

Work for Hire Fact Sheet

Restore Property Rights to America's Sound Recording Artists

Background

In November 1999, during last minute congressional consideration of the Satellite Home Viewer Improvement Act, a so-called “technical amendment” was added to the legislation. This amendment—which had nothing to do with the underlying bill—radically altered U.S. copyright law. In effect it punished America’s sound recording artists by prohibiting them from ever recovering control over their musical creations.

Before this “stealth” amendment was approved, a performing artist who had voluntarily transferred his or her sound recording copyright to a record company, had the right to terminate that transfer and reclaim his or her copyright ownership after 35 years. Congress ensured that recording artists would retain that important termination right under the 1976 Copyright Act. But the stealth amendment took it away by adding sound recordings to the list of specially commissioned works that can, under certain circumstances, be defined under copyright law as “works made for hire.” Under the law, termination rights do not apply to “works made for hire.”

Legislative History

The 1976 Copyright Act was the first substantive rewrite of U.S. copyright standards in many decades. Under study for over 20 years, the 1976 law was the product of years of debate, discussion and deliberations as well as some 35 studies by the U.S. Copyright Office. Among the carefully crafted compromises that were written into law were the Section 203 termination rights.

Under Section 203, Congress made a deliberate policy decision to provide termination rights to authors to “safeguard authors against unremunerative transfers. A provision of this sort [was created] because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”¹ Sound recording artists—especially those new talents who are negotiating their first recording contracts—were exactly the kinds of authors that the law was designed to protect because they have so little bargaining leverage with the record companies and are easily taken advantage of.

However, these longstanding termination rights were erased when the 1999 “stealth” amendment was added to the satellite bill during a closed-door meeting between Congressional staff members. This major change to the copyright law was later approved by lawmakers without so much as a minute of public hearings or any input by recording artists or their representatives. It was foisted upon unsuspecting legislators at the behest of the record companies under the guise of a mere “technical” correction. Yet copyright experts agree that this change is substantive and detrimental to recording artists. The Register of Copyrights, Marybeth Peters, described U.S. recording artists as “... the most unprotected segment of the entire world of copyright.” She has stated that, “... before the new law, artists absolutely had the right to reclaim [ownership of their sounds].” However, the 1999 amendment destroyed that right.

Termination Rights and Works Made for Hire

Generally, under U.S. Copyright law, the authors of any copyrighted work enjoy termination rights, except for those works created under “works made for hire” employment arrangements. With termination rights, authors or their heirs have the opportunity to reclaim their works 35 years from the date of copyright, unless those works are classified as works made for hire. A work may be made “for hire” if one of two definitions under Section 101 of the Act are satisfied: 1) the work was prepared by an employee within the scope of their employment; or 2) the work was specially ordered or commissioned for use in one of nine categories specifically enumerated within the law.

Thus, a sound recording can be a “work made for hire” if it is created by an employee as part of his or her employment arrangement. However, under the standards set by the Supreme Court in **Community for Creative Non-Violence v. Reid** most recording artists with royalty contracts are not “employees”. As a result, most sound recordings could not be defined as works made for hire under the first definition described above. The courts have also held that sound recordings cannot constitute works made for hire under the second definition because, they are not one of the nine categories of specially commissioned works that are enumerated in the definition. But the 1999 “stealth” amendment drastically altered that status by adding sound recordings to the list of categories of specially commissioned in the second definition, thereby making them “works made for hire.” As a result, recording artists have lost their termination rights.

The record industry claims that sound recordings already were eligible to be considered “works made for hire” under the category of “collective works or compilations.” But the record companies stand alone in espousing that view. As noted above, the courts have held that sound recordings do not fit within any of the nine categories, including collective works or compilations. And the legal commentators who have considered the record companies’ views have rejected them as untenable. The truth is that the industry sought the 1999 amendment because that was the only way to ensure that sound recordings could be considered specially commissioned works made for hire.

The Industry Game Plan

The reason why the recording industry needed to hijack the property of recording artists in this way was best explained in an article entitled, “***Time Bomb in the Record Company Vaults***”, written for the 1994 edition of the **Entertainment, Publishing and Arts Handbook**. The authors laid out the problem this way:

Imagine that in the year 2013 Sony Music is planning a boxed set of the greatest hits of Bruce Springsteen. The record company is eagerly anticipating the profits from this release by one of its all-time biggest-selling artists, whose music continues to generate income, much like the Led Zeppelin catalog earns significant revenues for Atlantic Records in 1993 [footnote omitted]. As Sony is about to release the set, the time bomb goes off: a letter arrives from Springsteen’s attorney, informing Sony that the artist is exercising his right under copyright law to terminate Sony’s ownership of the sound recordings. Upon this termination, Springsteen will become the sole owner of the copyrights. If Sony wants to continue to use the recordings, it must repurchase those rights from

Springsteen. This could be quite costly, depending on what other record companies would be willing to pay for these recordings. Springsteen could even decide not to deal with Sony, and instead sell or license his recordings to another record label. This is not the situation Sony was eagerly anticipating! Although this scenario is twenty years into the future, record companies must defuse this time bomb before it is too late.

This same article suggested that “[a] simple solution for the record companies, of course, would be to lobby Congress for an amendment to the definition of a work for hire that would add sound recordings to the nine categories of specially commissioned works that are works for hire [footnote omitted].”

Industry Practices: Facts vs Myths

Copyright Registrations While the record companies have routinely copyrighted sound recordings as works made for hire, simple registration—especially one this is contrary to law—is not determinative. Just registering something as a work made for hire does not make it one. The industry claims that artists haven’t been challenging any of these registrations. The reason: the issue would not be relevant until 2013, the first year that recording artists could exercise their termination rights and reclaim their property under the Copyright Act. The 1999 amendment was a pre-emptive strike designed to prevent artists from asserting their termination rights and thereby challenging the companies copyright registrations.

Co-ownership The legislative history of the 1976 law describes as authors “the record producer who is responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.”² Thus, when the record company does these things, it is also an author. When this is the case, if one of the other authors (i.e., the performer) terminates the transfer of copyright, the record company will not lose control of the sound recording. They will merely have to account to the other copyright owners and pay them their proportionate share of income produced by the sound recording.

Contract safeguards The Copyright Act’s requirement that the author must agree in writing before a work will be considered a “work made for hire” does not provide sufficient protection to artists. Most royalty artists’ contracts provide for both: 1) the transfer of the copyright in the sound recording from the recording artist to the record company, and; 2) that the recording is a work made for hire. But most recording artists have insufficient bargaining power to avoid these onerous provisions. Of course, under the law prior to the 1999 amendment, the second provision was a nullity because it was unlawful under the copyright statutes.

In the real world of the music business, very few artists are powerful enough to negotiate a requirement that ownership of their sound recordings shall revert to them at some time in the future. Those negotiations, however, begin with the legal premise that the artist would regain ownership of the sound recordings after 35 years under the termination rights provision of the Copyright Act. With this provision now eliminated, it will be more difficult for even successful artists to negotiate to regain ownership of their sound recordings and, even if they can, the term of the transfer will be longer as a result of this amendment.

New artists, who do not yet know the value of their recordings, are the very people that termination rights were intended to protect. Clearly, they don’t have the clout to negotiate

termination protections and, thus, could lose total control and ownership of their sound recordings forever. As a result, many new artists enter disadvantageous deals with record companies that permit a one-sided renewal by the record companies for seven additional albums. Because of the 1999 amendment, new artists will permanently lose ownership of their first seven to ten years' work "because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited."³

Discrimination

Finally, it should be noted that the 1999 amendment in effect discriminates between two classes of creative artists in the recording industry. The concept of termination rights is not unique to just the recording artist. Authors of pre-1978 musical compositions have been asserting termination rights for the past 22 years. The termination right has enabled songwriters to renegotiate or end inequitable contractual relationships with those to whom they originally granted the right to publish their music. This is a common practice in the music industry. But now, by virtue of the 1999 revision, performing artists are denied that right for no other reason than the corporate conglomerates who control the industry want to also own these sound recordings forever and prohibit these artists from ever recovering their artistic creations and property. In the final analysis, there is no reason for discriminating against these artists by affording them a narrower scope of rights than that extended to songwriters.

Property Rights for Artists

In the final analysis, there is only one reason for obliterating the longstanding copyright protections for U.S. recording artists—industry greed! Each year the recording industry makes billions of dollars in profits from the creative work of these talented Americans, but apparently that just isn't enough.

Sadly, congressional lawmakers were led to believe that the so-called "technical" amendment put before them by a congressional staffer—who has since gone to work for the Recording Industry Association of America—was non-substantive. To the contrary, this radical change to copyright law nullified important legal protections for U.S. recording artists and expropriated from them all future control over their artistic creations by handing it all over to the recording industry forever. It was indeed, the best pre-millennium, gift-wrapped present the recording industry could have hoped for.

It is now up to Congress to do the right thing—to undo this ill-advised action and restore to American recording artists their property rights.

¹ H.R. Rep. No. 94-1976, 94th Congress, 2D Session (1976).

² Ibid.

³ Ibid.