that have been assigned the complete ownership rights to artistic creations cease to exist or fail to maintain the assignment.¹⁸⁰ Termination rights may resolve this problem by allowing an artist's heirs to reclaim the rights to musical pieces that are not being exploited. Another way that termination rights could resolve the issue of orphan works occurs when the author of an "[orphan] work is identifiable and locatable, but has long since transferred his rights and does not like how the transferee is managing those rights, he may terminate the grant. This means that the author can terminate a grant of rights and grant subsequent licenses, effectively de-orphaning the work."¹⁸¹

Moreover, the secondary goal of the U.S. copyright system, which is partly based on Hegelian personality theory, is advanced by termination rights.¹⁸² Termination rights function to achieve the same goal as another provision of the U.S. Copyright Act, Section 106A, which grants authors of works of visual arts with the right:

to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and . . . to

177. See *supra* Part II.B (explaining the primary and secondary goals of the U.S. copyright system).

178. See ROBERT LIND ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 1:36 (3d ed. 2012) ("The music branch of the entertainment industry is divided into those individuals and entities that are responsible for the creation and exploitation of sound recordings, those individuals and entities that are responsible for the creation and exploitation of musical compositions and those who perform music before a live audience.").

179. Christian L. Castle & Amy E. Mitchell, *Unhand That Orphan*, ENT. & SPORTS LAW., Spring 2009, at 21 (defining orphan work as a work that is "generally thought to be a work of copyright for which the author cannot be found after a good-faith search of relevant documents").

180. See, e.g., Judith Beth Prowda, *Work for Hire, Freedom of Contract, and the "Creative Genius" After the Martha Graham Case*, 53 J. COPYRIGHT SOC'Y U.S.A. 645, 680 (2006) (explaining through the use of an analogy to orphan works, that even though not-for-profit organizations are designed to have perpetual life, many of them do not survive and when this happens an artist's work could fall into copyright limbo if the not-for-profit organization dissolves or fails to satisfy the mission of its founding artist).

181. Christina M. Costanzo, *Have Orphan Works Found a Home in Class Action Settlements?*, 83 TEMP. L. REV. 569, 595-96 (2011).

182. See *supra* Part II.B (explaining Hegelian personality theory).

prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.¹⁸³

Two benefits are evident from recognizing that termination rights achieve the same function as Section 106A:¹⁸⁴ (1) artists no longer have to suffer their recordings being used by causes that they deem to be “prejudicial to [their] honor or reputation” because they can control how their works will be used after a certain period of time;¹⁸⁵ and (2) termination rights will bring the U.S. Copyright into better harmony with the other members of the Berne Convention who adhere to the personality theory justification for copyright law.¹⁸⁶

Finally, termination rights should be allowed because Congress originally granted artists termination rights to protect against “unprofitable or improvident disposition of [their] copyright” by allowing them to regain control of their works after thirty-five years so that artists can “negotiate new contracts for the further exploitation of the work.”¹⁸⁷

2. *Arguments Against Termination Rights*

Despite the benefits of a copyright system that allows artists to exercise termination rights, it may be argued that these particular rights are only beneficial to wealthy or business-savvy artists who have commercially successful records or the financial resources to ensure that these works are available to the public.¹⁸⁸

It could also be argued that termination rights will create an inefficient copyright system if artists who recover ownership of their works, through the exercise of their termination rights, fail to exploit these regained works.¹⁸⁹ For example, if a grantee of a musical piece is effectively exploiting a work, but the artist does not like how his creation is being used, he may choose to exercise his termination rights, regain ownership of his creation, and never

183. 17 U.S.C. § 106A(a)(3)(A)–(B) (2006).

184. See Lior Zemer, *Moral Rights: Limited Edition*, 91 B.U. L. REV. 1519, 1526–27 (2011) (noting that 17 U.S.C. § 106A is part of a group of provisions in the U.S. Copyright Act that are popularly called VARA which stands for “Visual Artists Rights Act”).

185. 17 U.S.C. § 106A(a)(3)(A).

186. See Zemer, *supra* note 184, at 1526–27 (“[VARA] was passed two years after the United States joined the Berne Convention for the Protection of Literary and Artistic Works . . . [and that] VARA was meant to accommodate the obligations imposed on the United States by Article 6bis of the Berne Convention, which requires all signatory states to provide at least some protection for the moral rights of authors. In essence, VARA imported ‘a limited version of the civil-law concept of the “moral rights of the artist” into our intellectual-property law.’ Despite the United States’ expressed will to join the group of nations that accept moral rights as a legitimate principle in copyright law, VARA is ‘largely insufficient.’” (citations omitted)).

187. Raftery, *supra* note 17, at 1054 (“Congress designed the right of termination to guarantee artists an opportunity to renegotiate their share of the profits that their art generates, regardless of the terms on which they initially parted with that art.”); see also Abrams, *supra*, note 23, at 211–13 (quoting HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1961) (emphasis added)).

188. See Raftery, *supra* note 17, at 1055 (“Even if artists can reclaim their copyrights, success would be hollow unless artists could continue selling records.”).

189. *Id.*

exploit it. Consequently, this failure would frustrate the primary goal of the U.S. copyright system¹⁹⁰ while allowing the secondary goal¹⁹¹ to be achieved. This argument favors record companies because the labels have the know-how and expertise to efficiently exploit the musical works.¹⁹²

From the perspective of the record labels, the artists' termination rights may be seen as unjust enrichment, particularly in cases where the record label's employees provide input to an artist or invest heavily in an artist's brand.¹⁹³ For example, record labels provide many of the resources used by the artists to ensure that their music is heard by the public—this includes a workforce that handles the marketing, distribution, packaging, and financing of the album.¹⁹⁴ One possible argument could be that without the record label to help the “struggling artist,” his work would never have made a profit.¹⁹⁵

Even though the artist provided the work, the label might be entitled to recoup the heavy investment it made in the artist, and termination rights do not allow for this.¹⁹⁶ Conversely, artists could argue that a failure to allow them to recover ownership of their creations will allow the record companies to profit unjustly at their expense for an extended period of time, as thirty-five years should be enough time for the record label to recoup its investments.¹⁹⁷

3. *Termination Rights Are Beneficial to the U.S. Copyright System*

As noted in the preceding sub-sections, termination rights satisfy both the primary and secondary goals of the U.S. Copyright system.¹⁹⁸ The benefits of a U.S. Copyright system with termination rights outweigh its drawbacks.

First, the marketplace will resolve any problems that may arise from artists who choose to exercise their termination rights but fail to exploit

190. See *supra* Part II.B (explaining the primary goal of the U.S. copyright system).

191. See *supra* Part II.B (explaining the secondary goal of the U.S. copyright system).

192. Jeff Carter, *Strictly Business: A Historical Narrative and Commentary on Rock and Roll Business Practices*, 78 TENN. L. REV. 213, 217 n.14 (2010) (“The building of such a brand is an exceedingly expensive undertaking in the modern music industry. Unquestionably, the record companies are invaluable for their ability to absorb this expense.”).

193. See Gould, *supra* note 17, at 133 (“[A] record label might be able to establish joint authorship based on contributions from an A&R employee or other label representative. A&R employees sometimes visit the studio and provide input not too different from that of the producer.”).

194. See generally *In re Antone's Records, Inc.*, 445 B.R. 758 (Bankr. W.D. Tex. 2011) (explaining the quid pro quo of artists and labels).

195. See *id.* at 779 (“When an artist enters into a contract with a record label, the performance generally does not exist. The record label pays for the cost of creating the performance, including an advance to the artist, payment of the musicians who perform the song and payment of the costs of creating the master recording. In return, the artist agrees that the copyright to the performance (as opposed to the words and music themselves) belongs to the record label. The master is the embodiment of the performance on tape or digital image, which can be used to produce compact discs or digital downloads for sale to the public. Because the record label pays for the creation of the master, record contracts provide that the master belongs to the label. More importantly, the copyright for the performance belongs to the label as well. The contracts between [the artist] and the record labels followed the normal practice in the industry.”).

196. *Id.*

197. See Hall, *supra* note 52, at 210–17 (arguing that substantive unconscionability exists because “[t]he recoupment clause and the work-for-hire clause [that exists in most recording contracts] have left artists in a position where they have paid for everything but own nothing”).

198. See *supra* Parts II.B, III.B(1), III.B(2) (explaining the primary and secondary goals of the U.S. copyright system as well as termination rights).

regained works. If a work is still valuable after thirty-five years, termination rights will ensure that record companies and artists, or their managers, engage in the negotiation of a new grant.¹⁹⁹ Through the bargaining process, the termination rights will guarantee that record companies “mitigate the potential inefficiencies of . . . long-term option contracts and keep successful artists happy,” instead of leaving it up to the discretion of the record companies who may forfeit re-negotiation due to non-economic reasons.²⁰⁰ By increasing the number of incentives for artists to create through termination rights, the number of works created will increase and this will directly benefit the American public.²⁰¹

Termination rights could also create efficiencies in the copyright system for the benefit of the American people by assigning ownership rights to the party with the greatest capability to exploit sound recordings, regardless of whether it is the record company or the artist.

Moreover, termination rights are beneficial because they could allow for the increased harmonization of the U.S. copyright system with the rest of the world, and because they provide a partial solution for the orphan works problem.²⁰²

Based on the beneficial qualities of a copyright system with termination rights, this Note proposes a framework for courts to decide the outcomes of litigation that revolve around an artist’s exercise of these rights.

IV. RESOLUTION

A. *A New Framework for the Courts*

1. *A Possible Framework for Resolving the “Termination Rights” Issues*

The United States has shown its willingness to align its patent and copyright law system with that of the international community by passing several new pieces of legislation such as the America Invents Act and Visual Artists Rights Act (which are both beyond the scope of this Note).²⁰³

In keeping with this goal of internationalization of U.S. laws, the judiciary should look to the members of the international community that have

199. Gould, *supra* note 17, at 130.

200. *Id.*

201. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare.”); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (explaining that copyright law is intended to “motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired”).

202. See *supra* Parts II.B, III.B(1), III.B(2) (explaining the goals of the U.S. copyright system as well as the problem of orphan works).

203. See *Zemer*, *supra* note 184, at 1526–27 (explaining that the Visual Artists Rights Act was passed by United States to express its “will to join the group of nations that accept moral rights as a legitimate principle in copyright law”); see also H.R. Rep. No. 112-98(I) (2011), 2011 WL 2150541, at *54 (explaining that the America Invents Act represents a “change [that] is long overdue” because U.S. maintenance of a patent filing that differs from the rest of the world places U.S. applicants at a disadvantage).

similar termination rights in their copyright systems for guidance on how to resolve the issues presented by termination rights under Section 203. For example, French, German, Italian, and Spanish law all grant authors a withdrawal right that allows an author to regain ownership of his works if the author believes that his work is no longer being preserved in its original artistic form, subject to the condition that the author indemnifies the grantee for “losses suffered as a consequence of withdrawal.”²⁰⁴ In a similar vein, U.S. courts should require authors to indemnify record labels for losses suffered as a result of termination.²⁰⁵

By requiring artists to shoulder some of the losses that record labels will incur from the exercise of termination rights, artists will likely resort to renegotiation of their positions with the record labels instead of resolving these issues through expensive litigation.²⁰⁶ This course of action might seem to be the sensible compromise, because of the “potentially disruptive effect of termination notices.”²⁰⁷ However, the right of withdrawal used in civil law countries differs significantly from the U.S. version of termination rights.²⁰⁸

In civil law countries, authors are required to indemnify grantees for any rights of withdrawal that are exercised, because the authors are generally allowed to assert these rights with little or no notice.²⁰⁹ This differs significantly from the termination rights in the U.S. copyright system which allows a termination to occur only after thirty-five years from the date of the original grant with notice being given at least two years before the termination is to be effectuated.²¹⁰

Moreover, the doctrine of indemnification is only applied in the United States when a party has a right to indemnity based on “(1) an express contract; (2) a contract implied-in-fact; or (3) equitable concepts arising from the tort theory of indemnity, often referred to as a contract implied-in-law.”²¹¹ All three of which are inapplicable to the contract defining the relationship between artists and record companies.²¹²

204. See PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT PRINCIPLES, LAW, AND PRACTICE § 10.4, 354–55 (2010) (“The U.S. Copyright Act’s termination of transfer provisions roughly approximate the civil law right of recall by giving authors and their statutory successors a nonwaivable right to terminate copyright transfers after a specified period.”).

205. *Id.*

206. Tropp, *supra* note 17, at 823 (“[R]ecord label[s] generally assume[] all of the financial risk in exchange for an exclusive assignment of all copyrights in the masters and sound recordings.”).

207. *Id.*

208. See GOLDSTEIN, *supra* note 204, § 10.4, 354–55 (“The U.S. Copyright Act’s termination of transfer provisions roughly approximate the civil law right of recall by giving authors and their statutory successors a nonwaivable right to terminate copyright transfers after a specified period.”).

209. See *id.* (explaining that the French provision on *droit de repentir* allows an author to withdraw his grant from an assignee even after the work has been published so long as the author indemnifies the assignee); see also *id.* at 266–67 (explaining that an author may withdraw his grant of exploitation right two years after granting or delivering the exploitation right to the assignee if the assignee’s “nonexercise has seriously harmed the author’s lawful interests”).

210. 17 U.S.C. § 203 (2006).

211. 41 AM. JUR. 2D *Indemnity* § 2 (1964).

212. *Id.* (“Express and implied contractual indemnity claims require proof of a contract to indemnify, whereas implied or equitable indemnity is based on concepts of equity. The purpose of the doctrine of equitable indemnity is to avoid the unfairness, under the joint and several liability theory, of holding one

Based on the discussion in the preceding paragraphs, a framework that seeks to resolve termination rights issues through an indemnification model is unworkable in the U.S. copyright system and should not be used by courts.

2. *A Better Framework for Resolving “Termination Rights” Issues*

A framework that focuses on the utilitarian justification for the U.S. copyright system will be better suited to resolving the termination rights issues that arise in the litigation context. The application of the traditional rules and principles of agency law, labor law, and contract law to the question of whether musicians’ works are works-for-hire “is strongly supported by legal doctrine, and the legislative policy underlying the right of termination forcefully supports the legal argument.”²¹³

This Note proposes that the framework that should be adopted by courts mirror the application of legal rules and principles that were discussed in Part III(A)—a framework based on existing doctrines of contract law, labor law, and agency law.²¹⁴ The proposed framework will begin its inquiry into whether an artist may exercise his termination rights by determining if the piece of work that artist seeks to regain ownership rights to was made as a work-for-hire under definitions of Section 101.²¹⁵

As noted in Part II(A)(2) of this Note, there are two forms of works that are considered works-for-hire under Section 101—(1) “a work prepared by an employee within the scope of his or her employment,” or (2) nine types of works that must be specially ordered or commissioned.²¹⁶ The determination of whether an artist is an employee of a record label will be based on agency law and labor law as laid out in *Reid*.²¹⁷

Courts “should first apply general common law of agency principles to ascertain whether the work was prepared by an employee or an independent contractor, and, depending upon the outcome, should then apply either Section 101(1) or 101(2).”²¹⁸ If a court determines that an author is an employee under Section 101(1), then his employer will be deemed the author of the creation only if the creation was made within the scope of the employee’s duties.²¹⁹ On the other hand, if a court determines that an author is an independent contractor, then the independent contractor will be deemed the owner of the

defendant liable for the plaintiff’s entire loss while allowing another responsible defendant to escape all liability. Indemnity may also be based upon a theory of unjust enrichment, and if two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, that person is entitled to indemnity from the other if the other would be unjustly enriched at his or her expense by the discharge of the liability *In the absence of a duty imposed by law to indemnify another, there is no right to indemnification unless derived from a contract.*” (emphasis added) (citations omitted).

213. Rafter, *supra* note 17, at 1054.

214. *See supra* Part III.A.

215. 17 U.S.C. § 101.

216. *Id.*; *see also* NIMMER & NIMMER, *supra* note 31, § 5.03[B] (explaining the different types of works made for hire under 17 U.S.C. § 101).

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

218. *Id.* at 731.

219. *Id.* at 738; *see also* Rafter, *supra* note 17, at 1032 (“The finding that a laborer is an employee results in the conclusion that the copyright in the work of that laborer is a work-for-hire copyright.”).

works he created unless those works fit within one of the nine enumerated categories of Section 101(2) and unless those “works are . . . prepared at the instance, direction, and risk of a publisher or producer.”²²⁰

Courts should use the non-exhaustive list of thirteen factors provided in *Reid* to determine if an artist is an employee or an independent contractor.²²¹ After the determination of an artist’s employment status, courts should also use the *Reid* factors to determine if an employee or an independent contractor created the work in question as a work-for-hire under Section 101(1) or 101(2), respectively.

For Section 101(1), the traditional rules should be used to determine if the work was created by the employee during the scope of his employment.²²² A discussion of the issues related to whether a work created by an employee was done during the scope of his employment is beyond the scope of this Note.

In situations dealing with an independent contractor under Section 101(2), courts should require record companies to satisfy two requirements before they can be deemed the owners of a work: (1) a musician’s creations must fit into one of the enumerated categories of Section 101(2), and (2) the record companies must show that the music was created at their “instance, direction, and risk.”²²³

In applying this framework, courts should place emphasis on the fact that that “[n]othing in the Restatement of Agency, from which the *Reid* factors are derived, requires all factors to provide symmetrical inferences.”²²⁴

Courts should also look to the contractual relationship between the artist and the record company in making determinations about whether the musical piece at issue is a work-for-hire.²²⁵ To do this, courts should ascertain the true intention of the parties and use that to control the contract’s interpretation.²²⁶ In addition to this, the court should independently determine if the work in question is in fact a work-for-hire.²²⁷ In particular, the court should do this evaluation by borrowing principles from the U.C.C., which requires judges to engage in a similar evaluation to distinguish between leases and security

220. *Reid*, 490 U.S. at 741; *see also* Rafoth, *supra* note 17, at 1032–33 (“The finding that a laborer is an independent contractor may result in the conclusion that the copyright is a work-for-hire copyright, provided additional statutory requirements are met.”).

221. *Reid*, 490 U.S. at 751–52; *see also* Pearson, *supra* note 17, at 9 (construing *Reid*).

222. *See* Scott K. Zesch, Annotation, *Application of “Works for Hire” Doctrine Under Copyright Act of 1976 (17 U.S.C. §§ 101 et seq.)*, 132 A.L.R. FED. 301, 320, 323 (1996) (explaining that “in determining for purposes of 17 U.S.C. § 101(1) whether the creator of a copyrightable work is an employee, as distinguished from an independent contractor, the term “employee” should be construed in light of the general common law of agency” and that “in determining for purposes of 17 U.S.C. § 101(1) whether a copyrightable work created by an employee was prepared within the scope of the employment, the term ‘scope of employment’ should be given its common-law agency meaning, as set forth in Restatement (Second) of Agency 228”); *see also* RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

223. *Reid*, 490 U.S. at 741.

224. Gould, *supra* note 17, at 110.

225. *See supra* notes 82–88.

226. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1774 (2010) (“[A]s with any other contract, the parties’ intentions control.” (citations omitted)).

227. Rafoth, *supra* note 17, at 1031 (“The finding that an artist’s work is not a work-for-hire is the indispensable prerequisite to the artist’s right to terminate because a work-for-hire is not subject to termination under the copyright law.”).

interests.²²⁸ Finally, the court should weigh its interpretation of the parties' intentions and the evaluation of the alleged work-for-hire against the possibility of unconscionable contract terms.²²⁹

Based on this framework, this Note will now shift focus to discuss the policy-reasons that favor the adoption of this proposed framework.

B. Why the Proposed Framework Should Be Followed by Courts

A framework based on the application of the established rules and principles of agency law, labor law, and contract law should be adopted because it will allow the two goals of the U.S. copyright system to be achieved without compromising Congress's original intentions for including terminations rights in the 1976 Copyright Act.

Specifically, the framework discussed in Part III(B)(2) of this Note should be adopted by courts.²³⁰ This framework will provide certainty for courts and litigants in an area of the law that is lacking direction. In particular, this framework makes use of principles of law that judges are already accustomed to applying in multitudes of factually differing cases that are presented before them. The use of the same principles applied to determine whether a security interest is being disguised as a lease to the determination of whether a piece of music was created as a work-for-hire will ensure that courts engage in meaningful reviews of the parties' positions and arguments.²³¹ This benefit is bolstered by the mandated *Reid* analysis that courts are required to conduct.²³²

The proposed framework will most likely lead to litigation outcomes favoring musicians by allowing them to exercise their termination rights.²³³ Under an economic analysis of this outcome,²³⁴ this will be positive for the American public because it will lead to the creation of beneficial works by guaranteeing greater protection for authors. Furthermore, the level of a work's economic success, as viewed from the perspective of the general U.S. public, will be the criterion that is used to determine if a particular work is beneficial to the American public.²³⁵

228. See *supra* Part III.A.2.

229. See *supra* notes 82–94; see also Hall., *supra* note 52, at 202–07 (arguing that procedural unconscionability exists because musicians have “no option but to sign with a major label if the band wants to achieve any commercial success” because “five major labels [have] achieve[d] control over almost all commercially produced music”); *id.* at 210–17 (arguing that substantive unconscionability exists because “[t]he recoupment clause and the work-for-hire clause [that exists in most recording contracts] have left artists in a position where they have paid for everything but own nothing”); *infra* Part IV.B.

230. See *supra* Part III.B.

231. See *supra* Part III.B.

232. See *supra* Part III.A.

233. See *supra* Part III.A.

234. Darren Bush, *Caught Between Scylla and Charybdis: Law & Economics as a Useful Tool for Feminist Legal Theorists*, 7 AM. U. J. GENDER SOC. POL'Y & L. 395, 396 (1999) (“The school of thought known as Economic Analysis of Law (Law & Economics) uses economic principles to determine whether a legal outcome is efficient for society as a whole. The increasing popularity of this movement stems from its logical neatness and its broad applicability to general legal issues.” (citations omitted)).

235. Sterk, *supra* note 67, at 1229 (“Congress implicitly has decided that authors of successful works

One possible criticism of the proposed framework is that it unfairly favors musicians because it will lead to litigation results that allow many musicians to regain ownership of their works. However, litigation outcomes that allow musicians to regain their works were precisely the outcomes intended by Congress when it included the termination rights provisions in the 1976 Copyright Act: “*The renewal copyright was intended to revert to [the artists] so that they could negotiate new contracts for the further exploitation of the work.*”²³⁶

Since this framework will lead to end-results that favor musicians, it might also be criticized on the grounds that this framework will lead to an inefficient copyright system—the utilitarian goals of the U.S. copyright system will be hindered, at the expense of the system’s secondary goals, because some artists may reclaim their works and fail to exploit them. Nevertheless, this framework is designed to avoid those inefficiencies by minimizing the negative externalities²³⁷ associated with the duration of a copyright.²³⁸ In particular, these inefficiencies and externalities will be hindered because this framework facilitates competition within the music industry.²³⁹ Termination rights that favor musicians allow for works to reach the hands of those actors in the marketplace who can effectively exploit them for the public’s benefit at the lowest social cost.²⁴⁰ For example, orphan works that are re-owned will be placed back in the marketplace for the public’s benefit through licenses.²⁴¹

From an economic standpoint, the inefficiencies will be reduced because this framework will ensure that the primary and secondary goals of the U.S. copyright system are met by ensuring the creation of situations that encourage artists to create works that are beneficial to U.S. public as a whole.²⁴² From a

deserve greater compensation than authors of less successful works. The termination provision . . . guarantee[s] future compensation to authors of successful works.”)

236. See Abrams, *supra* note 23, at 211 (quoting HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1961) (emphasis added)).

237. Jeffrey L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. INTELL. PROP. L. 1, 5 (2005) (defining negative externalities as “the harm to others resulting from the activity of another”).

238. David W. Barnes, *Trademark Externalities*, 10 YALE J.L. & TECH. 1, 14 (2007) (“In a 2005 article, Professor Jeffrey Harrison used externality theory to develop operational rules for copyright issues. The fundamental idea is that copyright law awards the possibility of a financial reward to a creative person in a manner designed to maximize benefit to society. He demonstrates this through the application of two related rules: (1) protect works only when doing so creates more social benefits than costs and (2) incur no greater social cost than necessary to provide incentives to the creator.”) (discussing Jeffrey L. Harrison, *A Positive Externalities Approach to Copyright Law: Theory and Application*, 13 J. INTELL. PROP. L. 1 (2005)).

239. See Barnes, *supra* note 238 and accompanying text.

240. Barnes, *supra* note 238, at 14–15 and accompanying text.

241. See, e.g., Prowda, *supra* note 190, at 677 n.171 (explaining through the use of an analogy to orphan works that, even though not-for-profit organizations are designed to have perpetual life, many of them do not survive and when this happens an artist’s work could fall into copyright limbo if the not-for-profit organization dissolves or fails to satisfy the mission of its founding artist).

242. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (explaining that copyright law is intended to “motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired”); see also *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

practical standpoint, these inefficiencies will be reduced because artists will generally only be interested in exercising termination rights for works that are profitable, and thus beneficial to the U.S. public.

Additionally, this framework will even out the unequal bargaining power that exists between musicians and record companies by preventatively protecting artists from undue exploitation by record labels²⁴³ and by ensuring that termination rights achieve their intended objectives.²⁴⁴ Record companies will have strong incentives to renegotiate their relationships with musicians because of the potential negative impact that this framework could have on the profits currently enjoyed by record companies.²⁴⁵ Negotiations will also have the complementary benefit of reducing the wasteful litigation that is predicted to occur in 2013.²⁴⁶

There are several practical considerations that work in favor of record companies prevailing over musicians who choose to exercise their termination rights; nonetheless, record companies will most likely avoid creating situations that will lead to expensive and prolonged litigation.²⁴⁷ A discussion of these

243. See Tropp, *supra* note 17, at 800 (explaining that the inclusion of termination rights in the 1976 Copyright Act stemmed from the “widely held view that [record labels] primarily involved in the exploitation of [an artist’s] work would naturally have a superior bargaining position”). However, even though artists have unequal bargaining power, the climate is not as dire as what was happening in the early 1960’s. Cf. Tropp, *supra* note 17, at 823 (explaining that even though a bargaining gap still exists between artists and the record labels, musicians are better protected because they have organized themselves into collective bargaining units to protect their interests).

244. Rafoth, *supra* note 17, at 1054 (explaining that this outcome will be in line with Congress’s intent of ensuring that musicians have the “opportunity to renegotiate their share of the profits that their art generates, regardless of the terms on which they initially parted with that art”); Sterk, *supra* note 67, at 1228–29 (“The committee report accompanying the 1976 Act justified the termination provision by noting that “[a] provision of this sort is needed because of the unequal bargaining power of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.” (quoting H.R. REP. NO. 94-1476, at 124 (1976))).

245. Rafoth, *supra* note 17, at 1056 (“Record companies should meet artists at the bargaining table because the outcome of litigation is potentially unfavorable to the companies. Renegotiation of record deals is a favorable solution for both sides because litigation would sever a necessary relationship. Artists need record companies to produce, promote, and distribute their recordings. Artists would thus prefer to negotiate better deals with their current record companies than spend the time and resources required to shop around for new record deals. Obviously, a record company would prefer a smaller share of split profits rather than an end to a steady stream of income. Additionally, record companies draw new artists by having high profile artists on their roster, and a demonstration of loyalty and fairness to retired artists creates goodwill with the companies’ up and coming stars. By renegotiating with artists, record companies can avoid setting precedent that would destabilize their way of contracting and threaten their ownership of valuable sound recording copyrights subject to termination in year 2013 and beyond.”); *id.* (noting that record companies and musicians could negotiate “a price at which one party would sell his rights to the other—precisely the solution sought by right of termination policy”).

246. *Id.* at 1055 (“Threatened loss of copyrights in many valuable recordings in year 2013 and each year thereafter is a compelling reason [for record companies] to fight for favorable legal precedent, but artists likely to seek termination will have several practical advantages over record companies. Litigation will not be cost prohibitive if groups of artists share the costs by bringing class actions against their record companies. Perhaps competing record companies or other interested parties would lend support in exchange for some rights in the reclaimed copyrights. Moreover, recording artists can easily arouse sympathy for their cause because record companies have historically treated them unfairly.”).

247. Gould, *supra* note 17, at 130 (explaining that: termination rights only apply in the United States and the record labels, who are now multi-national enterprises, may fail to promote the artists’ work internationally leading to a degradation of the value of the work in the United States; record labels are not required to return the physical versions of the master records to the artists and this may result in further litigation; record labels may work to harm the short-term income of the artist once they have given notice of their intent to exercise

considerations and their effects on the efficient exploitation of re-owned works is beyond the scope of this Note.

Finally, as noted in Part III(B), the outcomes predicted under this framework will bring the U.S. copyright system into better harmony with the other member-countries of the Berne Convention who recognize the personality theory justification for copyright law.²⁴⁸

V. CONCLUSION

The judicial framework addressing an artist's exercise of termination rights under the 1976 Copyright Act is currently in a state of disorder, and consequently, outcomes of disputes over termination rights may be affected by the ambiguous gaps in the statutory language of Section 101 and Section 203 of the 1976 Copyright Act. These ambiguities may lead to objectionable results despite the fact that Congress originally intended for termination rights to allow artists to re-negotiate the exploitation of their creations.

The proposed framework—which is based on the established rules and principles of agency law, labor law, and contract law—provides a solution to the uncertainty that pervades this area of the law. In particular, this is done by focusing on Congress's original intentions, the goals of the U.S. copyright system, and the rules laid out by the Supreme Court in *Reid*.

This proposed framework should aid parties and courts in litigating issues that arise in the context of termination rights. The overarching framework, as well as the methods of analyzing ownership issues within that framework, provides the tools to be used in identifying the music industry actors who may appropriately terminate grants for copyrighted sound recordings under Section 101 and 203 of the 1976 Copyright Act. These tools have been designed to be flexible by taking into account precedent and the changing relationships within the music industry to allow the goals of the U.S. copyright system to be achieved despite changes in technology or societal norms.

their termination rights; and record labels may exploit the "derivative work" provision by creating remixes of the artists' works which may dilute the value of the original works).

248. See Zemer, *supra* note 184, at 1526.