Musical Sound Recordings as Works Made for Hire: Money for Nothing and Tracks for Free

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ENVISION THE FOLLOWING scenario representative of a modern music relationship:¹ a budding recording artist lands his first big record contract with a major label in November 2003 and agrees to record songs to be included in a ten-song album. The contract states that whatever the artist produces will be considered a “work made for hire.”² The record company advances him funds (which the Company will recoup out of the sales³), and provides the artist with a studio, producer, engineer, and other accompanying musicians. The artist writes the musical compositions for the album and the drummer lays down the drum tracks in January of 2004. The bass parts are recorded in February of the same year, followed by the guitars in March, the percussion in April, the keyboards in May, the lead vocals in June, the

* Class of 2004. The author would like to thank his parents for their love, confidence, and support. He would also like to thank John Lister and Alexa Koenig for their assistance and patience in editing, and Jeff Slattery, Josh Binder, and David Franklyn for their input on drafts of this Comment.


2. See 17 U.S.C. § 101 (1994) (defining "work made for hire"); 17 U.S.C. § 201(b) (1994) (stating that ownership and authorship of copyright in a work made for hire will vest in “the employer or other person for whom the work was prepared”). In this Comment, “work for hire” and the statutory construction “work made for hire” are used interchangeably.

3. See generally Sidney Shemel & M. William Krasilovsky, This Business of Music 13–14 (8th ed. 2000) (stating that the record company will generally pay all fees associated with the recording including payments to the artist, arranger, copyist, engineers, technicians, studio musicians, producer, and studio). In addition, the company will pay all production, marketing, editing, manufacturing, distributing, touring, and any other costs associated with producing and selling the album. In return, the record company will count the costs of production and of any advance paid to the artist against the profit gleaned from the sale of the album. Thus, until the record company makes all of its money back, the artist will get nothing (beyond the original advance—this the company will settle for a loss). See Anderson, supra note 1, at 590–91 (regarding the “advancement-recoupment-royalty” system).
horns in July, the background vocals in August, and the incidental sound effects in October. While the artist has a basic conception of how each track should sound, each is largely a creation from the mind of the individual musician and could be individually copyrightable. The songs recorded over the course of the previous ten months are mixed in November of 2004, mastered in December, and delivered to the record company. The record company receives the master recordings and, assuming the songs are "commercially satisfactory," selects which ten will be included on the first album. After the company has selected and arranged the songs that will make the cut, it releases the artist's first album with great fanfare.

After many years have passed, the artist has produced multiple albums by this same mechanism and has "made it big" in the entertainment world. Unfortunately, his relationship with the record company sours and he demands the return of his master recordings. The record company, however, insists that his product is a "work for hire" owned by the company. Either he is an employee of the record company, or since the recording contract stated that his works would be works made for hire and because both the individual songs and the album fall within the statutory definitions of a "compilation" and "collective work," the artist is out of luck. The record company owns the copyrights to all the songs and all albums produced in perpetuity.

This scenario illustrates but one way sound recordings can be considered works for hire under modern copyright law. Despite the absence of the term "sound recording" from the statutory definition of a work made for hire, this Comment argues that a sound recording can still qualify for work for hire status under the statute, thus irrepa-

4. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 125 (1997), quoted in Ryan Ashley Rafoth, Note: 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, 1034 (2000); see also MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 30.03A(1)(6.3) (2002) [hereinafter "the record label will not be obligated to accept the delivery of any Master Recordings which it determines are not technically and commercially satisfactory for the manufacture and sale of Phonograph Records"]).

5. See generally 17 U.S.C. § 101 (1994) (defining phonorecords as: material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.). Thus the term "phonorecord" encompasses analog tape, digital tape, mini-disc, reel-to-reel, 8-track, and even mp3 formats, in addition to compact discs.

6. See id.; see also discussion infra, Part IV.
rably altering the artist's right to control the fruits of his genius. This Comment argues that both an individual song and an album can be deemed works for hire if either the artist is an employee and created the songs or album within the scope of his or her employment, or the processes of their creation fit the statutory definition for a collective work or compilation. This argument hinges on the process involved in creating either the individual song or the album. If the process is deemed to result in a compilation or a collective work, work for hire status should attach to the detriment of the artist but to the benefit of the record company.

Part I of this Comment discusses the background of copyright law and the purpose of awarding copyrights to original creations as granted by the United States Constitution. Part II discusses the work for hire doctrine as it relates to copyright as a whole and the music industry in particular. Part III discusses the first part of the statutory definition of a work made for hire—the employer-employee distinction and the "within the scope of employment" tests. Part IV discusses the independent contractor prong of the work for hire statute and argues that musical sound recordings can be made works for hire as either a "collective work" or "compilation" even if created by an independent contractor. Part V proposes comprehensive factors to apply when examining whether a musical sound recording should be deemed a work for hire.

I. The Goal of Copyright

The United States Constitution permits Congress to make laws that "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."7 From this clause and from the Necessary and Proper Clause,8 Congress derives federal power to enact copyright legislation.9

"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.'"10 Although "[t]he prospect of reward is an

7. U.S. Const. art. I, § 8, cl. 8.
8. See generally U.S. Const. art I, § 8, cl. 18 (Congress shall have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.").
9. See 1 Nimmer, supra note 4, § 1.02.
10. Id. § 1.03 (quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932)).
important stimulus for thinking and writing," the Supreme Court has said that "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors." Thus, the United States Copyright Office grants a limited monopoly through copyrights to authors to protect their works of genius, and does so on a national scale. The public gains access to the fruits of the creative intellect, and creators are given exclusive rights to control their work, providing incentives to create.

A. The Copyright Clause

While the entire Copyright Clause has been the subject of extensive academic and judicial dissection, two phrases in particular are relevant to this discussion. "Author" means not only the narrow definition of a writer, "but rather [has] reach necessary to reflect the broad scope of constitutional principles." Thus, under this broad construction, an "Author" means anybody who creates an original work; that is, produces something "of one's own independent efforts" that has at least "a modicum of intellectual labor," regardless of the medium of expression. Therefore, a musician is undoubtedly an "Author."

"[T]o their respective Writings" has been construed as broadly as "Authors." A "Writing" can be "any physical rendering of the fruits of creative intellectual or aesthetic labor," produced in a tangible form, including musical compositions and sound recordings of

13. See generally 17 U.S.C. § 701(a) (1994) ("All administrative functions and duties under this title . . . are the responsibility of the Register of Copyrights as director of the Copyright Office . . . .").
14. See Goldstein v. California, 412 U.S. 546, 555 (1973). The Court goes on to state, however, that "the States have not relinquished all power to grant to authors 'the exclusive Right to their respective Writings.'" Id. at 560.
15. See generally Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (quoting U.S. Const. art. I, § 8, cl. 8) ("[t]he primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and useful Arts").
16. 1 Nimmer, supra note 4, § 1.06(A).
17. Goldstein, 412 U.S. at 561 (quoting Burrows-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884)).
18. 1 Nimmer, supra note 4, § 1.06(A).
19. Id.
those compositions. While myriad qualifications abound, "[t]he two fundamental criteria of copyright protection [are] originality and fixation in tangible form."22 "[O]riginality," the Supreme Court stated in *Feist Publications, Inc. v. Rural Telephone Service Co.*,23 "is not a stringent standard; it does not require that facts be presented in an innovative or surprising way."24 Additionally, "[o]riginality sufficient for copyright protection exists if the 'author' has introduced [a]ny element of novelty as contrasted with the material previously known to him."25 Thus, the basic rule is that if a person creates an original work in tangible form with at least a quantum of intellectual labor, that person owns, and therefore controls, the copyright. The result of owning a copyright is that the copyright holder is entitled to exclusive control over reproduction, distribution, creation of derivative works, public display, and performance for the amount of time defined by statute.26

B. History of Sound Recording Copyright

Pursuant to the Copyright Clause, the First Congress issued copyrights to "authors of any map, chart, book or books already printed."27 Musical compositions were added to the list of copyrightable materials in 1831.28 The Copyright Act of 1870 included as copyrightable, any "musical composition . . . intended to be perfected as works of the fine arts."29 The Copyright Act of 1909 ("1909 Act") expanded the scope of copyright, but required that in order for a musical work to acquire copyright protection, the work had to be reduced to sheet music or other tangible manuscript form.30 In 1971, Congress revised the 1909 Act through the Sound Recording Amendment Act of 1971 ("Act of 1971"),31 thereby extending copyright protection to sound record-
The Department of Justice, commenting on Congress's revision of the copyright law, stated, "[w]e believe that extending copyright to reproduction of sound recordings is the soundest; and . . . the only way in which sound recordings should be protected. . . . [T]here is an immediate and urgent need for this protection." The Act of 1971 first added sound recordings to the list of copyrightable materials. Finally, Congress revised the entire 1909 Act in the Copyright Act of 1976 ("1976 Act" or "Copyright Act"), which took effect on January 1, 1978. The 1976 Act embodies the current status of copyright law with respect to sound recordings.

C. Rights of Copyright

A copyright is a valuable piece of intellectual property to own. With exclusive control over reproduction, distribution, adaptation, and public display and performance, the owner can market, promote, assign, transfer, license, sell, grant, or do nothing with the object of the copyright.

Two important issues regarding copyright law are the duration of the copyright and the effect of termination of a copyright assignment. Under the Copyright Act, works created on or after January 1, 1978 are entitled to a copyright for the life of the author plus seventy years. Since copyrights are assignable and transferable, if an author transferred his copyright to another, that other party would own the copyright until seventy years after the author's death. However, the Copyright Act also provides the right of the author to terminate a copyright transfer and thereby recover the copyright. For copyrights transferred on or after January 1, 1978, termination can occur thirty-

five years after the transfer.\textsuperscript{39} This right to terminate is non-waivable and cannot be contracted away.\textsuperscript{40} The rationale for termination is that it “gives the author a ‘second bite of the apple,’” and protects him from transfers for which he was inadequately compensated, because it is often impossible to appraise the value of a work until it has been exploited.\textsuperscript{41}

II. The Work Made for Hire Doctrine

An author does not always get ownership of the copyright. The “work made for hire” doctrine states, “the employer or other person for whom the work was prepared is considered the author . . . and . . . owns all of the rights comprised in the copyright.”\textsuperscript{42} As such, the hiring party becomes vested with all copyrights that ordinarily would have vested in the composer or author. The rationale for the work for hire doctrine is that parties have the right to hire other parties to create copyrightable works.

[A]uthorship and ownership [will] vest in the statutory author [that is, the hiring party], thus allowing clear title and maximum ability to derive the economic benefits to society and access of the public to the work. Otherwise, the rights of termination and reversion held by . . . claimants could result in competing non-exclusive licenses that make exclusive exploitation of the work impossible.\textsuperscript{43}

The definition of a “work made for hire” explicitly states that in order to be considered as such, the work must be:

[A] work prepared by an employee within the scope of his or her employment; or

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.\textsuperscript{44}


\textsuperscript{39} See \S 203(a)(3).

\textsuperscript{40} See \S 203(a)(5) (“Termination of the [copyright transfer] may be effected notwithstanding any agreement to the contrary . . . .”); see also \S 304(c)(5) (covering termination of renewed copyrights; language identical to \S 203(a)(5)).

\textsuperscript{41} Frisch & Fortnow, supra note 37, at 213.

\textsuperscript{42} 17 U.S.C. \S 201(b) (West 2001).


\textsuperscript{44} 17 U.S.C. \S 101 (1994).
As Nimmer points out, the "obvious candidate missing from the foregoing enumeration is 'sound recordings.'"\(^{45}\) One possible reason for this is that "[a]t the time the work for hire statutes were drafted, no federal copyright existed for sound recordings, the single (rather than the album) was the dominant phonorecord format, and the record industry was not yet a multi-billion dollar industry with the resources to lobby Congress effectively."\(^{46}\)

The work for hire doctrine originated with the 1909 Act. Prior to that Act, the common law acknowledged the presumption of an employer's ownership of a copyright created by an employee.\(^{47}\) "[T]he principle was advanced that the payment of a salary to an employee 'entitle[d] an employer to all rights to obtain a copyright in any work performed during the hours for which such salary [was] paid.""\(^{48}\) In addition:

[T]he right belonging to that artist who is employed for the purpose of making a work of art so many hours a day, or that literary producer who is employed for so many hours, should be very different from the right that is held by the independent artist or man who makes a painting for art's sake.\(^{49}\)

The 1976 Act divided works made for hire between those created "within the scope of . . . employment"\(^{50}\) and those "specially ordered or commissioned."\(^{51}\) However, the effect was the same: "in the case of works made for hire the employer is considered the author of the work."\(^{52}\)

This shift of rights has immense implications for control of the copyright,\(^{53}\) transfer of the copyright,\(^{54}\) renewal of the copyright,\(^{55}\)

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45. Nimmer, supra note 4, § 5.03(B)(2)(a)(ii).
46. Frisch & Fortnow, supra note 37, at 224.
48. Id. at 1284 (alteration in original) (citations omitted).
49. Id. (citing 2 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT at 65 (E. Brylawski & A. Goldman eds., 1976)).
51. Id.
53. See generally 17 U.S.C. § 106 (1994) (stating that if a copyright is deemed a work for hire, the artist or creator will not have any exclusive control over the work; such control will vest in the employer or hiring party).
54. See generally § 201(d)(1) (1994) ("The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . . .").
55. See generally 17 U.S.C.S. § 304(a)(1)(B)(ii) (Lexis Supp. 2001) (stating that for works created prior to January 1, 1978, the effective date of the 1976 Act, "[i]n the case of—any work copyrighted . . . by an employer for whom such work is made for hire, the
and termination of the copyright. The practical effect of the work for hire statutes is if a work is deemed made for hire, the employer gets not only unfettered rights to do with the work what he or she pleases for the ninety-five or 120 year statutory period, but also is able to retain the copyright in perpetuity because after the expiration of the copyright the work would enter the public domain. Thus, the creator (not the hiring party) of a work for hire could never be vested with the copyright and would have no standing to sue for infringement.

A. The Music Industry, Sound Recordings, and the Work for Hire Doctrine

The music industry follows the work for hire doctrine in practice. "To offset the financial risk [inherent in sponsoring untested musical artists], record companies require artists to assign ownership of their sound recording copyrights to the record company in exchange for a 'record deal.'" Quite frequently, composers and recording artists "provide their recording and/or songwriting services pursuant to the 'work made for hire' doctrine." The rationale for this practice is that in addition to the financial burden imposed on record labels for recording, promoting, and publishing the music, music publishers and recording companies feel that ownership is easier than continually relicensing the work from the artist anytime the record company wants to reissue a work. "Ownership of the music

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56. See generally 17 U.S.C. § 203(a) (1994) ("In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright . . . is subject to termination . . . thirty-five years from the date of execution of the grant." (emphasis added)).

57. See generally 17 U.S.C. § 302(c) (1994) ("in the case of . . . a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or . . . 120 years from the year of its creation, whichever expires first.").

58. See § 203.


61. See 17 U.S.C. § 101 (1994) (defining "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, . . . regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.").

62. Rafoth, supra note 4, at 1027 (2000) (quoting Shemel & Krasilovsky, supra note 3, at 3); see also 17 U.S.C. § 109(a) (copyrights can be transferred); Wheaton v. Peters, 33 U.S. 591 (1834).

63. Anderson, supra note 1, at 588.

64. See Anderson, supra note 1, at 589.
[gives] the publishing companies the right to license it and collect on it as easily and profitably as possible, both in terms of recordings and especially sheet music."65 "Unlike the typical book publisher's contract, or the show music contract, all copyright rights covering popular music are customarily assigned to the publishers."66 The artist will still receive compensation for the service, usually in the form of royalties.67 However, the work for hire doctrine states that if a work is created during the scope of one's employment or falls within one of nine categories of enumerated creations,68 then the work is not owned by the artist but rather by the record company.

B. The Short-Lived Sound Recording as Work for Hire Amendment

Congress passed legislation adding "sound recordings" to the list of enumerated works in 1999.69 However, the legislation immediately came under fire as hastily constructed and inconsiderate of its effect on recording artists.70 The amendment to the definition of works for hire was buried as a technical amendment in a massive appropriations bill,71 and none of the congressional hearings or speeches reflected any concern over the impact the addition would have on the music industry. Legislators debated the broader points of the bill,72 but the
section revising the work for hire definition went untouched. Even the bill's author, Senator Trent Lott (R-MS), glossed over the work for hire amendment as:

[A] technical and clarifying change to the definition of a “work made for hire” in section 101 of the Copyright Act. Sound recordings have been registered in the Copyright Office as works made for hire since being protected in their own right. This clarifying amendment shall not be deemed to imply that any sound recording or any other work would not otherwise qualify as a work made for hire in the absence of the amendment made by this subsection.73

Senator Lott's statement, however, runs counter to the extant statutory law at the time the new legislation was passed,74 and also conflicts with widely accepted common law as well.75

In response, Representative Howard Coble (R-NC) introduced H.R. 5107,76 which, in effect, returned the definition of work made for hire to the status quo ante.77 Representative Coble acknowledged that sound recordings were not statutorily recognized as works made for hire.78 As a result of hearings held before the House Judiciary Subcommittee on Courts and Intellectual Property, Representative Howard Berman (D-CA) added that several legal scholars voiced opinions as to “whether sound recordings always, usually, sometimes, or never fall within the nine pre-existing categories of works eligible to be considered 'works made for hire.'”79 While one professor stated that “the contribution of an individual sound recording as one of several selections on a CD or other album will typically constitute a contribution to a collective work,”80 another stated that, “in a vast majority of instances, sound recordings would fail to qualify as 'contributions to collective works' or as 'compilations.'”81 The Register of Copyrights for the United States Copyright Office added that, “depending on the particular facts surrounding its creation, a sound recording might, or

78. See id.
80. Id. (quoting Professor Paul Goldstein, Stanford University Law School).
81. Id. (quoting Professor Marci Hamilton, Cardozo School of Law).
might not, constitute a contribution to a collective work."\textsuperscript{82} However, Representative Berman added:

[W]e do not want the removal of the words 'as a sound recording" from the definition of works-made-for-hire [sic] in Section 101 of the Copyright Act to be interpreted to preclude or prejudice the argument that sound recordings are eligible to be works made for hire within the nine, pre-existing categories.\textsuperscript{83}

Berman also expressly left open the possibility that "a future Congress, after more extensive deliberation and careful consideration, could decide whether this legal debate should be resolved through legislation."\textsuperscript{84}

As a result, Congress passed and effected legislation in 2000 that returned the definition of work for hire to the status quo ante.\textsuperscript{85} Thus, sound recordings are no longer considered one of the enumerated works.\textsuperscript{86}

The implications of reinstating the old work for hire doctrine on the music industry are wide-ranging. First, the copyright owner has the exclusive rights to reproduce, distribute, make derivative works of, and publicly display or perform the work.\textsuperscript{87} Although the artist would receive a royalty for every album sold, the actual control over the work would reside not with her but with the individual or company for whom the work was prepared. Second, the copyright will endure for the life of the artist plus seventy years, but will not be owned by the artist.\textsuperscript{88} Third, were the work not considered a work for hire, the artist could regain her copyright thirty-five years after a contractual assignment by termination of the assignment.\textsuperscript{89}

However, if a musical composition or recording is contractually deemed a work for hire, all control over the copyright vests in the "employer or other person for whom the work was prepared."\textsuperscript{90} Works

\textsuperscript{82} Id. (quoting Marybeth Peters, Register of Copyrights for the United States Copyright Office).
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{89} See Rafoth, supra note 4, at 1027; see also 17 U.S.C. § 203(a)(3) (1994) (describing certain conditions under which an author can terminate transfers and licenses (as in the situation in which the artist is deemed an independent contractor and not an employee). However, if the work is considered a work made for hire, the author may not terminate.).
\textsuperscript{90} 17 U.S.C. § 201(b) (1994).
for hire are non-terminable, and such a copyright would endure for ninety-five years from publication or 120 years from creation, whichever is earlier, after which time the work would pass into the public domain. The practical effect of these statutory provisions is that once work for hire copyrights are assigned, an artist will virtually never again have exclusive control over her work. Thus, the determination of whether a work is made for hire is crucial to the rights of both the artist and the record company.

Although sound recordings are no longer one of the enumerated works for hire, possible constructions of the statute may allow the music industry to bring sound recordings under the rubric of a work for hire. Ambiguity remains within the definition of a work for hire such that an artist could be considered an employee, and a musical sound recording can fall under the category of a "collective work" or a "compilation" for purposes of the work for hire doctrine.

C. The Problem

Recall the hypothetical situation involving the recording artist and the record company. If the contract were deemed a work for hire, the record company would own the artist's work forever and have exclusive rights to do anything it wants with the work, including discard it. Were the contract not deemed a work for hire, the artist may, after the thirty-five-year statutory period had expired, offer the album to other companies. Thus, the problem is in determining whether the work was made for hire.

The artist's interests lie in the determination that the recordings produced were not works made for hire because the artist could regain the copyrights by termination of the assignment. If the artist's success outlives the assignment, other record companies may compete for the work and the artist can renegotiate for a higher royalty rate. "Congress intended the right of termination to be a safeguard for new artists who assign their copyrights at a time when they cannot know the future value of their work, and their bargaining power is limited." On the other hand, the record company's interests lie in the determination that the recordings produced were works for hire; they would get control over the copyright in perpetuity. If the recordings

91. See 17 U.S.C.S. § 302(c) (Lexis Supp. 2001); see also Rafoth, supra note 4, at 1028.
93. See supra at 783.
95. Rafoth, supra note 4, at 1022.
are successful, the company can release and rerelease them in myriad permutations or terminate further release if unsuccessful.

However, it is not clear what makes a musical work a “work made for hire.”96 This Comment argues that there are two possible ways for a musical recording or composition to be considered a work for hire: first, if it was created either by an employee within the scope of his or her employment, or second, as a specially ordered or commissioned work falling into one of nine categories with a written instrument to back it up.97

III. The Employer-Employee Distinction and the “Within the Scope of Employment” Prongs of the Work Made for Hire Doctrine

A. The Employer-Employee Distinction

The Copyright Act defines a “work made for hire” first as “a work prepared by an employee within the scope of his or her employment.”98 However, the Copyright Act does not further define what “employee” means. Federal courts, including the Supreme Court, have addressed the issue, eventually arriving at the standard set forth in Community for Creative Non-Violence v. Reid.99

1. Control Tests

In Clarkstown v. Reeder100 and Aldon Accessories Ltd. v. Spiegel, Inc.,101 the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit, respectively, arrived at similar tests for determining whether a hired party was acting as an “employee” for the purposes of works made for hire.

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96. See 146 CONG. REC. S10498 (daily ed. Oct. 12, 2000) (statement of Senator Hatch): Sound recordings can be something of a hybrid art form lying on a continuum between the individual author writing a song or book and the motion picture where possibly hundreds of employees collaborate on the final work . . . . Because the facts can vary so widely . . . it is not clear what general rule would be either most fair to all concerned or would most encourage the continued creativity of recording artists.


98. Id.


101. 738 F.2d 548 (2d Cir. 1984).
In *Clarkstown*, the district court considered precedents arising under the 1909 Act and the 1976 Act. In evaluating copyright ownership interests in a manual for a youth court, it determined that “the contributions of others included not only ideas and suggestions but also direct control and monitoring of Reeder’s expression of his own thoughts.”\(^\text{102}\) The court held that the correct test, based upon precedent of *Murray v. Gelderman*,\(^\text{103}\) a case decided under the 1909 Act, was whether the employer had the right to direct and supervise the manner in which the work was being performed.\(^\text{104}\) Thus, the right to control the product became the first test used.

In *Aldon Accessories*, the Second Circuit, in a dispute over copyright ownership in statuettes, held that an employee is one who “act[s] under the direction and supervision of the hiring author, at the hiring author’s instance and expense. . . . What matters is whether the hiring author caused the work to be made and exercised the right to direct and supervise the creation.”\(^\text{105}\) Thus, actual control over the product became the test in the Second Circuit.

If a case regarding the quality of a work for hire relationship was decided under either the *Clarkstown* “right to control” test or the *Aldon Accessories* “actual control” test, ownership would likely lean in favor of the record company: unless artists are so established within the field that they can exercise complete power over their creative processes, they will retain only partial control, or no control at all.\(^\text{106}\) The balance of control over the work and the process would be exercised, or at least retained, by the record companies. This would, therefore, militate against a finding of the artist as an independent contractor and could subject the artist to employee status.

### 2. Agency Test

In *Easter Seal Society for Crippled Children & Adults of Louisiana, Inc. v. Playboy Enterprises*,\(^\text{107}\) the Fifth Circuit Court of Appeals held in a case involving ownership of certain music videos that for the purposes of determining employer-employee status, “a work is ‘made for hire’ . . . if and only if the seller is an employee [that is, a servant] within the meaning of agency law.”\(^\text{108}\) The court therefore adopted the ap-
approach of the Restatement of Agency. The court realized that there is no federal agency law and thus uniformity might suffer, but that its holding was favorable over the two previous control tests. The court's rationale was that the agency test made sense out of the nine categories of work for hire, and that the work for hire doctrine could be tied into the common law agency doctrine. In addition, the agency test would provide predictability because "[i]n most situations it will not be difficult for a buyer or seller to determine whether the seller is an employee or an independent contractor, and to structure their contractual relations accordingly."

The effect of this test on the music industry is unclear and will vary from case to case. Since no one factor is determinative, any court applying this standard will have to resolve the type of relationship that existed between the parties in order to establish copyright ownership.

3. Community for Creative Non-Violence v. Reid

In Community for Creative Non-Violence v. Reid, the Supreme Court attempted, in the context of ownership of a sculpture, to create a test for determining whether a relationship could be categorized as that of employer and employee. Weighing the control tests—whether the employer had either the right to control or actually exerted control over the employed party—against the common law agency test,
the Court unanimously determined that the common law agency approach adopted in *Easter Seal Society* made the most sense.\textsuperscript{114} The Court based its interpretation on the legislative history of the Copyright Act,\textsuperscript{115} and stated, “interested parties and Congress at all times viewed works by employees and commissioned works by independent contractors as separate entities.”\textsuperscript{116} The Court went on to state that since “Congress intended to provide two mutually exclusive ways for works to acquire work for hire status: one for employees and the other for independent contractors, . . . [t]he hiring party’s right to control the product simply is not determinative.”\textsuperscript{117}

4. Implications of the *Reid* Test for Sound Recording Works Made for Hire

Although some commentators have averred that sound recordings in general cannot be deemed works made for hire,\textsuperscript{118} courts have held differently.\textsuperscript{119} Common sense supports the courts’ view as well, as it is easily conceivable that a company would own a sound bite taken from a regular employee (for example, a company spokesperson, whose job it is to give sound bites). However, the application of the common law agency test is unclear with regard to sound recordings and the music industry.\textsuperscript{120} It may be evident that a producer or an engineer on the record company’s payroll might be considered an employee, but with respect to a recording artist, the test blurs. Each of the agency factors\textsuperscript{121} may vary from case to case, depending on how much involvement the record company has in the recording process. Three factors—the skill required, whether the artist is engaged in a distinct business, and the method of payment—favor the musician,

\begin{itemize}
\item \textsuperscript{114} See id. at 742.
\item \textsuperscript{115} See id. at 743.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id. at 747–48.
\item \textsuperscript{119} See Nat’l Ctr. For Jewish Film v. Goldman, 943 F. Supp. 113, 118 (D.Mass. 1996) (decided under the 1909 Act) (“Absent [the producer’s] urging as the ‘motivating factor’ behind the production of the movies, . . . there would have been no Songs. These facts . . . are dispositive of this [work made for hire] aspect of the case.”); Warren v. Fox Family Worldwide, Inc., 171 F. Supp. 2d 1057, 1067–68 (C.D. Cal. 2001) (including sound recordings as works made for hire by the independent contractor prong as audiovisual works).
\item \textsuperscript{121} See Restatement (Second) of Agency § 220 (1958).
\end{itemize}
because inevitably the artist is hired specifically for his or her skill and proficiency within the musical realm, and the payment is per record, not per hour.122 Since the record company is in the regular business of creating records, this factor favors the record company.123 However, other prongs could vary depending on the contract signed by the artist and the record company.

The Court of Appeals for the Second Circuit recently held in Aymes v. Bonelli,124 a case involving ownership of copyright in a computer program, that five factors are more relevant than others in determining whether an author is an employee for purposes of the work for hire doctrine. These are a subset of the Reid factors: “(1) the hiring party’s right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party.”125 The Aymes court found the fact that a company failed to pay employment benefits or payroll taxes highly indicative of the fact that the company considered a computer programmer to be an independent contractor rather than an employee.126 The court also noted “that every case since Reid that has applied the [Supreme Court’s multi-factor] test has found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes.”127

Applying the Aymes standard to the music industry, record companies typically provide benefits to and pay taxes for their regular employees, but do not do so for their artists.128 The “right to control” prong may go either way in any individual situation and would depend on the level of involvement the record company exerts in the recording process. The “level of skill” prong would favor the artist since the recording of a record requires considerable skill, not to mention the talent required for the artist to get signed to a recording contract in the first place. As previously discussed, the “employee benefits” and “tax treatment” prongs favor the artist as well, since the recording company rarely pays benefits or taxes for musicians.129

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122. See Frisch & Fortnow, supra note 37, at 219.
123. See id. at 220.
124. 980 F.2d 857 (2d Cir. 1992).
125. Id. at 861.
126. See id. at 862.
127. Id. at 863.
128. See Frisch & Fortnow, supra note 37, at 219.
129. See id. (stating that record companies could have agreements with musician unions that require contribution to union’s health and retirement fund. However, these ben-
Whether the hiring party can assign additional projects is an inconclusive factor because the artist is contractually obligated to deliver a set number of songs or albums and the record company cannot ordinarily commission more without additional contract negotiations. However, this arguably favors the artist because an artist can decline additional deals, whereas an employee cannot. Thus, under the Aymes test and applying the Reid factors, a recording artist will likely not be found to be an employee of the record company for the purposes of the work for hire doctrine.

B. The “Within the Scope of Employment” Qualification

If, however, a court determines that the relationship between a recording artist and a record company can be considered that of employer-employee within the context of common law agency, the next question is whether the work produced by that artist was created within the scope of his or her employment. An employer-employee relationship alone does not make the created work a work for hire. Courts have applied the Restatement of Agency test in order to determine what “within the scope of employment” means. In order to fall within the scope of an employee’s employment, the work must be the kind of work he is employed to perform; occur substantially within authorized work hours and space; and be actuated, at least partially, by a purpose to serve the employer.

Under these criteria, it is likely that an artist’s creation of a song or songs for an album would be considered created within the scope of employment. The recording of music is the kind of work an artist is employed to perform, and is actuated pursuant to a recording contract. However, the work may not occur “within authorized work hours and space” since artists set their own schedules. Nevertheless, if a court found that an artist were an employee, it would be difficult to argue that the artist’s recordings were not produced within the scope of his or her employment. Therefore, a sound recording could be accorded work for hire status.

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130. See id.

131. See 1 NIMMER, supra note 4, § 5.03(B)(1)(b)(i).

132. See id. (citing RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).

133. Frisch & Fortnow, supra note 37, at 220.
IV. A Musical Compact Disc or Phonorecord as a "Compilation" or "Collective Work"

The second way a creation could be considered a "work made for hire" as defined by §101 of the Copyright Act is if the work is specially ordered or commissioned, falls into one of the nine enumerated categories, and is supported by a written instrument attesting to that effect.134 Generally speaking, record contracts frequently contain clauses stating that the artist's work is commissioned as work for hire sufficient to satisfy the written instrument requirement.135 In addition, "recording artists are likely to be considered as 'independent contractors,'"136 whom record companies specially commission to record songs; this satisfies the specially ordered or commissioned requirement.137 Therefore, the issue is whether a sound recording and, specifically, a musical compact disc or phonorecord, can fall under any of the statutory categories.

The Copyright Act lays out nine categories of works that can be considered works made for hire: (1) contributions to a collective work; (2) portions of a motion picture or other audiovisual work; (3) translations; (4) supplementary works; (5) compilations; (6) instructional texts; (7) tests; (8) answer materials for a test; or (9) atlases.138 A musical compact disc can only fall into four possible categories;139

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135. See Rafter, supra note 4, at 1029 (paraphrasing Anderson, supra note 1, at 588, 592); see also Donald Farber, Entertainment Industry Contracts: Negotiating and Drafting Guide, form 159-1 (2001); 6 Nimmer, supra note 4, § 30.03A(2)(10.2); Steven J. Pena, Composer Agreement, 662 Practicing L. Inst. Pat., Copyright, Trademark, and Literary Prop. Course Handbook Series 513, 516 (2001). Standard recording contracts will include language such as the following:

   Each Master made pursuant [sic] this Agreement or during its term, from the inception of its recording, will be considered a "work made for hire" for [the recording company]; if, for any reason, any such Master fails to qualify . . . as a work made for hire, then all right, title, and interest in and to the copyright shall be deemed transferred, on an exclusive basis, in perpetuity, to [the record company] by this Agreement.

6 Nimmer, supra note 4, § 30.03A(2)(10.2); cf. Frisch & Fortnow, supra note 37, at 224 ("Even if such language is not determinative, it puts the artist on notice that the copyrights may not be terminable.").

136. Jaszi, supra note 120.
137. See Anderson, supra note 1, at 593.
139. An argument could theoretically be made for a translation. For instance, if a record company specially ordered an artist to make an English version of the song La Vie En Rose, popularized in French by Edith Piaf, then work for hire status might attach.
contributions to a collective work,\textsuperscript{140} portions of a motion picture or other audiovisual work,\textsuperscript{141} supplementary works,\textsuperscript{142} or compilations.\textsuperscript{143} Since it is already established that a sound recording can be a work for hire as an audiovisual work,\textsuperscript{144} then setting aside the audiovisual work and supplementary work\textsuperscript{145} categories, the question remains: can a phonorecord be classified as a work for hire by compilation or as part of a collection?

The definition of “compilation,” which includes “collective works,”\textsuperscript{146} consists of an original work of authorship resulting from the selection, coordination, or arrangement of preexisting materials.\textsuperscript{147} “While a compilation involves merely selection and arrangement, or the bringing together of materials or data which do not necessarily, but may, be subject to copyright protection individually, a collective work is a compilation of contributions which would themselves be capable of copyright protection.”\textsuperscript{148} The definition of compilation implies that three elements must be met in order for

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\begin{itemize}
\item \textsuperscript{140} See § 101 (defining a collective work as “a work . . . in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole”).
\item \textsuperscript{141} See id. (defining audiovisual works as “works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, . . . regardless of the nature of the material objects, . . . in which the works are embodied,” and defining motion pictures as “audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any”).
\item \textsuperscript{142} See id. (defining supplementary work as “a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as . . . musical arrangements”).
\item \textsuperscript{143} See id. (defining a compilation as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term ‘compilation’ includes collective works.”).
\item \textsuperscript{145} See Rafoth, supra note 4, at 1044 (stating that sound recordings cannot be supplementary unless there are multiple artists on the same album, and then “sound recordings on an album comprised of various artists’ songs are not supplementary works unless a single artist’s songs predominate, making the other sound recordings ‘secondary’”); cf. Valerie A. Dearth, 1999 Amendment to Work Made for Hire Doctrine Comes Full Circle: Where It Came From, What It’s Been Through, and Where It Is Now, 19 CARDOZO ARTS & ENT. L.J. 215 (2001) (stating a sound recording can, but is not likely to be, a supplementary work).
\item \textsuperscript{146} See § 101 (“The term ‘compilation’ includes collective works.”).
\item \textsuperscript{147} See id.
\item \textsuperscript{148} David E. Rigney, What Constitutes a “Compilation” Subject to Copyright Protection—Modern Cases, 88 A.L.R. FED. 151, 158 (1988).
\end{itemize}
compilation to acquire copyright: (1) the collection and assembly of preexisting materials or of data; (2) selection, coordination, or arrangement of those materials; and (3) the creation out of those materials of a work of original, and thus copyrightable, authorship.149 “This tripartite conjunctive structure is self-evident, and should be assumed to ‘accurately express the legislative purpose.’”150

There are two related justifications for considering compilations as original works entitled to copyright protection.151 The first hinges on the labor expended in their preparation,152 and the second relies on the subjective judgment of the author in selecting the materials that form the compilation.153 However, because a compilation necessarily consists of pre-existing material, the copyright in a compilation would cover only that material contributed by the author, and does not cover the underlying material.154 This situation would, of course, not apply were the author of the compilation deemed the author of the underlying work or transferred the copyrights to those works.155

In seeking a copyright for a collective work, the contribution made to the pre-existing material must be more than trivial.156 “Originality in the context of compilations can consist of selectivity, or independent original effort in collection, assembling, selecting, organizing, arranging, and compiling the pre-existing materials.”157

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150. Feist Publ'ns, 499 U.S. at 357, (quoting William Patry, Copyright in Compilations of Facts (or Why the “White Pages” are not Copyrightable), 12 COMM. & L. DEC. 37, 51 (1990) (citation omitted)).
153. See, e.g., Adventures In Good Eating, Inc. v. Best Places To Eat, Inc., 131 F.2d 809 (7th Cir. 1942) (upholding copyright for compilation of choice restaurants).
154. See Rigney, supra note 148, at 158–59; see also 17 U.S.C.S. § 103(b) (1994) (“The copyright in a compilation ... extends only to the material contributed by the author of such work, as distinguished from the preexisting material ... and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of ... any copyright in the preexisting material.”).
156. See Rigney, supra note 148, at 158–59.
157. Id. at 159.
A. Musical Albums as “Collective Works” and Therefore “Compilations”

Numerous cases present situations analogous to the one hypothesized at the beginning of this Comment. Whenever the author has exercised discretion in the “process of selecting, bringing together, organizing, and arranging previously existing material,” status as a collective work or compilation will attach. The difference between a compilation or collective work and a compilation or collective work as a work for hire is the requirement of special ordering or commissioning and the fulfillment of the writing requirement.

Case law supports the finding that a musical sound recording can be accorded work for hire status, but unfortunately, few cases specifically address this issue. However, the scarcity of case law is easily explainable. First, cases in which infringement actions have been brought and work made for hire has been used as a defense have had fatal flaws, such as the lack of a signed writing, that have caused the works to not be deemed works for hire. Second, since, under the Copyright Act, termination rights will not begin to vest until at least 2013 (thirty-five years after the effective date of the current Act), there will be no such cases until that year. Unfortunately, the lack of case law extends to other areas in which a compilation was found to be a work for hire. Case law exists in which a work was deemed a work for hire, and in which a work was deemed a compilation or collective work, but none entailed a compilation or collection as a work for hire. One reason is that the issues differ in most cases involving

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159. See, e.g., Ballas v. Tedesco, 41 F. Supp. 531, 541 (D.N.J. 1999) (“[T]here was no signed written agreement between the parties.”).
160. See Ballas, 41 F. Supp. at 541; see also Neva v. Christian Duplications Int'l, Inc., 742 F. Supp. 1533 (M.D. Fla. 1990) (holding that in an action for infringement due to distribution contrary to recording agreement, implied terms of the contract evinced intent that the author of the sound recording should retain ownership of the copyright therein).
162. See AFTRA, supra note 118, at 8 (“None of these copyright registrations has been challenged because the issue will not become ripe until 2013, the first year that copyright owners of sound recordings may exercise their termination rights under the Copyright Act.”).
163. See, e.g., Dahlen v. Mich. Licensed Beverage Ass’n, 132 F. Supp. 2d 574 (E.D. Mich. 2001) (text of poster qualified as compilation); Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222 (3d Cir. 1986) (dental computer program deemed compilation); United Tel. Co. v. Johnson Publ’g Co., 855 F.2d 604 (8th Cir. 1988) (telephone company white pages section of phone book protectable as compilation); Carter v. Helmsley-Spear, Inc., 71 F.3d 77 (2d Cir. 1995) (sculpture held to be work for hire); In re Marvel Entm’t Group, Inc., 254 B.R. 817 (D. Del. 2000) (cartoon characters held to be works for hire);
compilations and works for hire. In work for hire cases, the ownership of the copyright is at issue. In compilation cases, the ownership of the compilation is generally not at issue, but rather the ability of the compilation to withstand infringement claims. However, the step from compilation to work for hire is only a written instrument away.

Three cases typically cited for holding that sound recordings in general, and musical sound recordings in particular, cannot be works made for hire actually hold nothing of the sort. In Ballas v. Tedesco, a case usually cited for the proposition that a musical sound recording cannot be a work made for hire, the court held that the musical CD at issue was not a work made for hire because:

[T]he sound recordings, and the relationship between the parties, did not fall under either of the two statutory definitions of a work for hire. . . . [Additionally,] 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.

However, by narrowly tailoring the holding to apply to the musical CD in question, the court implied that the determination of whether a sound recording can be deemed a work for hire must be made situationally.

Second, in Lulirama Ltd., Inc. v. Axcess Broadcasting Services, Inc., the Fifth Circuit found it unnecessary to rule on copyright ownership


164. See Ballas, 41 F. Supp. at 541; Neva, 742 F. Supp. at 1533.

165. See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991) (phone books and factual compilations are copyrightable but information contained therein is not, so infringement claim cannot stand); Key Publ'ns, Inc. v. Chinatown Today Pub. Enters., Inc., 945 F.2d 509 (2d Cir. 1991) (business directory copyrightable as compilation but defendant did not infringe); Roy Exp. Co. Establishment v. Columbia Broad. Sys., Inc., 672 F.2d 1095 (2d Cir. 1982) (short film consisting of classic scenes from movies deemed a compilation because of skill and creativity of compiler in selecting and arranging the work, and was subject to protection against infringement).


168. See Rafoth, supra note 4, at 1045 ("[T]he court in Ballas v. Tedesco held that 'sound recordings are not a work-for-hire.'").

169. Ballas, 41 F. Supp. 2d at 541.

170. 128 F.3d 872 (5th Cir. 1997).
because it found that the plaintiff's "copyright infringement claims are foreclosed regardless of who owns the copyrights." The court added, "[t]his conclusion should not be construed as disposing of the issue of who actually owns the copyrights to the . . . jingles." To the contrary, the court explicitly recognized that sound recordings (here, musical sound recordings in the form of advertising "jingles") can be works for hire: "[A]ny copyrights that [co-plaintiff] Michlin would otherwise own as creator of the jingles are owned by [co-plaintiff] Lulirama pursuant to the work for hire doctrine because Michlin wrote the jingles in the course and scope of his employment as president of Lulirama."

Third, although the court in Staggers v. Real Authentic Sound stated in dicta that "a sound recording does not fit within any of the nine categories of 'specially ordered or commissioned' works," this is an extremely limited view. The court later holds that it "does not have sufficient information to determine whether [defendant] RAS is the sole . . . owner [by work for hire] of the sound recording copyright." The fact remains that a sound recording can be a work made for hire. Simply because "sound recordings" are no longer enumerated as a category in the definition of works made for hire does not exclude them from falling under another category.

For example, in Warren v. Fox Family Worldwide, Inc., the court found that "[t]here appears to be no question that musical compositions created for inclusion in an audiovisual work such as a television series are one of the categories of 'specially ordered or commissioned' works that can be accorded work for hire status." In that case, plaintiff composer of music for a television show alleged, inter alia, that he was the owner of the copyright and that the party that had hired him to compose the music was not. The court found that plaintiff was indeed an independent contractor, the works composed fell under the "specially ordered or commissioned" prong as included
in an audiovisual work, and that there was a writing to back it up, and thus awarded ownership to the hiring party.\textsuperscript{181}

The determination of whether a musical recording is a work for hire must therefore be made on a case-by-case basis. However, one can easily envision the situation in which an album could be considered a "collective work," and therefore a work for hire. Consider the situation presented at the beginning of this Comment. In order for the album of the artist's songs to be considered a compilation or collective work, the following must occur: First, the record company must specially commission the artist to record a number of songs. This fulfills the "specially ordered or commissioned" requirement. Second, the artist and the record company must jointly sign a contract that states that the works produced pursuant to the contract are works for hire, fulfilling the "written instrument" requirement. Third, and most importantly, after the artist has recorded his songs and delivered them to the record company, the songs must be "selected, coordinated, or arranged in such a way that the resulting work as a whole [could] constitute [...] an original work of authorship."\textsuperscript{182} The album's producer performs this step. However, the producer must be an employee of the record company,\textsuperscript{183} or else the credit and thus ownership of the copyright in the compilation would vest in the producer. Depending upon the level of innovation inherent in the selection, coordination, and arrangement of those tracks, the resulting album could be considered a compilation or a collective work.\textsuperscript{184} The efforts of the record company resulting in the original work of authorship "are distinguishable from the work involved in creating each individual work, such as selecting which musicians, technicians, and studios to use on each recording."\textsuperscript{185} The record album, as distinguished from the individual recording, also has a life of its own by virtue of its promotion as a unit, its artwork, and its liner notes included to provide the listener with information about the artist and the recording.\textsuperscript{186} If a record company includes more of these ele-

\textsuperscript{181} See id. at 1067–68.
\textsuperscript{183} See, e.g., Starshak, supra note 166, at 113 ("[T]he record company . . . provides a producer, designs the cover for the compact disc, and distributes the recording.") (citing AFTRA, supra note 118).
\textsuperscript{184} See Frisch & Fortnow, supra note 37, at 222–23; see also 1 Nimmer, supra note 4, § 3.02 at 3–7, ("It is not necessary that the contributions emanate from different authors. A collective work may consist of 'collections of the discrete writings of the same author[ ] . . .'") (quoting H.R. REP. No. 94-1476, at 122 (1976)).
\textsuperscript{185} Frisch & Fortnow, supra note 37, at 222.
\textsuperscript{186} See id.
ments, its argument of ownership as a work for hire by compilation becomes stronger.\textsuperscript{187}

\textbf{B. Contemporarily Recorded Songs as “Collective Works” or “Compilations”}

Much like the argument that an album can be considered a compilation or collective work for the purposes of determining work for hire status, the assertion can be extended to include the individual sound recordings made using modern technology. In the hypothetical situation presented above,\textsuperscript{188} a series of separate tracks, each entitled to copyright as the product of the individual musician’s imagination and improvisation, were separated compositionally and temporally. In modern commercial recordings, it is not unusual to record tracks separately. Since the musicians an artist desires or requires may have conflicting schedules, the recordings may not occur simultaneously. Regardless of when the recordings take place, gone are the days of a group of musicians playing in one room into one microphone.

The song produced by the eventual mixing of the individual tracks can be considered a “joint work”\textsuperscript{189} if the musicians are indeed independent. Normal recording practice, however, is that either the artist or the record company retains the side musicians.\textsuperscript{190} As such, they are deemed either employees of the artist or of the record company, or independent contractors who assign their work to the artist or the record company. Thus, ownership of their input into the recordings will belong to the party who hired them.

After the musicians finish recording their tracks, it is the producer’s job to “edit or adapt the Masters to conform to technological or commercial requirements in various formats now or hereafter

\begin{itemize}
  \item \textsuperscript{187} See id. at 223.
  \item \textsuperscript{188} See supra at 783.
  \item \textsuperscript{189} See 17 U.S.C. § 101. (Lexis 2001) (stating “[a] ‘joint work’ is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole”). This in itself creates problems for the work for hire doctrine. If a sound recording is considered a joint work but is not a work for hire, termination of the assignment would necessarily have to be with the consent of a majority of the joint authors. See 17 U.S.C. § 203(a)(1) (1994). However, thirty-five years after the original assignment the trail might be cold and it might be difficult to determine who must assent to termination and whether a sufficient number of the joint authors have joined in the decision to terminate. For an excellent treatment of this issue, see Mary LaFrance, \textit{Authorship and Termination Rights in Sound Recordings}, 75 S. Cal. L. Rev. 375, 392 (2001).
  \item \textsuperscript{190} See SHEMEL & KRASILOVSKY, supra note 3, at 3.
\end{itemize}
known or developed."¹⁹¹ In carrying out this task, the producer may decide to eliminate a track in order to achieve a more commercially and technically satisfactory sound.¹⁹² Depending on how extensive this alteration is and how creative the resulting track ends up, the producer may be entitled to copyright the finished product as a collective work or compilation. However, since the producer is an employee of the record company, the work produced during the course of his employment (that is, the finished Master recording) will belong to the company.¹⁹³

The effect of an individual song being considered a work for hire is that the artist will never regain copyright ownership in the work. To that end, the record company can rerelease the song after it has been released in album form, and it can also alter the song or include it in an entirely different album or collective work.¹⁹⁴ A record company owning copyright to a song can release it in an “album version,” a “radio edit version,” a “remix version,” or an “instrumental version.” If a song is found to be a work for hire, essentially all that the artist gets is whatever is left from the advance the company paid initially plus the royalties on the sale of copies of the work. If the work is unsuccessful, the artist may receive nothing for his labors. If the work is successful, the artist could make some money off of the recording, but will not be able to regain the copyright and shop the record after the transfer is terminated.

V. Determination of Work for Hire Status

Inevitably, a court must determine whether sound recordings can be deemed works for hire according to the facts of the case before it. While a court has substantial discretion to so find, the Supreme Court has attempted to clarify the first prong of Section 101 of the Copyright Act.¹⁹⁵ As such, a court may use the common law agency test in order to determine whether a musical sound recording should be considered a work for hire.

If a court finds that a musician is not an employee of the record company but rather an independent contractor, then the issue is whether the circumstances surrounding the recording comport with that of a compilation or a collective work. Like the employer-em-

¹⁹¹. 6 Nimmer, supra note 4, § 30.03A(2)(10.4).
¹⁹². See id.
¹⁹⁴. See Schiffies, supra note 155, at 410 (citing H.R. Rep. No. 94-1476, at 122 (1976)).
ployee distinction, this determination is within a court's discretion, but there is less guidance. However, the decisive inquiry is whether a number of preexisting contributions are "selected, coordinated, or arranged" so that the resulting product constitutes a work entitled to copyright, that is, has a modicum of originality and is fixed in a tangible medium of expression.

In considering whether a song or an album is a compilation or a collective work, a court should consider a number of factors in addition to the existence of a written document and the fact that the works were specially ordered or commissioned. First, what was the nature of the relationship between the parties; for example, did the artist rely heavily on the input of the employer or record producer? Second, what was the manner in which the songs were recorded; for example, were the tracks recorded in a disparate manner, either temporally or locationally? Third, how were the songs treated by employees of the record company after recording; for example, did the producer exert a high level of influence and discretion over the final product? Fourth, who had control over decisions with respect to how the songs and the album were structured; for example, were most of the decisions made by the producer in order to achieve that "commercially satisfactory" sound or did the artist have free reign? Fifth, are there issues surrounding termination; for example, are there multiple joint authors who must join in the notice of termination, or has the period for termination passed? Sixth, since the evidentiary record is likely to be old, will there be difficulty answering the above questions? These questions should not be thought of as comprehensive—a court should make a determination of work for hire status tailored to the factual situation presented.

Conclusion

The impact on the recording industry and recording artists as to whether musical sound recordings are works made for hire can have enormous financial as well as social repercussions. Inevitably a flood of litigation will ensue when artists begin to pursue their termination rights in 2003.\footnote{Since the work for hire doctrine eliminates the artist's right to renegotiate through termination, the imposition of work for hire status on musical sound recordings will have a significant impact on the recording industry and recording artists.} Since the work for hire doctrine eliminates the artist's right to renegotiate through termination, the imposition of work for hire status on musical sound recordings will have a significant impact on the recording industry and recording artists.

\footnote{See 17 U.S.C. § 203(a) (4) (1994) (“notice [of termination of a copyright transfer] shall state the effective date of the termination, . . . and the notice shall be served not less than two or more than ten years before that date”); see also § 203(a)(3) (“Termination of the grant [of a copyright] may be effected at any time . . . thirty-five years from the date of execution of the grant . . . .”) So, for copyrights transferred on January 1, 1978 (the effective date of the grant) the notice of termination must be served between January 1, 1988 and January 1, 1998.}
for hire status contravenes that right without any sacrifice on the part of the record company. 197 Work for hire status for musical sound recordings permits recording companies to exert an almost unconscionable amount of power over a fledgling recording artist inexperienced in contract negotiations. The record company can gain copyright in the artist’s work in perpetuity by either bestowing upon the artist the benefits of employment, or adding significant economic value to the artist’s work by compilation processes. 198 The artist can refuse the contract initially and take his chances elsewhere. However, this represents a Hobson’s choice: the artist can either record music but never again own his work, or continue to struggle to make money but retain ownership of the fruits of his creative genius. For the record company, work for hire means perpetual ownership of a potential cash cow with only a relatively nominal investment. Sounds like money for nothing and tracks for free.

197. See Rafoth, supra note 4, at 1052; see also 3 Nimmer, supra note 4, § 11.07 (stating that a purchaser of copyrights “may not exert greater bargaining power so as to require the author to agree to surrender his or her future right of termination”).

198. See Rafoth, supra note 4, at 1051.