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Yours, Mine, and Ours: The Joint Authorship Conundrum for Sound Recordings

*Abbott M. Jones**

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In 2013, authors of sound recordings will have their first opportunity to exercise their right to terminate assignments made to record companies.¹ Congress has yet to settle just who may claim authorship in, and thus the right to terminate assignments of, sound recordings. Record companies have responded to this uncertainty by including language in standard recording contracts purporting to declare sound recordings made under the contracts works made for hire, such that authorship would vest initially in the record companies themselves. If sound recordings fit within the scope of a work made for hire, these recording contracts would seal the deal that the record company is the author for copyright purposes. However, many

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1. An author may transfer his or her rights "in whole or in part by any means of conveyance," 17 U.S.C. § 201(d)(1) (2000), and may terminate any such conveyance and reclaim full rights in his or her work thirty-five years after the time of the transfer, 17 U.S.C. § 203(a)(3) (2000). The termination provision went into effect in 1978, so 2013 will mark the beginning of terminations of assignments.

judicial² and scholarly³ opinions seem to establish that sound recordings do not qualify as works made for hire.⁴ Once again, record companies have anticipated this problem by also including standard contract language that alternatively assigns the rights in the sound recordings to the record companies.⁵ As artists attempt to terminate or renegotiate those assignments in a few years, courts will be flooded with litigation to determine the scope of authorship, work-for-hire status, and termination rights in sound recordings. The fact that authorship in sound recordings, if not works made for hire, is still uncertain only exacerbates the problem. Thus, perhaps the more pressing issue, since the majority of affected parties seem to agree that sound recordings are not works made for hire,⁶ is which artists

2. See, e.g., *Lulirama Ltd. v. Axxess Broad. Servs., Inc.*, 128 F.3d 872, 878 (5th Cir. 1997) (finding that the intentional enumeration of specific and exclusive categories in the second prong of the works-for-hire provision would be meaningless if the category of "audiovisual works" could encompass the entirely separate realm of sound recordings); *Bucciarelli-Tieger v. Victory Records, Inc.*, 488 F. Supp. 2d 702, 709 (N.D. Ill. 2007) (finding that "[s]ound recordings are notably exempt from the list of works that can be specially commissioned as works-for-hire" (citation omitted)); *Ulloa v. Universal Music & Video Distribution Corp.*, 303 F. Supp. 2d 409, 414-16 (S.D.N.Y. 2004) (finding that because a vocalist was not an employee, the work was not a work for hire); *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 63-64 (D.D.C. 1999) (stating that "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) (stating that sound recordings were not works for hire because they did "not fit within any of the nine enumerated categories").

3. See, e.g., Mark H. Jaffe, *Defusing the Time Bomb Once Again—Determining Authorship in a Sound Recording*, 53 J. COPYRIGHT SOC'Y USA 139, 164 (2005-2006) (determining that performers and producers of a sound recording "cannot reasonably be determined to be employees"); 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 (2000) (discussing the many interpretations and elements of work-for-hire status and determining that sound recordings do not fit the description).

4. But see *UMG Recordings, Inc. v. MP3.com, Inc.*, 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000) (finding that a CD may be considered a compilation—one of the categories eligible for work-for-hire status); U.S. COPYRIGHT OFFICE, CIRCULAR 56, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS (July 2006), <http://www.copyright.gov/circs/circ56.html#what> (acknowledging that some sound recordings might fit the definition of a collective work).

5. Authors have an inalienable right to termination that cannot be waived by contract. 17 U.S.C. § 203.

6. *United States Copyright Office and Sound Recordings as Work Made for Hire: Hearing Before Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 106th Cong. 257 (2000) [hereinafter *Sound Recordings as Work Made for Hire: Hearing*] (prepared statement of Marci A. Hamilton, Thomas H. Lee Chair in public law, Cardozo School of Law) ("[T]he Framers explicitly chose to place 'exclusive rights' in creative works into the hands of 'authors,' and simultaneously rejected publishers, disseminators, guilds, or industry as primary rights holders.").

involved in the creation of a sound recording will be considered “authors” for copyright purposes.

I. AUTHORSHIP

Though the Constitution did not define “author,” the Supreme Court has interpreted the term as meaning “he to whom anything owes its origin; originator; maker.”⁷ The Court has also added that a “modicum” of originality must be shown to constitute authorship in a work.⁸ The definition seems straight forward enough, but in the context of sound recordings, where many contributing artists could have viable claims of authorship, the question remains quite complex and uncertain.

A. *Sole Authorship*

Some, like Sheryl Crow, a highly successful recording artist and vice president of the Recording Artist Coalition, have argued that the featured artist should be considered the sole author of a sound recording.⁹ In support of her argument, Crow cited the process by which a featured artist will author a sound recording like the captain of a ship—making decisions about accompanying musicians, directing engineering and production, and choosing songs that will appear on the album, as well as selecting the title.¹⁰ However, her argument for sole authorship completely ignores the fact that, generally, many people, including featured artists, producers, engineers, and background musicians, contribute creatively to the production of an album. Additionally, the sole authorship approach would create a disincentive for artists to collaborate and share ideas, by giving only the featured artist a claim of authorship rights.

B. *Joint Authorship*

Precisely because many contributors are involved in the creation of sound recordings, others argue that sound recordings

7. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (citation omitted).

8. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-46 (1991) (holding that the Constitutional grant of copyright protection to “authors” for their “writings” requires independent creation and a modicum of creativity).

9. *Sound Recordings as Work Made for Hire: Hearing*, *supra* note 6, at 163-67 (prepared statement of Sheryl Crow).

10. *Id.*

should be considered joint works. Congress has acknowledged that “performers, arrangers, and recording experts are needed to produce . . . a distinctive sound recording.”¹¹ The Copyright Office itself has agreed with the argument that sound recordings should generally be considered joint works, comprised of multiple significant contributions of authorship.¹² Though sound recordings might easily be categorized as joint works, the question still remains as to *which* participants will be considered the joint authors.

The language of the Copyright Act is not particularly illuminating. Section 101 of the Act defines a joint work as “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.”¹³ The legislative history reveals that Congress used the word “inseparable” to describe situations where the components of the unitary whole have little or no meaning by themselves, like paragraphs in a novel, and the word “interdependent” to describe situations where the components could stand alone, but achieve a greater effect when combined, like the lyrics and melody of a song.¹⁴ Though not explicit in the legislative history or the Act itself, the use of the word “authors” also seems to suggest that each contribution to the unitary whole must be independently copyrightable. Authors of a joint work obtain undivided ownership of the copyrights in the whole work.¹⁵

1. Ninth and Second Circuits: Goldstein Approach

Because joint authorship, unlike joint works, is not defined in the statute, there are many interpretations of the requirements for joint authorship. The Register of Copyrights has stated that independent copyrightability is required under the statutory standard of authorship and, perhaps, under the Constitution as well.¹⁶ The

11. H.R. REP. NO. 92-487 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1569.

12. *Sound Recordings as Work Made for Hire: Hearing, supra* note 6, at 92-93, (prepared statement of Hon. Marybeth Peters, Register of Copyright).

13. 17 U.S.C. § 101 (2000).

14. H.R. REP. NO. 94-1476, at 120 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736. The touchstones are (1) physical collaboration or (2) the intention to join separately created contributions into an integrated whole. *Id.*

15. 17 U.S.C. § 201(a) (2000); 1 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 6.06[A] (2007) [hereinafter 1 NIMMER ON COPYRIGHT].

16. *Childress v. Taylor*, 945 F.2d 500, 506 (2d Cir. 1991) (citing *Moral Rights in Our Copyright Laws: Hearings on S. 1198 and S. 1253 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 101st Cong. 210-11 (1989) (statement of Ralph Oman, Register of Copyright)).

Ninth Circuit, however, has determined that contributing independently copyrightable material is not sufficient to claim joint authorship of a work, even if other factors, such as intent to create a unitary whole, are met.¹⁷ The Ninth Circuit's decision is supported by the general policy of protecting authors and promoting the progress of the arts because "[p]rogress would be retarded rather than promoted, if an author could not consult with others and adopt their [input] without sacrificing sole ownership of the work."¹⁸

Similarly, the Second Circuit has interpreted joint authorship as requiring independent copyrightability and a mutual intent to share authorship as prerequisites for a joint work.¹⁹ This interpretation is in part based upon the so-called Goldstein approach, which states that "[f]or a joint work to exist, each author must have intended to create a joint work at the time he made his contribution."²⁰ The Goldstein approach also embodies the Ninth Circuit's rationale that "[a] collaborative contribution will not produce a joint work, and a contributor will not obtain a co-ownership interest, unless the contribution represents original expression that could stand on its own as the subject matter of copyright."²¹ The Second Circuit adopted the Goldstein approach to prevent mere collaborators from making "spurious claims" against a sole author²² and because the court believed it to be the correct balance between copyright and contract law.²³ The Goldstein approach is in line with the notion that the Act's use of the word "authors" in defining joint works suggests that each contribution must be independently copyrightable for a copyright ownership interest to vest in the contributor, though the Act and its legislative history do not call for such a stringent standard.

2. Seventh Circuit: Nimmer Approach

The Seventh Circuit has adopted the somewhat more lenient Nimmer approach, which simply requires more than a *de minimis*

17. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000) (articulating factors such as exercise of control, "objective manifestations of a shared intent to be coauthors," and audience appeal derived from the joint effort).

18. *Id.* at 1235.

19. *Childress*, 945 F.2d at 506-09.

20. 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 4.2.1.1, at 4:7 (3d ed. 2005 & Supp. 2007).

21. *Id.* § 4.2.1.2, at 4:15.

22. *Childress*, 954 F.2d at 507.

23. *Id.*; see also *Thomson v. Larson*, 147 F.3d 195 (2d Cir. 1998) (following the Goldstein approach again).

contribution for joint authorship status.²⁴ Unlike the Second and Ninth Circuits, the Seventh Circuit has held that where two contributors intend to create an indivisible copyrightable work, each contributor will be a joint author even if the portion he or she contributed would not be independently copyrightable.²⁵ By closely following the statutory definition of a “joint work,” the Nimmer approach creates a lower threshold of authorship, rewards more artists for their contributions, and provides an incentive to collaborate. This approach also furthers the fundamental copyright goals of promoting the arts and protecting authors “by rewarding all parties who labor together to unite idea with form.”²⁶ It could also be argued that this approach, by not requiring that each contribution be independently copyrightable, grants copyright protection to ideas, which the Act strictly forbids.²⁷ However, this concern is unfounded, for it is not each component but the finished unitary whole that is granted copyright protection, with each contributor acquiring co-ownership interests in the final integrated work. The Nimmer approach protects contributors while still allowing parties to contract around the default rule of joint authorship through assignments of copyright interests or work-for-hire agreements.

II. IMPLICATIONS FOR TERMINATION RIGHTS

The many potential interpretations of authorship in sound recordings will come into play in 2013 when artists begin terminating and renegotiating transfers of copyrights in those sound recordings. That is, if sound recordings are not deemed works made for hire, a “record company might be faced with a situation in which it can be held hostage to the demands of the individual artist who knows that he can deprive the record company of the exclusive right to exploit the work simply by assigning his nonexclusive rights to another record

24. See *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004) (stating that uncopyrightable contributions to a copyrightable work could give rise to status as joint author).

25. *Id.* at 658-59 (stating that it would be paradoxical not to allow anyone to claim a copyright in a finished, copyrightable work simply because no individual contribution was itself copyrightable, and articulating a test that requires (1) an intention to create a unitary work and (2) a more than de minimis contribution); see 1 NIMMER ON COPYRIGHT, *supra* note 15, § 6.07[A][3][a]. *But see* *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1072 (7th Cir. 1994) (adopting the Goldstein approach in finding that an actor was not a joint author because his suggestions were not copyrightable on their own).

26. 1 NIMMER ON COPYRIGHT, *supra* note 15, § 6.07[A][3][a].

27. See 17 U.S.C. § 102(b) (2000) (denying copyright protection to ideas, concepts, and principles).

company.”²⁸ If the featured artist is the sole author, the featured artist will have the right to terminate or renegotiate the assignment.²⁹ If the sound recording is a joint work and two or more joint authors grant rights in the work, then “termination of the grant may be effected by a majority of the authors who executed it.”³⁰ However, if a joint author granted his rights in a separate conveyance, as record producers often do, such an author may terminate individually and obtain non-exclusive rights in the work.³¹ It is that scenario—where joint authors who have conveyed rights in a sound recording in separate assignments may tender separate notices of termination to reclaim nonexclusive rights in the work—that will cause the most trouble for industry players in the coming years.

III. FINDING A WORKABLE MIDDLE GROUND: PROPOSED SOLUTIONS

Copyright Register Marybeth Peters has stated that “[t]he Copyright Office believes that those who contribute significant authorship to a sound recording should have the right to terminate.”³² As such, the best definition of authorship in a sound recording might grant copyright protection to those who contribute significantly—the “key contributors”—but not to those who merely collaborate in some small way. Background musicians, therefore, would not be key contributors, though producers could be given special consideration on a case-by-case basis.³³ Under this approach, contributions to sound

28. *Sound Recordings as Work Made for Hire: Hearing, supra* note 6, at 92 (prepared statement of Hon. Marybeth Peters, Register of Copyright).

29. Once an assignment is terminated, the author(s) regain the full measure of copyrights and may make new assignments or use the termination right as a bargaining chip to renegotiate with the original assignee for a new contract with more favorable terms. Corey Field, *Their Master's Voice? Recording Artists, Bright Lines, and Bowie Bonds: The Debate Over Sound Recordings as Works Made for Hire*, 48 J. COPYRIGHT SOC'Y USA 145, 155-56 (2000). The termination right may be the most important right available to artists, especially fledgling recording artists who have no leverage to bargain for favorable terms in their initial recording contract, as compared to established artists who, after thirty-five years, have greater bargaining power because of their established repertoire. *See generally* Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375 (2002) (discussing termination rights and their effect on authors).

30. 17 U.S.C. § 203(a)(1) (2000).

31. *See* H.R. REP. NO. 94-1476, at 122 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5736. If this author grants a new transfer of nonexclusive rights, he must make an accounting to the other authors of any profits earned and due to them. *Id.*

32. *Sound Recordings as Work Made for Hire: Hearing, supra* note 6, at 93, (prepared statement of Hon. Marybeth Peters, Register of Copyright).

33. *See, e.g.,* *Morrill v. Smashing Pumpkins*, 157 F. Supp. 2d 1120, 1126 (C.D. Cal. 2001) (recognizing a music video as a joint work between the producer and the recording artist).

recordings by non-key contributors could fit within the definition of works made for hire under the collective works category,³⁴ but there would be an exception to work-for-hire status for key contributors.³⁵ Not only is this approach in line with the language of the Copyright Act and standard music industry contracting practices,³⁶ but it would also strike a balance between the two major theories of authorship in sound recordings: it would maintain the collaboration-encouraging effects of the Nimmer approach while also assuaging the concerns at the core of the Goldstein approach.³⁷

This proposal, however, could also lead to a determination that an artist is a key contributor simply because of that artist's relative notoriety and, thus, bargaining power, because more established singers would more likely be designated as featured artists on a song.³⁸ Another approach that would not require any subjective, fact-based, case-by-case analysis of the significance of an artist's contribution would be to alter the language of § 203 such that a majority of joint recording authors would be necessary to terminate an assignment, even if the grants were made in separate executions. Perhaps a combination of the two proposed solutions would best solve the complicated problems involved if multiple joint authors are allowed to terminate and grant competing, non-exclusive assignments. The fact remains that Congress needs to address the scope of authorship in sound recordings and establish firm standards for works-for-hire status before courts and industry players become entangled in litigation over termination rights.

34. This is in line with standard industry practice whereby background musicians sign work-for-hire agreements.

35. Key contributors would retain authorship and termination rights per 17 U.S.C. § 203.

36. See, e.g., 4 ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 9:5 (3d ed. 2004 & Supp. 2007) ("Generally, copyright protection extends to two elements in a sound recording: (1) the contribution of the performer(s) whose performance is captured and (2) the contribution of the person or persons responsible for capturing and processing the sounds to make the final recording." (footnote omitted)).

37. See *supra* Part I.B.1. The Goldstein approach is concerned with protecting true authors from spurious claims of small contributors who were not intended to be considered co-authors and who contributed only non-copyrightable elements to a work.

38. *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409, 418 (S.D.N.Y. 2004) (finding that an unknown backup singer was not a joint author).