



Rewind, Reclaim: Copyright Termination and the Music Business

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A Look at What's Inside:

1. The copyright reclamation right gives artists the ability to tear up their copyright transfers or licenses after 35 years. This right has the potential to transform the recorded music business.
2. For decades, some record labels have used their copyright holdings as leverage to become industry gatekeepers against artists and consumers alike, and to burden the development of new distribution platforms that threaten to make them obsolete.
3. Artists' right to terminate transfers, which first took effect in 2013, empowers artists to reclaim control over their own life's works or negotiate better deals with their current business partners. This can have some unique impacts on the recorded music industry, which has traditionally been plagued by the imbalance of power between the major record labels and artists.
4. The termination right is still relatively new, so Congress, musicians, and music fans alike must be vigilant to make sure unanticipated pitfalls don't prevent artists from exercising their reclamation rights.



Introduction

It's not often that you see a law that lets one party to a deal tear up a signed contract and start over. But sometimes special problems call for special solutions, which is why Congress created something called the copyright reclamation right.¹

Usually, when two people (or companies) make a contract to exchange some combination of services, goods, and money, the government will honor and enforce that contract for as long as the parties want. That means that for as long as the contract is in force either party can sue the other for breaking the promises made in that contract. If she proves her case, the government will make the other person pay damages or fulfill the contract.

But copyright law has an exception to this general rule.

The copyright reclamation right gives artists the ability to tear up their copyright transfers or licenses after 35 years. This ability has the potential to transform the recorded music business.²

Artists will be able to take their sound recording copyrights back from the record labels, which have for decades relied on owning massive catalogs of copyrights for their business models. For decades, these incumbent middlemen have used their leverage as industry gatekeepers to squeeze artists and consumers alike, while burdening the development of new distribution platforms that threaten to make them obsolete. But the termination right, which is first taking effect in 2013,

will allow artists to reclaim control over their own life's works or negotiate better deals with their current business partners.

The copyright termination right promises to empower artists across all types of creative works, but will have some unique impacts on the recorded music industry, which has traditionally been plagued by the imbalance of power between the major record labels and artists. This paper will explain the impact of copyright termination both on creators generally and on recording musicians specifically.



Why Should Artists Be Able to Terminate Their Licenses?

Decades after Congress gave artists the right, copyright termination has indeed turned out to be desperately needed in an industry plagued by poor treatment of artists and imbalanced power structures that only hinder new works from reaching the public.

Congress's stated reasons for creating the termination right fit into two main categories. First, the termination right was designed to protect actual artists who struck bad deals with record labels or publishers. Most of those lopsided deals were the result of the fact that even an artist who shows obvious musical promise will have relatively little leverage or savvy compared to the labels and publishers she will be striking deals with. For example, Joanna "JoJo" Levesque recently sued Blackground Records, a subsidiary of major label Universal Music Group, to escape the record contract she made as a 12-year-old just entering the music business.³ JoJo alleged that her label refused to release her third album after she delivered multiple master recordings, failed to pay producers and thus hurt her working relationships in the industry—all of which was enabled under the terms of her recording contract because she had little to no leverage as an undiscovered act. JoJo was ultimately able to escape her record deal--10 years after the fact--but artists who were adults when they struck their deals might not be so lucky.⁴

Congress also recognized that it can be hard for anyone to tell how successful a work will be before it reaches the market. 35 years into a deal, the termination right

empowers artists to renegotiate for a royalty based on how the work actually performed in the marketplace.⁵ When a work turns out to command a higher price in the market than the original bargain provided, the copyright reclamation right empowers the artist to negotiate for the actual value of the work.⁶ For example, in the 1930s Jerome Siegel and Joseph Shuster collaborated to create a comic book villain named "The Superman," which they re-worked into a hero named "Superman" and sold to Detective Comics for \$130 and a small per-page rate that lasted 5 years.⁷ Using the termination provisions available to pre-1978 transfers,⁸ the heirs re-gained the copyright in 2008, giving them the power to negotiate licenses that actually reflected the value of the comics.⁹

Termination Can Help Create a Better Music Industry

Having the benefit of hindsight, we can also see why copyright reclamation is so desperately needed to reset the balance of power in the recorded music industry and direct more royalties to actual artists. As this paper will explain, record industry practices systematically deny equity to the very people copyright law was designed to incentivize—actual artists—while entrenching the dominance and anticompetitive incentives of the industry's largest middlemen, like the major record labels. If a substantial number of artists use their right to terminate transfers with the largest music industry middlemen, musicians will likely retain more control over their own careers and the institutions that define the industry, and receive a more proportionate return on their works. This



would in turn also give record labels some incentive to treat artists better or risk losing their business when the artist's termination right matures.

operations and better rates for the actual musician.

Copyright reclamation could also be a boon for the development of new online music distribution platforms. Artists who reclaim their rights will regain the ability to negotiate directly with online platforms that distribute music to consumers. Or, if artists choose to continue using intermediaries to strike distribution deals, they could use copyright reclamation to move their licenses to another company. This has the potential to shake up the current power structures in the recorded music business, as major labels see their sizeable copyright catalogs shrink and subsequently lose the leverage they have previously used to veto or demand outsized payments or ownership stakes from new distribution platforms.¹⁰

To date, new online distribution platforms for sound recordings have needed to get direct permission from record labels, and the dominance of the three major labels (due to their enormous copyright holdings) have given those labels the market power to burden, control, or entirely shut down new platforms that enable artists to more directly and effectively reach their fans. But, if the termination right leads to smaller copyright holdings for the major labels or more limited renegotiated contracts with artists, the majors would not be able to exercise so much control over the development of the digital music space. This could also level the playing field between the major labels and smaller distribution middle men, who would need to compete against each other to attract artists by offering more efficient



The Mechanics of Copyright Reclamation

Originally, the term of copyright protection over a work was divided into an original term and a renewal term. When the first term ended, the author could renew the copyright for a second term.¹¹ In 1831, Congress changed the law so the author could sell or give away his future interest in the renewal term, but he still could not sell his heirs' contingent right to the renewal.¹²

This meant that an artist could sell his right to renew the copyright in a work ahead of time, but if that artist passed away before it came time to renew, the renewal right always went to the artist's heirs. Congress again included a renewal provision in the 1909 Copyright Act.¹³ Today, current copyright law gives the author the right to renew her copyright or the right to terminate contracts after 35 years, depending when the work was made and when the contract was formed.

Renewal Rights v. Termination Rights

Copyright protection for works is based on the year that the work was first published. Currently, copyright law continues the copyright renewal system for works first published before 1978 while creating a new right for authors to terminate licenses and other copyright transfers executed in 1978 and later.¹⁴ For works created before 1978, the author has the sole right to renew the copyright, but courts have interpreted this law to allow authors to sign away the renewal right at the same time they sell

the copyright.¹⁵ As a result, intermediaries simply demanded that authors give up both the copyright and the renewal right simultaneously—defeating the purpose of giving the author more leverage later in time and allowing both parties to evaluate how the work has performed in the marketplace. The only exception to this system is when the artist dies before the copyright is eligible for renewal, in which case the renewal right passes by law to the artist's heirs, regardless of whether the artist has sold the renewal right to another party.¹⁶ This gives the artist's heirs the right to either renew the copyright in their own name and negotiate their own contracts, or let the work fall into the public domain.

For copyright licenses executed after January 1, 1978, copyright law grants authors the right to terminate transfers and licenses of their works during a 5-year period beginning 35 years after the execution of the grants.¹⁷ For joint works, the termination must be effected by a majority of the authors.¹⁸ If the grant is not terminated, the grant continues under its original terms.¹⁹ The termination right includes several subparts meant to guarantee that the author cannot be coerced into selling her rights before 35 years have passed. Unlike the older renewal system, the termination right is not alienable, so any agreements that purport to transfer the author's termination right ahead of time are invalid.²⁰ If an author decides to terminate a contract and then negotiate a new contract with the same grantee, that new agreement is only valid if it is made after the author gives her official notice of termination.²¹ The statute even goes so far as to specify who the author's heirs are, if the author passes away.²²

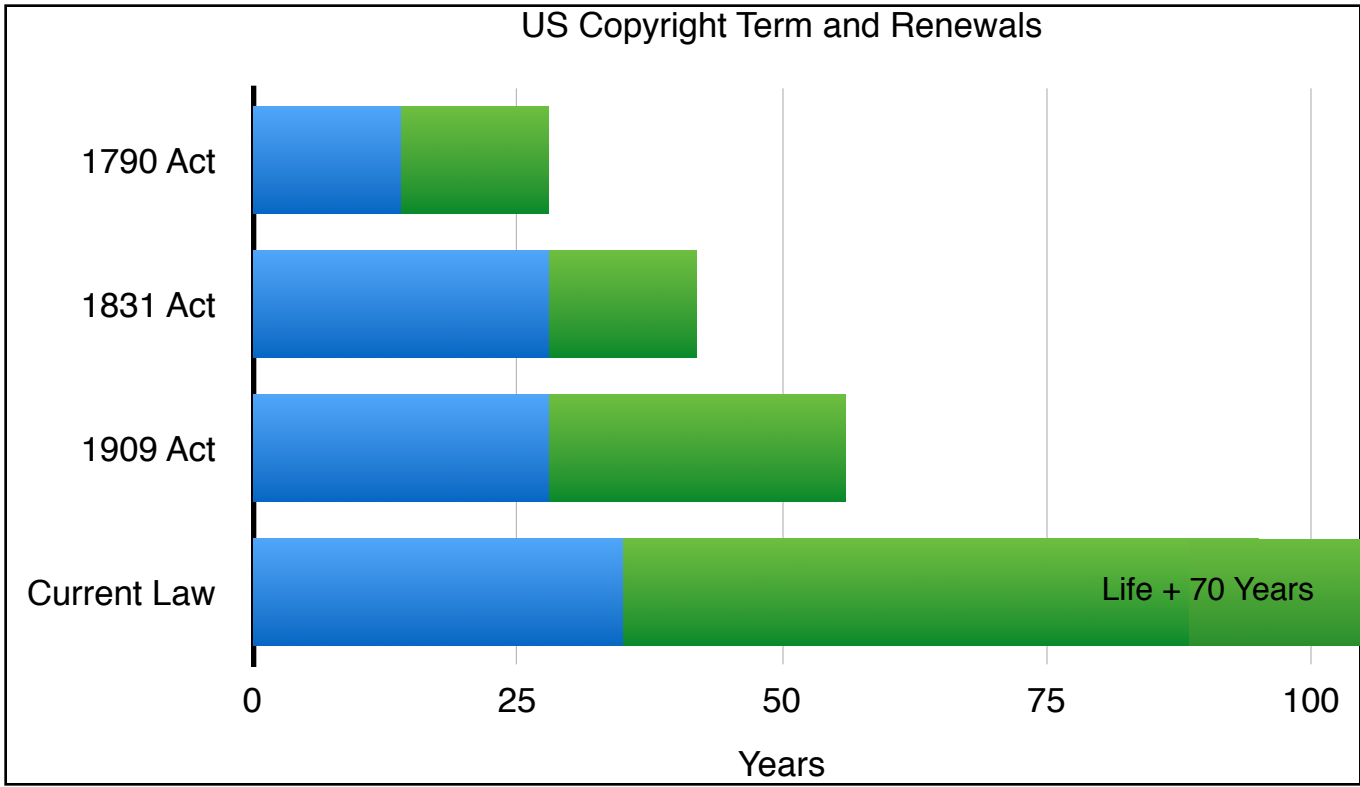


Figure 1: Durations of US Copyrights with point of renewal or termination

To actually go about terminating a license or assignment, the author must first give notice that she plans to terminate the deal during a 2 to 10 year window before the termination will take place. Upon termination, all rights granted to authors under the Copyright Act revert to the author (including joint authors who did not want to terminate the license).²³ If the author terminates a contract to make derivative works, the derivative works that existed at the time of the termination can still be used under the original contract's terms, but new derivative works made after the termination will require a new contract.²⁴

Exceptions to the Termination Right

The most prominent exception to an author's right to terminate a license or

transfer is in the case of a "work made for hire." The termination right does not cover works made for hire ("WMFH"),²⁵ so if a work qualifies as a WMFH the original creator has no statutory right to terminate his assignments or licenses of the work. If a work qualifies as a WMFH, the employer is considered the author of the work, not the artist.²⁶

There are two mutually exclusive ways that a work could be categorized as a WMFH: it could be made by an employee within the scope of his employment, or it could be a specially commissioned work that falls within certain categories of works²⁷ that the parties agree in writing would be a WMFH.²⁸

To decide if a work was prepared by an employee within the scope of her employment, a court will turn to the



general rules of the common law of agency that has developed through the court system, rather than relying on any particular state’s interpretation to understand who qualifies as an “employee” and an “employer” and what constitutes the “scope of employment.”²⁹ Courts will then consider the hiring party’s right to control the manners and means by which the work is created, including the skill required, the source of tools, the location of the work, the duration of the parties’ relationship, whether the hiring party has the right to assign more projects to the hired party, the extent of the worker’s discretion to decide when and how long to work, the payment method, the worker’s method of hiring assistants, whether the work is part of the “regular business” of the hiring party, whether the worker receives employment benefits, and how the hiring party treats the worker for tax purposes.³⁰

The question of whether a work has been commissioned as a WMFH in writing is a little more straightforward, but parties may fight over whether the work in question falls within one of the nine categories that are eligible to be commissioned. For example, “sound recordings” are not included in the list, although this paper will discuss later how some parties may try to argue that they fit

into other broader categories that are included in the list.

The Nuts and Bolts of Terminating a Contract

One important factor that will determine what impact the termination right ultimately has on artists and the music industry in particular will be the process authors must go through to terminate a contract. Currently, the Copyright Office sets the regulations for how artists must write and serve termination notices, and the rules and process can still be opaque to everyday authors who aren’t used to reading and following detailed legal regulations.

The Copyright Office’s regulations implementing the termination provisions detail what information must be included in a termination notice,³¹ noting that the notice must include “a complete and unambiguous statement of facts in the notice itself, without incorporation by reference of information in other documents or records.”³² The regulations lay out the process for serving notice,³³ which does not include any electronic form of service.³⁴ The Copyright Office does not provide a form for authors to utilize in serving notice upon licensees.³⁵

Categories for Specially Commissioned Works that Can Qualify as Works Made for Hire

- as a contribution to a collective work
- as a part of a motion picture of 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

Figure 2



To make this process easier, the Copyright Office could clarify and streamline the termination process by updating its regulations. Possible revisions could include: launching a resource website for authors seeking information about termination, providing a downloadable termination notice that authors could fill out, and permitting certain types of electronic service of notice.



Case Study: The Recorded Music Business

The record industry has been a prime subject of speculation for copyright termination enthusiasts, in no small part because the major record labels have for decades based their business model on owning, controlling, and collectively leveraging the copyrights for the recordings made by musicians. The major labels have also developed a reputation for using their leverage against their own artists, so musicians receive a disproportionately small—if any—payment for their works. These conditions make the record industry ripe for disruption by artists who may use the termination provision to reclaim the rights to their works or negotiate deals that reflect the value of their works, which would almost certainly hurt the major labels' bottom line.

Since the termination right started in 1978 and only comes into fruition 35-40 years later, the first deals eligible for termination can be ended starting in 2013. This means that the impact of copyright reclamation has been speculated about for years in the music business, but there is little actual precedent to confirm whether musicians will generally be able to terminate their record deals and how those terminations will affect the structure of the music industry.

What's in a Record Deal?

The analysis and predictions here will focus on the overall impact of copyright reclamation on the recorded music business, and in particular the general practices of the major record labels. That

said, not all record contracts are the same, not all albums are recorded the same way, and there is especially a lot of variation among the practices of the smaller independent labels, so there are many variables that will impact whether any particular musician can terminate her record deal and reclaim her copyrights. It is usually wise for any individual artist to contact a lawyer to determine whether and when her contract is eligible for termination, and to help comply with the regulations covering how the notice must be written and served.

Generally speaking, here are the main provisions related to copyright termination that an artist can expect to see in a major label record deal:

- **Giving up copyrights.** Often, record deals require musicians to give the record label ownership of their sound recording copyrights in exchange for the record label's help producing, promoting, and/or distributing the album. This means the record label will own the copyright in perpetuity, and often the contract will even claim that the record label is the author as a WMFH.
- **Advances, royalties, and debt.** The record label often gives the artist a lump sum advance and covers the upfront cost of making, marketing, and distributing the album, and sometimes funds videos and tours. Record deals will then divide future revenues, usually giving new artists 10-15% of the retail, wholesale, or sales channel price.³⁶ But the artist's share is entirely diverted to the record label until the artist's

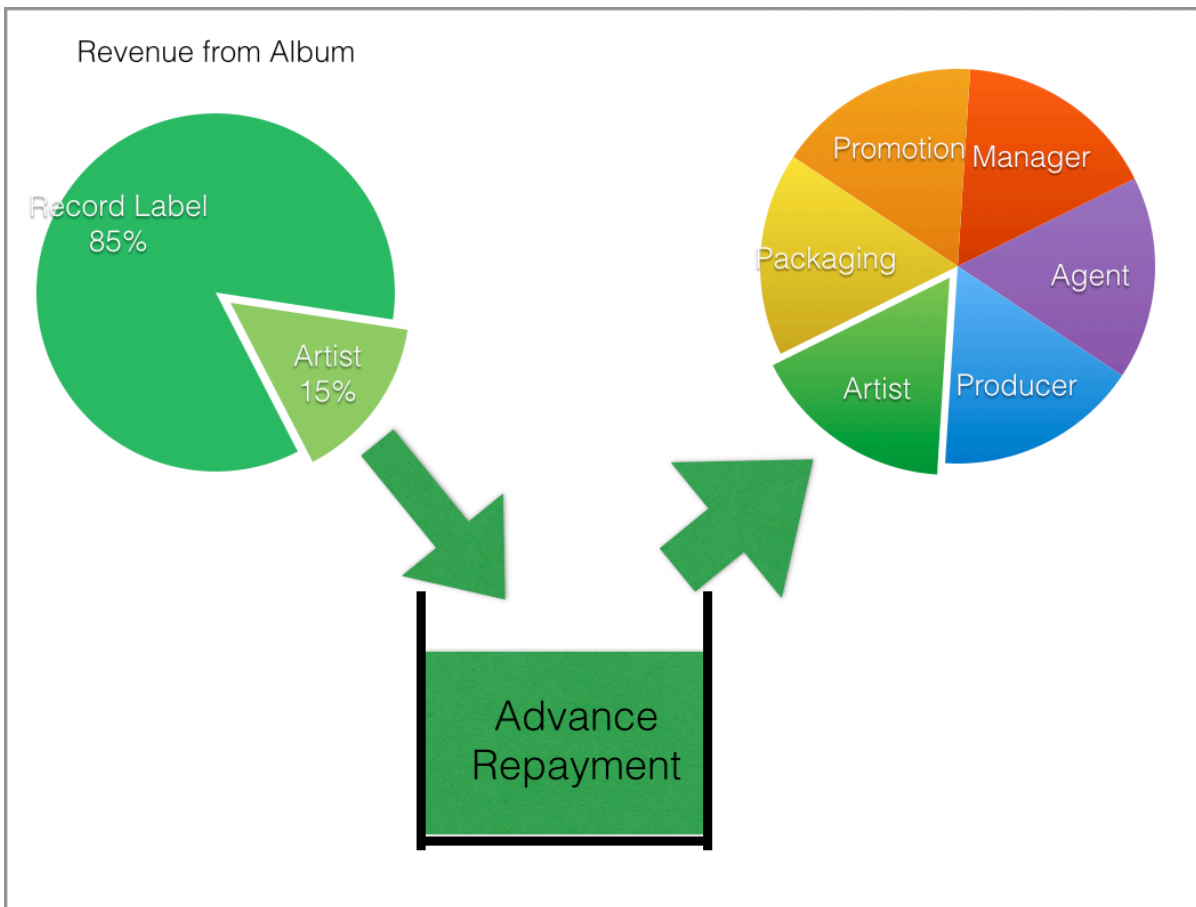


Figure 3: Album Revenue Splits

percentage has paid back all of the money the label spent on the album through her share of the royalties.³⁷ Even then, the artist probably will not see all of her 10-15%: the producer's cut is usually paid from the artists' share of the royalties, the label will probably deduct the cost of packaging and promotional copies from the artist's share, and the artist's manager and/or agent may take an additional percentage.

- **Accounting and auditing.** The record contract will usually give the artist the right to an account statement every 6 months and the right to audit the label's books.

However, the contracts usually makes the process for getting an audit fairly arduous and time-consuming, and the artist will usually be responsible for paying for the audit. Once done, the record contract often restricts how and when the artist can challenge or seek review of the audit results.

- **Options.** Record deals also usually give the label the option to renew the contract for future albums; labels often ask for around 6 options (albums, not calendar years). The record contract may even require that the albums delivered by the artist be "commercially acceptable," which

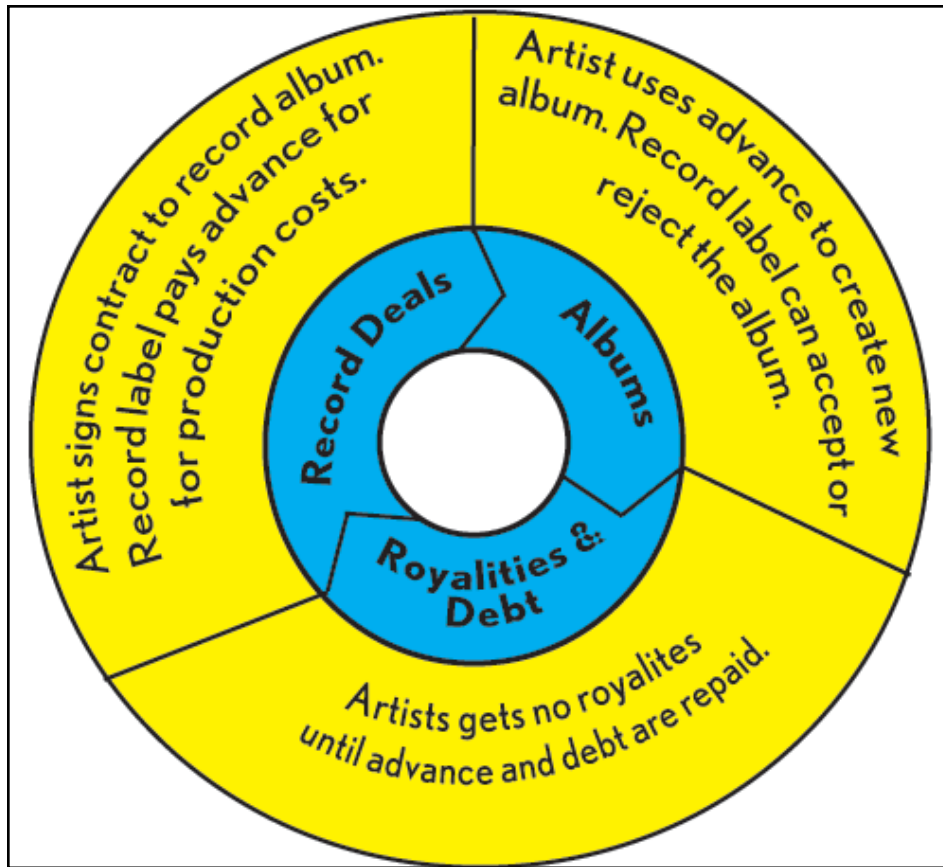


Figure 4: Artists with extraordinary sales and no debt can leave after their label has used all of its renewal options or released them. All other artists must convince the label to release their contract and find another label to pay off their debt to the first label in order to buy the contract.

allows the record label to require the artist to re-work an album and delay exercising the next album option until the label knows whether the first album was a hit.

- **Cross-collateralization.** The small share of artist royalties and the large sums she must pay back to the record label mean that many albums never reach the point where they are actually receiving royalties. As a result, the artist often ends up in debt to the label, even if the label has actually earned a strong profit, and the label still has the option to renew

the contract for future albums. In this case, the record deal may specify that the artist's next album must pay back the debt from both the first and second albums before the artist sees any royalties. The artist's best chance at getting out of this cycle would be to find another record label willing to pay the first label back for the "debt" the artist has accumulated, but it's not very easy to find a label willing to pay for and forgive hundreds of thousands of dollars for anything less than a proven top artist.



- **One-sided risk.** The record contract is usually “assignable” by the record label, so the record label is free to sell the artist’s contract to another company. But the artist has no such option and is usually bound to be exclusive to that label unless the artist receives what is called a “sideman’s” clause that gives the artist permission to play as a side artist in studios for other bands and labels.
- **Other rights and royalties.** If the artist is also a songwriter and the record label owns a music publishing arm, the label may ask for ownership of the artist’s musical composition copyrights as well, and in any event will want to pay the artist less than the standard compulsory rate for mechanical copies: often only paying for 10 songs per album or 75% of the mechanical rate.

Under a contract like this, the record label makes a substantial profit while the artist is still indebted to the record label, and the record label has the ability to renew the contract for several years whether the artist wants to continue the relationship or not. Unfortunately, a new unsigned band has little leverage against a major record label and faces an uphill battle if they want to change any of the many terms in the contract that disadvantage the artist.

The Importance of the Termination Right


Copyright reclamation does not right all of these wrongs, but it gives the artist a chance to reclaim control over her work

or simply renegotiate for a better deal after they have the leverage of a proven musical career and fan base.

It could be that many artists will prefer to simply strike a better deal with the same labels they have always worked with. Or, artists may opt to terminate their contracts entirely, take back their own copyrights, and pursue an independent career using new digital platforms to handle their own distribution.

If a critical mass of artists choose this path the termination right may actually end up having a structural impact on the music industry: as the major record labels lose the aggregated rights they had collectively leveraged to veto or burden new online distribution platforms, more entrepreneurs may invest in the business and more digital platforms may arise to reach consumers in new and innovative ways.

As these changes take place, the copyright termination right also gives unrepresented groups of artists the opportunity to increase their leverage and create a balance of power in a system that has traditionally exploited their music without allowing them to gain equity in the institutions that control their life’s work.³⁸ Record label contracts are often structured such that albums will never earn back the money originally fronted by the label for an album’s production and promotion, so the label never passes on any royalties to the actual artist. Even if the artist is lucky enough to “recoup” the label’s expenses and begin collecting royalties, that artist still only receives a small portion of the total revenue from that recording, and gains no equity in the companies that profit so richly from the album. This system of exploitation is yet



greater for artists from historically underrepresented communities, like African American musicians. As Professor Kevin J. Greene put it, “While it is true that the music industry has generally exploited music artists as a matter of course, it is also undeniable that African-American artists have borne an even greater level of exploitation and appropriation.”³⁹

Ways Record Labels May Fight Termination

There are, however, many ways the major labels may fight artists attempting to terminate their record deals, not least of which is the claim that recorded albums are works made for hire and the label—not the artist—is therefore the “author” of the album. Using some “belt and suspenders” provisions, major label record contracts often include a clause asserting that the works are WMFH, and that even if the albums are not WMFH the artist grants the label ownership or an exclusive license in perpetuity.⁴⁰ If a record label can show that a recording is a WMFH, the musician can never terminate her record contract and have a second chance at striking a fair deal or controlling the recordings herself.

Works Made Within the Scope of Employment


There are many non-determinative factors a court may consider when trying to decide if the work was made within the scope of employment.⁴¹ Ultimately this legal question is very fact-based, so whether a particular recording is a WMFH will depend on the facts surrounding its creation. We can, however, make some

educated guesses based on general industry practices. In the recording industry, most featured artists or bands signed by a label are likely not employees of the label, because generally the label leaves the manner of the work up to the artists, the artists provide their own instruments and make most day-to-day artistic decisions, artists are not subject to performing any additional tasks unrelated to the albums, and artists are only paid through a recoupable advance and the possibility of future royalties after recoupment and distribution expenses instead of a regular salary.

Specially Commissioned Works

Record labels are very likely to argue that sound recordings can qualify as specially commissioned WMFH, even if artists don’t qualify as their employees. Specially commissioned works can qualify as a WMFH only if they fall within the nine categories explicitly listed in the statute, and only if the for-hire relationship is evidenced by a written contract.⁴² Sound recordings are not listed within the nine categories.⁴³ It is, however, somewhat unsettled whether they qualify as compilations or contributions to a collective work (two of the nine categories), because no cases have yet confronted the issue of sound recordings as a WMFH in the termination context.⁴⁴ Record labels may nevertheless try to argue that recorded singles are compilations or collective works of multiple recorded tracks⁴⁵ or that albums are compilations or collective works of multiple singles.

A compilation is “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.”⁴⁶ Notably, this requires that the compilation itself have at least a minimum level of creativity, not just the individual works within it. Within the category of compilations are “collective works,” which are “work[s], such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.”⁴⁷ A record label therefore has incentive to argue before a court that recorded singles or entire albums qualify as both collective works and compilations to maximize the label’s likelihood of being named the author and escaping termination.

Even if a record label retains authorship over a sound recording or album as a compilation, the label will only have control over that compilation, not over the underlying tracks or singles, respectively. This means the author could technically still be free to regain ownership over the particular tracks or singles and release her own competing “compilation” in the market.

Record labels may also consider that claiming authorship of entire albums as compilations could have unintended consequences. For example, when determining infringement damages an entire compilation is considered one work,⁴⁸ even if the constituent parts of the compilation are independently registered.⁴⁹ Also, considering albums as compilations might affect the fair use analysis in an infringement case, because infringement of a single song is


no longer the entire “work” if the “work” is an album of multiple songs.

Works Made for Hire for Loan-Out Corporations

Ironically, the WMFH exception may also cause trouble for artists who offer their services through their own wholly-owned companies. For these companies, sometimes called “loan-out corporations,” the artist may be considered an employee of her own company, and the resulting works could then be considered WMFH owned by the loan-out corporation. As WMFHs, the recordings would not be eligible for termination, either with the loan-out corporation or with any subsequent grantee like a record label. As the owner of an artist’s WMFH, the loan-out corporation could not terminate its contract licensing the WMFH with the label.

A loan-out corporation can offer an artist logistical, liability, and tax benefits. An artist may create a loan-out corporation to protect her own personal assets from work-related liability,⁵⁰ or to receive the beneficial tax treatment often afforded to companies.⁵¹

The question of whether a sound recording could be a commissioned WMFH for the loan-out corporation follows a similar analysis to the one discussed above in the record label context, but the loan-out corporation structure could be much more susceptible to a finding that the recordings are WMFH because the artist is an employee of the corporation. Ironically, the very characteristics of a loan-out corporation that make it legal for tax purposes—



salaries and benefits, strong control over the artist and her work—make it more likely that the artist is an employee of the corporation for termination purposes.⁵²

If the use of loan-out corporations obviates termination rights for a large swath of artists, this common industry practice could obstruct Congress’s intent to empower artists against the dominant intermediaries. The legislative history of the termination right shows no sign that Congress contemplated the use of loan-out corporations and how they would interact with copyright termination, but the explicit language of the statute may be too much to be overridden by the ill-considered policy outcomes of the law.


There are, however, some contractual steps an artist might take to make it less likely that her music is WMFH. An artist may use a limited liability company instead of a corporation in order to be both the managing member of the firm and an independent contractor of the firm.⁵³ In that case, the artist could use the independent contractor contract to specify that the works are also not commissioned WMFH. The artist would, however, need to give up some of the benefits of operating a corporation instead of an LLC, which is taxed differently and may impose pass-through liability to the owners of the LLC. In the end, a legislative solution may be the most straightforward way to resolve this unintended consequence for artists.

Other Copyright Termination Pitfalls

There are several other ways in addition to the WMFH doctrine that a record label may attempt to prevent an artist from

terminating her contract or make it logistically difficult to do so.

- **Notice.** If an artist does not serve notice of the termination properly, she risks invalidating the entire termination and/or missing the termination window. To terminate a contract, the artist must give notice to the copyright owner or licensee 2-10 years before the termination,⁵⁴ and must comply with the form, content, and service regulations issued by the Copyright Office.⁵⁵ The Copyright Office lists the information that must be included in a termination notice, including the grantee’s name and address, the date of the grant’s execution, the work’s title, the name(s) of the author(s), a statement identifying the grant, the termination date, and the author’s signature.⁵⁶ The regulations also require that the author serve notice on the grantee or the grantee’s successor in title, and describes a “reasonable investigation” for that person or entity’s current address.⁵⁷ However, as long as the grantee actually receives sufficient notice under § 203, failure to make a reasonable investigation will not affect the validity of the service.⁵⁸
- **Derivative works.** A derivative work that already exists at the time the artist terminates a contract can continue to be used indefinitely under the terms of the original grant even after termination, but no new derivative works can be made after termination.⁵⁹ For example, even if a novelist terminated a contract to



let a movie studio turn his book into a movie, the studio would continue to be able to market that movie, but wouldn't be able to develop new derivative works under the contract. Similarly, a record label could continue to use the grants it has to exploit derivative works even after the artist terminates, although those derivative works may face competition from the recipients of new post-termination grants. A derivative work is a "work based upon one or more preexisting works."⁶⁰ Sound recordings are specifically included as an example of potential derivative works.⁶¹ However, the compulsory licensing structure that is specifically set up to allow recording artists to record previously-released songs specifically states that it operates by granting a compulsory license for the reproduction and distribution rights of the songwriter, but does not mention the derivative work right—this implies that some sound recordings may be considered derivative works of the underlying composition and some may not.⁶² Even if the original sound recording is not a derivative work, the record label may claim that it created a derivative work if the label was responsible for equalizing, mixing, or mastering the recording, or if the marketed recording was in some way a derivative work of the recording that the artist delivered to the label.

- **Joint works.** If a work has two or more authors, a grant can only be terminated by a majority of the authors who executed it.⁶³ A sound recording can arguably have many authors: featured artists, session musicians, producers, recording engineers, etc. If a recording has multiple authors it may be more difficult to organize a majority to terminate, particularly if one or more of the authors are employees of the record label. Unfortunately, it is hard to estimate which contributors are likely to be considered authors, because each recording will have its own fact pattern and courts have not had to dive into this question heavily yet since the termination right is just now beginning to mature for earlier sound recording contracts.
- **Foreign rights.** The termination right only extends to "those rights covered by the grants that arise under this title," and does not affect rights granted under other federal, state, or foreign laws.⁶⁴ Any rights that an artist granted to a record label under foreign laws would thus not be terminable, except to the extent to the extent that foreign law allows it (for example, in Germany transfer can only be effected by license, not by assignment). If an artist recaptures her U.S. rights, she may still be unable to exercise those rights in other countries.
- **Physical ownership of the original files.** A recording artist often has the contractual obligation to deliver a "master"



recording, from which all copies are made. Ownership of that physical master is separate from ownership of the copyright in the sound recording or composition. If the artist does not obtain her own copy of the uncompressed sound file, the record label may still own and/or control the only *copies* of the recording in an uncompressed format (often in PCM or BWF formats). As a result, the artist may terminate and recapture the right to use a recording, but still not own a high-quality copy of that recording, and may thus be forced to only work with a CD that's been pressed by the manufacturer (or, sigh, an MP3). Even if the CD has a high-quality file on it, that file is usually printed to stereo (left and right tracks, or maybe surround sound) instead of leaving each recorded track independent (where each track embodies a single microphone or plug-in), which makes the music more difficult to manipulate.



Open-Content Projects and Problems with Termination

Congress largely established the termination to protect authors from unremunerative transfers when they have less bargaining power, but the statute does not actually make unequal bargaining power a condition for the termination right. As a result, termination can have unintended consequences for situations that don't involve unequal bargaining power. One of those situations is when an author publishes a work under a free or open-source license (referred to collectively as "open-content" for this memo). An author may use this type of license to grant a perpetual license to copy, distribute, and/or modify her work without needing to ask for individual permission.

These licenses, however, are very likely constrained by the termination provisions of § 203, and thus can be terminated by the original author after 35 years. Once an open-content contributor terminates her license, no future authors may rely upon that license to build on her work. Furthermore, if the work is intermingled within a larger project like Wikipedia or the code for an open-source computer program, it would be very difficult to accurately extract the terminating's author's contributions from the rest of the work.

Some licenses, like the GPLv3 license, purport to be irrevocable, and Creative Commons has gone so far as to create a CC Public Domain Dedication,⁶⁵ which attempts to put the work in the public domain, but the termination provision could prevent either of these license from

being fully effective.⁶⁶ For one thing, both licenses would conflict with the statutory heirs' rights under § 203(a)(2), even if the author died wishing for the work to be available for free.

Open-content brings a number of benefits to society, including: minimizing transaction costs, facilitating uses that would not otherwise occur, creating a commons of raw materials that can be used by any member of the public, and, in the software context, allowing programmers to work together outside of a large firm by letting them adapt and reuse one another's code without fear of liability.

The execution of open-content licenses does not involve the sort of unequal bargaining power that appears in the context of large corporations negotiating with individuals, but it does still present the difficulty of evaluating the value of a new creative work before it has been exploited.

The open-content problem could be solved legislatively in a few ways. First, the law could be amended to include a mechanism for authors to voluntarily put their works in the public domain before the end of the statutory duration of copyright. Authors could still choose to use open-content licenses instead, but those licenses would likely still be terminable. This might divide advocates for artists, however, because although it gives artists another choice in how to distribute their works, it would also foreclose an author from retrieving those works from the public domain later, regardless of the commercial value of the work.



Second, the termination provision could be amended to include an exception for licenses granted overtly and explicitly to the public at large. This would somewhat mirror how § 203(a) currently handles WMFH.

Finally, the termination provisions could be amended to grant the Librarian of Congress the authority to issue exceptions from the termination mechanism. This option would be the most complicated and present the most risk. The Librarian would undoubtedly be heavily lobbied by corporate players wishing to retain their licenses over works. Also, if this mechanism is not structured properly it could create even more confusion; for example, as to whether the exception applies to works existing at the time of the rulemaking or licenses drafted before the next rulemaking, etc.



Conclusion

The termination right offers the opportunity to reexamine the current power structures that dominate the music industry and rebalance control and revenue based on the legitimate value that each party provides. Copyright termination has the potential to empower artists and increase artists' incentives to create new works for the public to enjoy, which ultimately serves the fundamental purpose of copyright law.

There are, however, many pitfalls to the copyright termination right, and it remains to be seen if the system operates as Congress and the public expects it will. If powerful copyright owners and licensees are able to avoid or diminish the benefits that copyright termination provides to artists, consumer advocates, artist representatives, and Congress must be ready to remedy the system and ensure that copyright reclamation actually serves its purpose.



Appendix A

The following is an example of a notice of termination served by Boston band member Donald “Tom” Scholz on P.C. Productions, Ahern Associates, Pure Songs, and Paul Ahern on January 18, 2013.

NOTICE OF TERMINATION

PLEASE TAKE NOTICE that, pursuant to Section 203 of the Copyright Act, the undersigned, Donald Thomas Scholz (“Scholz”), hereby provides notice of his termination of any and all rights transferred to any or all of P.C. Productions, Ahern Associates, Paul Ahern d/b/a Pure Songs, and Paul Ahern (collectively, “Pure Songs”), in and to the copyright in the musical works identified on the attached schedule of works (the “Schedule”).

In connection with this Notice, Scholz offers the following information, required under 37 C.F.R. 201.10:

This termination is made under Section 203 of the Copyright Act.


The grantees whose rights are being terminated are Paul Ahern and P.C. Productions. Upon information and belief, and after reasonable investigation, Paul Ahern and P.C. Productions are now doing business as Pure Songs. This notice is being served upon the following, as listed in the ASCAP directory as of January 8, 2013, by First-Class Mail:

Pure Songs
c/o BSFS Ltd
15360 China Rapids Drive
Red Bluff, CA 96080

Pure Songs
c/o Next Decade Entertainment Inc.
c/o Next Decade Music
Attn: Stuart Cantor
65 West 55th Street, Suite 4F
New York, NY 10019

With a courtesy copy to: Eisenberg Tanchum & Levy
Attn: Stewart L. Levy
675 Third Avenue
New York, NY 10017

The date of execution of the grant which is being terminated is April 24, 1978. Scholz and Paul Ahern signed a songwriter’s agreement on November 15, 1975 (the “1975 Agreement”), which contains the grant language. The 1975 Agreement is referenced in the recording, management and songwriting agreement executed by Scholz and other artists, and by P.C. Productions, Ahern Associates, Paul Ahern d/b/a Pure Songs, and Paul Ahern on April 24, 1978 (the “1978 Agreement”). A settlement between Paul Ahern and Charles McKenzie was executed contemporaneously with the 1978 Agreement (the “Settlement”). Prior to the 1978 Agreement and the Settlement, Scholz took the position that the 1975 Agreement was void, voidable, or terminated. He relinquished that position in exchange for various changes in the 1978 Agreement and revisions to a 1976 recording agreement with CBS Records. The 1978 Agreement changed the 1975 Agreement in many respects. One concerned the “Publisher.” According to the Settlement, the 1975 Agreement was claimed to have been executed by Paul Ahern as a partner in a partnership between him and Charles McKenzie. The Ahern/McKenzie partnership was dissolved by the Settlement. Unlike the 1975 Agreement with Paul Ahern as a partner, the 1978 Agreement is with Paul Ahern as an individual and the only owner of P.C. Productions, Ahern Associates, and Paul Ahern d/b/a Pure Songs, and therefore constitutes a new grant of rights.



This Notice terminates all rights granted by Scholz to Pure Songs in the 1978 Agreement in and to the musical works identified on the attached Schedule.¹

With respect to the works appearing on Boston's *Don't Look Back* album, an alternative basis for this notice under Section 203 of the Copyright Act is pursuant to the June 6, 2011 amendments to the regulations governing notices of termination: "In any case where an author agreed, prior to January 1, 1978, to a grant of a transfer or license of rights in a work that was not created until on or after January 1, 1978, a notice of termination of a grant under section 203 of title 17 may be recorded if it recites, as the date of execution, the date on which the work was created." 37 C.F.R. 201.10(f)(5). All works included on *Don't Look Back* were created in 1978.

To ensure the accuracy of information included in this Notice, Scholz requested copies of copyright registration certificates and relevant agreements from Pure Songs. Pure Songs failed to produce any documentation. As such, the information included above is culled from searches of the Copyright Office online records, commercial search reports, discovery documents and litigation exhibits, and ASCAP and other online databases.

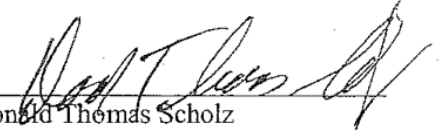
The effective date of termination shall be January 24, 2015.

¹ This Notice of Termination applies to each and every work composed solely by Scholz that is included on Boston's debut album, *Boston*, and Boston's second album, *Don't Look Back*. If any such work has been omitted, such omission is unintentional and involuntary. Scholz reserves his rights to serve and record additional Notices of Termination in relation to works not deemed covered by this Notice of Termination.

To the best knowledge and belief of the undersigned, this Notice has been signed by the only person whose signature is necessary to terminate the grant referred to herein under Section 203 of the Copyright Act.

Dated: 1-18-13

Signed: _____


Donald Thomas Scholz

c/o Craig E. Pinkus
BOSE MCKINNEY & EVANS LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
Telephone: (317) 684-5358
Facsimile: (317) 684-0358

Schedule of Works

Boston

Title	Registration Number	Registration Date	Claimant	Date of Publication	Authorship listed on Registration
More Than a Feeling	EU625326	10/29/75	Donald T. Scholz ^{2*}	N/A	Musical composition, words, music and arrangement by Donald T. Scholz
More Than a Feeling	EU706122**	8/9/76	Pure Songs	N/A	Musical composition, words and music by Donald T. Scholz
More Than a Feeling	EP368076 ³	11/4/76	Donald T. Scholz	11/4/76	Musical composition, words and music by Donald T. Scholz; arrangement for piano by Columbia Pictures Publications as employer for hire of Bert Dovo
Peace of Mind	EU536104	11/19/74	Donald T. Scholz ^{4*}	N/A	By Donald T. Scholz
Peace of Mind	EU706121**	8/9/76	Pure Songs	N/A	Words and music by Donald T. Scholz
Peace of Mind	EP366503 ⁵	1/14/77	Donald T. Scholz	1/14/77	Words and music by Donald T. Scholz; arrangement for piano by Columbia Pictures Publications as employer for hire of Bert Dovo
Peace of Mind	PA10590 ⁶	4/25/78	Donald T. Scholz	4/5/78	Words, music and arrangement by Donald T. Scholz
Fore-Play - Long Time	EU706125	8/9/76	Pure Songs ⁷	N/A	Words and music by Donald T. Scholz

² The in-process records of the Copyright Office indicate that an application to renew this registration was received October 15, 2004, listing the author/claimant as Pure Songs.

³ This registration cites the prior 1975 registration (EU625326).

⁴ This registration was renewed on January 2, 2002 in the name of Donald T. Scholz (RE858058).

⁵ This registration cites the prior 1974 registration (EU536104).

⁶ This registration cites the prior 1977 registration (EP366503).

⁷ This registration was renewed on January 6, 2004 in the name of Donald T. Scholz (RE895693).

Title	Registration Number	Registration Date	Claimant	Date of Publication	Authorship listed on Registration
Foreplay	EP366502 ⁸	1/14/77	Pure Songs	1/14/77	Words and music by Donald T. Scholz; arrangement for piano by Columbia Pictures Publications as employer for hire of Bert Dovo
Song without Words	EU495558	6/17/74	Donald T. Scholz*	N/A	Words, music, arrangement by Donald T. Scholz
Rock n' Roll Band	EU543181 ⁹	12/23/74	Donald T. Scholz*	N/A	Words, music and arrangement by Donald T. Scholz
Rock and Roll Band	EU706120**	8/9/76	Pure Songs	N/A	Words and music by Donald T. Scholz
Rock & Roll Band	EP366505 ¹⁰	1/14/77	Donald T. Scholz	1/14/77	Words and music by Donald T. Scholz; arrangement for piano by Columbia Pictures Publications as employer for hire of Bert Dovo
Gonna Hitch a Ride	EU226302	12/28/70	Donald T. Scholz*	N/A	Donald T. Scholz, contribution not specified
Hitch a Ride	EU706124**	8/9/76	Pure Songs ¹¹	N/A	Words and music by Donald T. Scholz
Hitch a Ride	EP366507 ¹²	1/14/77	Donald T. Scholz	1/14/77	Words and music by Donald T. Scholz; arrangement for piano by Columbia Pictures Publications as employer for hire of Bert Dovo
It Isn't Easy	EU625325	10/29/75	Donald T. Scholz*	N/A	Words, music and arrangement by Donald T. Scholz

⁸ This registration cites the prior 1976 registration (EU706125).

⁹ This registration cites the prior June 17, 1974 registration (EU495558).

¹⁰ This registration cites the prior December 23, 1974 registration (EU543181).

¹¹ The in-process records of the Copyright Office indicate that an application to renew this registration was received October 15, 2004, listing the author/claimant as Pure Songs.

¹² This registration cites the prior 1970 registration (EU226302).

Title	Registration Number	Registration Date	Claimant	Date of Publication	Authorship listed on Registration
Something About You	EU706118**	8/9/76	Pure Songs	N/A	Words and music by Donald T. Scholz
Something About You	EP366508 ¹³	1/14/77	Donald T. Scholz	1/14/77	Words and music by Donald T. Scholz; arrangement for piano by Columbia Pictures Publications as employer for hire of Bert Dovo

* An Assignment of Copyright, dated January 21, 1977 and recorded February 7, 1977, shows assignment of these registrations from Donald T. Scholz to Pure Songs.

** A letter from Blackwood Music, Inc., dated February 7, 1977 and recorded March 3, 1977, indicated that these registrations were "made erroneously... and should be expunged from the records of the Copyright Office." The five (5) registrations listed in the letter "duplicate pre-existing registrations made in the name of Donald T. Scholz for the subject musical compositions."

¹³ This registration cites the prior 1975 registration (EU625325).

Don't Look Back

Title	Registration Number	Registration Date	Claimant	Date of Publication	Authorship listed on Registration
Don't Look Back	PAu000052500	8/10/78	Pure Songs	N/A	words & music: Tom Scholz
Don't Look Back	PA0000014789	9/1/78	Pure Songs	8/18/78	words & music: Tom Scholz
The Journey	PAu000052494	8/10/78	Pure Songs	N/A	music: Tom Scholz
The Journey	PA0000014790	9/1/78	Pure Songs	8/18/78	music: Tom Scholz
It's Easy	PAu000052498	8/10/78	Pure Songs	N/A	words & music: Tom Scholz
It's Easy	PA0000014791	9/1/78	Pure Songs	8/18/78	words & music: Tom Scholz
A Man I'll Never Be	PAu000052497	8/10/78	Pure Songs	N/A	words & music: Tom Scholz
A Man I'll Never Be	PA0000014792	9/1/78	Pure Songs	8/18/78	words & music: Tom Scholz
Feelin' Satisfied	PAu000052499	8/10/78	Pure Songs	N/A	words & music: Tom Scholz
Feelin' Satisfied	PA0000014793	9/1/78	Pure Songs	8/18/78	words & music: Tom Scholz
Don't Be Afraid	PAu000052495	8/10/78	Pure Songs	N/A	words & music: Tom Scholz
Don't Be Afraid	PA0000014796	9/1/78	Pure Songs	8/18/78	words & music: Tom Scholz

Certificate of Service

The undersigned hereby certifies that he served by First-Class Mail, a true and correct copy of the foregoing Notice of Termination upon the following on this 23rd day of January, 2013:

Pure Songs
c/o BSFS Ltd
15360 China Rapids Drive
Red Bluff, CA 96080

Pure Songs
c/o Next Decade Entertainment Inc.
c/o Next Decade Music
Attn: Stuart Cantor
65 West 55th Street, Suite 4F
New York, NY 10019

With a courtesy copy to:

Eisenberg Tanchum & Levy
Attn: Stewart L. Levy
675 Third Avenue
New York, NY 10017

Craig E. Pinkus Esq.
Craig E. Pinkus
BOSE MCKINNEY & EVANS LLP
111 Monument Circle, Suite 2700
Indianapolis, IN 46204
Telephone: (317) 684-5358
Facsimile: (317) 223-0358



Appendix B

The following is a list of albums that may be eligible for copyright termination in the upcoming years, based on the year they were released. This list is intended to give an indication of the types of albums that may be implicated by the termination right, but each album on this list may not be eligible for any of several reasons, or the album may become eligible for termination shortly before or after the time indicated in the chart, depending on when the album's relevant recording contract had been "executed."

Artist	Album	Release Year	Possible Termination Year
Boston	Don't Look Back	1978	2013
The Cars	The Cars	1978	2013
Van Halen	Van Halen	1978	2013
Eagles	The Long Run	1979	2014
Pink Floyd	The Wall	1979	2014
AC/DC	Back in Black	1980	2015
Michael Jackson	Off the Wall	1980	2015
Journey	Escape	1981	2016
Michael Jackson	Thriller	1982	2017
Lionel Richie	Can't Slow Down	1983	2018
Madonna	Like a Virgin	1984	2019
Prince	Purple Rain	1984	2019
Bruce Springsteen	Born in the U.S.A.	1984	2019
Whitney Houston	Whitney Houston	1985	2020
Bon Jovi	Slippery When Wet	1986	2021



End Notes

¹ This right is sometimes referred to as “copyright reclamation” and sometimes as “copyright termination,” because it allows artists to terminate their contracts. There is also another similar right that applies to older works, which is referred to as “copyright reversion.”

² For a short list of examples of albums that may become eligible for termination in the upcoming years, see Appendix B.

³ Complaint, *Joanna Levesque v. Da Family Records, LLC* (N.Y. Sup. Ct., July 29, 2013).

⁴ Gerrick Kennedy, *Exclusive: JoJo Signs Deal with Atlantic Records*, L.A. Times Music Blog (Jan. 14, 2014), <http://www.latimes.com/entertainment/music/posts/la-et-ms-exclusive-jojo-deal-atlantic-records-20140114,0,3524459.story>.

⁵ See H.R. Rep. No. 94-1476, at 124 (“A provision of this sort is needed 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.”).

⁶ *Stewart v. Abend*, 495 U.S. 207, 229 (1990).

⁷ *Siegel v. Warner Bros. Entm’t Inc.*, 542 F. Supp. 2d 1098, 1102-07 (C.D. Cal. 2008).

⁸ See § 304.

⁹ *Siegel v. Warner Bros.*, 542 F. Supp. 2d at 1145.

¹⁰ See Testimony of Gigi B. Sohn on Behalf of Public Knowledge and Consumer Federation of America, *The Universal Music Group/EMI Merger and the Future of Online Music*, U.S. Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, at 6-10 (June 21, 2012), available at <http://publicknowledge.org/files/Gigi%20Sohn%20Testimony%20-%20UMG-EMI%206-21-12.pdf>.

¹¹ Copyright Act of May 31, 1790, ch. XV, § 1, 1 Stat. 124.


¹² Copyright Act of Feb. 3, 1831, ch. XVI, 4 Stat. 436.

¹³ Copyright Act of 1909, 17 U.S.C. § 24; H.R. Rep. No. 2222, 60th Cong., 2d Sess., 14 (1909) (“It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum.”) (“If the work proves to be a great success and lives beyond the term of twenty-eight years, . . . it should be the exclusive right of the author to take the renewal term, and the law should be framed . . . so that [the author] could not be deprived of that right.”).

¹⁴ 17 U.S.C. §§ 203, 304. So, there are two main variables that determine what legal structure will determine the renewal or termination right: when the work was made or published, and when the artist struck a deal licensing or selling her copyright. Works made before 1978 receive a renewal right that is governed by section 304. Separately, if an author makes a deal to license or sell her copyrights in 1978 or later, she can terminate that particular contract after 35 years.

¹⁵ 17 U.S.C. §§ 203, 304.

¹⁶ *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960).



¹⁷ 17 U.S.C. § 203(a). If the grant covers publication of a work, the termination period begins at the earlier of 35 years from publication or 40 years from execution of the grant. § 203(a)(3).

¹⁸ § 203(a)(1).

¹⁹ § 203(b)(6).

²⁰ § 203(a)(5).

²¹ §§ 203 (b)(3)-(4). For an example of a copyright termination notice, see Appendix A.

²² § 203(a)(2).

²³ § 203(b).

²⁴ § 203(b)(1). The U.S. Court of Appeals for the Second Circuit has held that the derivative works exception does not prevent songwriters from receiving full royalties for existing recordings of their songs after terminating the licenses the songwriter gave to their publisher, reasoning that the law here was intended to balance the interests of creators and derivative users, but not to benefit intermediary assignees who do not make any new creative contribution. *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 720 F.2d 733 (2d Cir. 1983).


²⁵ § 203(a).

²⁶ A work's status as a WMFH also determines how long it receives copyright protection. See 17 U.S.C. § 302(c).

²⁷ See 17 U.S.C. § 101 (“A “work made for hire” is . . . 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. For the purpose of the foregoing sentence, a “supplementary work” is 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 forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.”).

²⁸ See 17 U.S.C. § 101; *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 747-48 (1989).

²⁹ See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989).



³⁰ *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (holding that sculptor was an independent contractor and not an employee, even though the commissioning organization exercised some control over the work). This is significantly different from how the courts had begun to identify employment under the 1909 Copyright Act in the late 1960s, when courts would often only look to whether the potential employer had the right to control or supervise the creator's work. *See, e. g., Siegel v. National Periodical Publications, Inc.*, 508 F.2d 909, 914 (2d Cir. 1974); *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir.), *cert. denied*, 409 U.S. 997 (1972); *Scherr v. Universal Match Corp.*, 417 F.2d 497, 500 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970); *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567-68 (2d Cir. 1966).

³¹ 37 C.F.R. §§ 201.10(b)-(c), (e).

³² 37 C.F.R. § 201.10(b)(3).


³³ 37 C.F.R. § 201.10(d).

³⁴ 37 C.F.R. § 201.10(d)(1).

³⁵ 37 C.F.R. § 201.10(a).

³⁶ One alternative calculation method that is more common among independent labels than major labels is to give the artist a 50% share of net revenues. This means that all direct costs are first deducted from the gross revenues, and the artist and label share what is left over.


³⁷ Depending on how the advance is structured, a record label or other licensee may argue that an artist who reclaims her copyright under the termination right must still repay the advance that the record label paid out at the beginning of the contract, particularly if the recording contract characterizes the advance as repayable or refundable in addition to being recoupable. Under the termination provision, if the record label's right to be repaid the advance "arises under any other Federal, State, or foreign laws" instead of arising under copyright law, terminating the contract won't change the artist's duty to repay. But even if that's the case it could still be in the artist's interest to terminate in order to reclaim her copyright ownership (which would have stayed with the label even after repaying the advance) or to simply market her recordings more efficiently and repay the advance more quickly, without the many deductions often found in a major label contract.



³⁸ Kevin J. Greene, “Copynorms,” *Black Cultural Production, and the Debate Over African American Reparations*, 25 *CARDOZO ARTS & ENT. L.J.* 1179, 1184 (2008) (“Further, given their corporate nature as successors in ownership, the class of beneficiaries (primarily music publishers and record labels) that profited at the expense of Black artists are both identifiable and continue to benefit given the long terms of copyright protection. This point is underscored by the recent copyright extension that reflected a policy choice to provide a windfall to the largest IP distributors.”); Kevin J. Greene, *What the Treatment of African American Artists Can Teach About Copyright Law*, *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE*, 387 (Peter Yu ed., 2007), (“The [music] industry routinely deprived Black artists of the two fundamental predicates of intellectual property protection—credit and compensation.”); DAVID P. SZATMARY, *ROCKIN’ IN TIME: A SOCIAL HISTORY OF ROCK AND ROLL* 25-27 (1995). For example, major record labels went decades without paying any royalties at all to legendary African American artists from the 1940s and 1950s like Muddy Waters, Wolf, Buddy Guy, Bo Diddly, and the Soul Stirrers. See Richard Harrington, *MCA to Pay Royalties to R&B Greats*, *WASH. POST* (Dec. 7, 1989).

³⁹ Kevin J. Greene, *Copyright, Culture & Black Music: A Legacy of Unequal Protection*, 21 *Hastings Comm. & Ent. L.J.* 339, 341 (1999). See also Kevin J. Greene, “Copynorms,” *Black Cultural Production, and the Debate Over African American Reparations*, 25 *CARDOZO ARTS & ENT. L.J.* 1179, 1189-90 (2008) (“Black artistic production was also impacted by exclusion. From its inception, racial subordination led the early recording industry to resist opening its doors to African-American artists. . . . Similarly, Black artists were excluded from performance rights societies such as the American Society of Composers, Authors, and Publishers (“ASCAP”). . . . Segregation also was imposed on black artists. Although the sale of sound recordings was a big business in the United States by the 1920’s, Black artists were segregated into “race record” divisions of major record companies, and subjected to particularly onerous contracts.” (internal citations omitted)).

⁴⁰ A provision to grant a license in perpetuity likely would not be intended to defeat a termination claim so much as to establish that, even if the record label does not count as the author, the record label has the exclusive right to use the work forever (unless the author terminates the contract).



⁴¹ To determine whether a work is “prepared by an employee within the scope of his or her employment,” § 101, a court must first determine whether, “using principles of general common law of agency . . . the work was prepared by an employee or an independent contractor.” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 750-51 (1989). The determine whether the creator is an employee a court will look to “the hiring party’s right to control the manner and means by which the product is accomplished . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business . . . the provision of employee benefits; and the tax treatment of the hired party . . . No one of these factors is determinative.” *Id.* at 951-52.

⁴² § 101.

⁴³ Sound recordings were at one point added to the list of commissioned WMFH categories without public comment in a much larger bill that was purported to only include technical amendments to the copyright law. When artists and the rest of the public realized that the law had made such a significant substantive change to the termination right, the outcry made Congress delete the change within a year, while the congressional aide who added the language left shortly thereafter to work for the RIAA.

⁴⁴ There *See Staggars v. Real Authentic Sound*, 77 F. Supp. 2d 57, 63-64 (D.D.C. 1999) (“a sound recording does not fit within any of the nine categories of ‘specially ordered or commissioned’ works”); *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999) (“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”); *Lulirama Ltd. V. Axxcess Broadcast Servs., Inc.*, 128 F/3d 872, 876-79 (5th Cir. 1997) (holding that purely audio works do not qualify as audio-visual works for purposes of the WMFH categories).

⁴⁵ Multitrack recording techniques allow artists to separately record multiple sound sources. For example, the rhythm guitar line of a song could be recorded separately from the bass guitar line. This allows the artist, producer, or engineer to add effects or otherwise alter a specific track without changing the rest of the recording and to mix the recording by changing the volume, frequency levels, and panoramic positions of the tracks before the entire song is condensed into the traditional two-channel stereo format for retail.


⁴⁶ § 101.

⁴⁷ § 101.

⁴⁸ § 504(c)(1).

⁴⁹ *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 141 (2d Cir. 2010); H.R. Rep. No. 94-1476, at 162 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.

⁵⁰ *See Main Line Pictures, Inc. v. Basinger*, 1994 WL 814244, *1 (Cal. Ct. App. 1994) (overturning \$8 million breach of contract verdict against actress Kim Basinger because the jury instruction asked if Basinger and/or her loan-out corporation was liable, instead of asking if Basinger personally was liable).



⁵¹ The Internal Revenue Service has consistently worked to combine enforcement and revisions to the tax code to reclaim taxable revenue saved by the use of loan-out corporations. See Aaron J. Moss & Kenneth Basin, *Copyright Termination and Loan-Out Corporations: Reconciling Practice and Policy*, 3 HARV. J. SPORTS & ENT’MNT L. 55 (2012). However, U.S. courts have been much more prone to respecting the loan-out corporations as devised. See *Idaho Ambucare Cent. Inc. v. United States*, 57 F.3d 752, 755 (9th Cir. 1995); *Sargent v. Comm’r*, 929 F.2d 1252 (8th Cir. 1991); *Fox v. Comm’r*, 37 B.T.A. 271 (1938).

⁵² Some, however, argue that the standard for finding an employer-employee relationship in the tax context is lower than that for the WMFH context, and so artists could operate their corporations legally under the tax code without making their works WMFH. See Michael H. Davis, *The Screenwriter’s Indestructible Right to Terminate Her Assignment of Copyright: Once a Story Is “Pitched,” a Studio Can Never Obtain All Copyrights in the Story*, 18 CARDOZO ARTS & ENT. L.J. 93, 114 (2000).

⁵³ See Mary LaFrance, *Authorship & Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 378-90 (2002).

⁵⁴ § 203(a)(4)(A).

⁵⁵ § 203(a)(4)(B).

⁵⁶ See 37 C.F.R. §§ 201.10(b)(2)(i)-(vii), 201.10(c)(3)-(5).

⁵⁷ § 201.10(d).

⁵⁸ § 201.10(d)(4).

⁵⁹ § 203(b)(1).

⁶⁰ § 101.

⁶¹ *Id.*

⁶² § 115.

⁶³ § 203(a)(1).

⁶⁴ § 203(b)(5).

⁶⁵ *Creative Commons Legal Code*, <http://creativecommons.org/publicdomain/zero/1.0/legalcode>.

⁶⁶ This has never been tested in court, although the outcome might also be influenced by the courts’ jurisprudence on abandonment. See *Capitol Records, Inc. v. Naxos of Am., Inc.*, 372 F.3d 471, 483 (2d Cir. 2004) (copyright abandonment requires “(1) an intent by the copyright holder to surrender rights in the work; and (2) an overt act evidencing that intent,”); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001) (“waiver is the intentional relinquishment of a known right with knowledge of its existence and the intent to relinquish it,”) (quoting *United States v. King Features Entm’t, Inc.*, 843 F.2d 394, 399 (9th Cir.1988)).