"Knock, Knock, Knockin' on [Congress's] Door": A Plea to Congress to Amend Section 203 of the Copyright Act of 1976

Steven Bolanos

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"Knock, Knock, Knockin' on [Congress’s] Door": A Plea to Congress to Amend Section 203 of the Copyright Act of 1976

Steven Bolaños*

I. INTRODUCTION ..................................................... 391

II. SECTION 203 OF THE COPYRIGHT ACT OF 1976 .............. 392

III. HISTORY OF SECTION 203 OF THE COPYRIGHT ACT OF 1976 .... 393
   A. The History and Continuous Expansion of Copyright Protection .. 394
   B. Legislative History and Intent Behind Section 203 ............... 395

IV. CRITICISM OF CONGRESS’S LEGISLATIVE INTENT ...................... 396
   A. Musicians Depend on Record Labels to be Successful .......... 396
   B. Section 203 Overlooks the Record Labels’ Risk and Investment .. 397

V. THE NEGATIVE IMPACT OF SECTION 203 ............................ 399
   A. Impact on Record Labels ....................................... 400
   B. Impact On Consumers ........................................ 401
   C. Impact on the Artists or Successors ........................... 402

VI. POTENTIAL SOLUTIONS AND PREDICTIONS ......................... 403
   A. The “Work Made for Hire” Doctrine is not the “Catch-All” Solution .................................................... 404
   B. Congress Should Amend Section 203 to Exclude Sound Recordings .................................................... 406
   C. Artists and Record Labels Should Renegotiate Copyright Transfers to Ameliorate the Effects of Section 203 ............... 407

VII. CONCLUSION ...................................................... 409

I. INTRODUCTION

The days of bulky music records or even so-called “compact” discs are long gone. Now, people’s music collections are in digital form, and may be accessed anywhere through a phone, computer, or tablet (even mp3 players are becoming obsolete without any added functionalities). However, the first wave of termination rights under section 203[1] of the Copyright Act of 1976[2] ("1976 Act") vested in 2013, and songs by Bob Dylan, Billy Joel, and Bruce Springsteen, among others, could very

* J.D. Candidate, May 2014, Western State College of Law; B.A. in Political Science, Latin American Studies minor, University of California Los Angeles (UCLA). I dedicate this Article to my beautiful and wonderful wife for all of her support throughout these past three years of law school. I would also like to extend my gratitude to all law review members, particularly the board, for making this publication possible.

1. Unless otherwise specified, all section numbers mentioned hereinafter refer to the Copyright Act of 1976.

soon disappear from many people’s digital music collections.\(^3\) Termination rights could have a very negative impact on the music industry, where record labels are barely managing to survive, and consumers finally have the upper hand with respect to availability and affordability of music.\(^4\) Moreover, in a complicated music industry, artists and successors exercising termination rights might not necessarily obtain the benefits they anticipate.

This paper will argue that Congress should amend section 203 of the Copyright Act of 1976 to exclude sound recordings. Part II of this paper provides an overview of the key provisions of Section 203. Part III briefly examines the history of the Copyright Act of 1976 and the legislative intent behind Section 203. Part IV and V criticize the enactment of Section 203: while Part IV criticizes the legislative intent behind Section 203, Part V focuses on the negative impact of Section 203 on record labels, consumers, and even the authors and their successors. Finally, Part VI of this paper discounts the possibility of courts applying the “work made for hire” doctrine to termination claims across the board (as many commentators predict); instead, in Part VI, this paper proposes amending Section 203 to exclude sound recordings.

II. SECTION 203 OF THE COPYRIGHT ACT OF 1976

Section 203 became effective in 1978, and the year 2013 marked the first time that termination rights under this section could be exercised by the original authors or the authors’ successors.\(^5\) Section 203 provides, in pertinent part:

In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978 . . . is subject to termination . . . .

. . . .

Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty

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3. See Kevin C. Parks, From Ray Charles to “Y.M.C.A.” – Section 203 Copyright Terminations in 2013 and Beyond, 33 LICENSING J. 1, 5 (Mar. 2013) (“Petty, Kristofferson, Waits, Joel and Dylan are among the nearly 10,000 authors who have filed notices of termination with respect to specific songs, recordings, or other copyrighted works.”); Matthew Perpetua, Bruce Springsteen, Bob Dylan and Others May Regain Control of Copyrights, ROLLING STONE (Aug. 15, 2011, 4:45 PM EST), http://www.rollingstone.com/music/news/bruce-springsteen-bob-dylan-and-others-may-regain-control-of-copyrights-20110815#ixzz2nKevnEzW (discussing the different artists that have already initiated the process of terminating copyright transfers/assignment to certain songs under section 203 of the Copyright Act of 1976).


years from the date of execution of the grant, whichever term ends earlier . . . .

Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.
Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author . . . .

Thus, under Section 203, post-1977 grants of any copyright interests, with the exception of works made for hire, are now terminable after only thirty-five years, upon advance notice by the grantor to the grantee. This provides for a much shorter waiting period than the fifty-six years provided for by its predecessor, Section 304. Upon termination, all rights revert to the original owner, regardless of any agreement by the parties to the contrary.

Section 203 is perhaps one of the most significant changes in the recent history of copyright law, and its effects will only begin to be seen in the upcoming years. Those effects could prove to be particularly devastating for an already fragile music industry.

III. HISTORY OF SECTION 203 OF THE COPYRIGHT ACT OF 1976

The history of copyright legislation in the United States has been one of continuous expansion of the rights and protections afforded to the original authors of copyrighted works. A review of the legislative history of Section 203 reveals Congress's intent to continue expanding that protection bestowed on the original authors through earlier reversionary rights.

7. The complicated or at least ambiguous notice requirements of Section 203 raise challenging issues for authors and successors; such issues are beyond the scope of this paper.
10. Id.
12. See Parks, supra note 3, at 4 (“[W]ith the stakes particularly high for the music labels . . . .”).
13. The duration of copyright protection has gone from fourteen years under the Copyright Act of 1790 to a term of life plus seventy years after death under the current provision of the Copyright Act of 1976. United States Copyright office, http://www.copyright.gov/history/1790act.pdf (last visited Apr. 11, 2014).
14. 17 U.S.C. § 203 (2002) (Section 203 has cut the number of years that an author was required to wait before he could terminate a copyright grant almost by half from what the previous termination provision required).
A. The History and Continuous Expansion of Copyright Protection

The Copyright Clause of the U.S. Constitution provides that, "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Pursuant to the powers granted by this clause, the first Congress passed the Copyright Act of 1790. Under the Copyright Act of 1790, the author's sole ownership of a copyright interest was protected for a term of fourteen years, and could be renewed for an additional term of another fourteen years. That term of fourteen years remained in effect for over one hundred years; it was not until 1909 that Congress extended the initial term as well as the renewal term to twenty-eight years. These early statutes provided "very rudimentary rights" to the authors, and the scope of the protection given "was limited to the right to copy the work itself.

In 1976, however, as a result of "[d]issatisfaction" with the twenty-eight-year term, and after a "series of one-year term extensions," Congress passed the Copyright Act of 1976, which remains effective today. Under the 1976 Act, protection shifted from the time of publication to the time of creation, and the term of protection was extended to an astounding lifetime term plus fifty years, or seventy-five years for corporate authors. The Copyright Act of 1976, was not just another amendment to copyright law, it was "the most substantive change in copyright law since the ratification of the Constitution." Since the 1976 Act, "both the size of the copyright statute and the amount of protection it provides have [continued to grow] by leaps and bounds." For example, in 1998, Congress amended the Copyright Act of 1976 through the Sonny Bono Copyright Term Extension Act (CTEA). Under the CTEA, Congress further extended the duration of copyright protection for an extra twenty years. Thus, under section 302 of the Copyright Act of 1976, copyright protection now "endures for a term consisting of the life of the author and 70 years after the

16. Jones, supra note 11, at 89.
17. Given that this was the First Congress, they were perhaps in the best position to ascertain the intent of the drafters of the Constitution with regard to the appropriate period of protection required by the Copyright Clause. See Kent Greenfield, Original Penumbras: Constitutional Interpretation in the First Year of Congress, 26 CONN. L. REV. 79, 80 (1993) ("The Supreme Court has used the records of the First Congress as the basis for numerous decisions on specific constitutional questions. Constitutional scholars have also looked to the First Congress for insight into substantive constitutional issues.").
18. Jones, supra note 11, at 89.
19. Id.
21. Jones, supra note 11, at 89.
22. Id.
23. Id. at 90.
author's death," which is "the longest blanket extension since the Nation's founding." The continuous expansion in the duration of copyright terms seems to contradict the purpose and objectives of the Copyright Clause of the Constitution, which the U.S. Supreme Court characterized as follows:

The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.

Such balance has continuously been tipped in favor of longer copyright terms and less public availability. Congress seems to have forgotten that the Copyright Clause of the Constitution is "both a grant of power and a limitation," and that Congress "may not overreach the restraints imposed by the stated constitutional purpose." The Copyright Act of 1976 was the ultimate tip in the scales in favor of only rewarding creative work and almost completely forgetting about and disregarding the benefits of "promoting broad public availability of literature, music, and the other arts." This trend is especially reflected in Section 203, which favors only the author of a creative work through earlier reversionary rights, regardless of the effect on public dissemination of the author's work.

B. Legislative History and Intent Behind Section 203

The House of Representatives's Report number 94-1476 expressly states Congress's intent to "eliminate" the previous reversionary provisions and "substitute" them with "a provision safeguarding authors against unremunerative transfers." The report explains that, "[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." Additionally, in an attempt to justify the new provision, the report affirms that "Section 203 reflects a practical compromise that

28. Eldred, 537 U.S. at 243 (Breyer, J., dissenting).
29. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (emphasis added).
30. See Bohannan, supra note 20, at 569 ("[T]he general trend in copyright law has been an expansion of the rights of copyright owners at the expense of public access and improvements to copyrighted works."); Jones, supra note 11, at 87 ("This . . . runs counter to recent legislation like the Copyright Act of 1976 . . . and most recently, the CTEA, which have arguably de-emphasized the public domain in favor of a regime more centered on individual property rights.").
31. Eldred, 537 U.S. at 223 (Stevens, J., dissenting) (citing Graham v. John Deere Co. of Kansas City, 383 U.S. 1 (1966)).
32. Aiken, 422 U.S. at 156.
33. See generally Parks, supra note 3, at 31(discussing the artist's need for larger entities like record labels "in order to market and distribute their works as broadly as possible," and inability of most artist to accomplish broad distribution).
35. Id.
will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved."  

As previously alluded to, and as will be further discussed below, such compromise is non-existent. Section 203 is far from promoting the objectives of copyright law and even further from promoting the interests of all parties involved: Section 203 favors only the interests of Congress and special-interest groups. Even artists and their successors are unlikely to obtain the benefits they anticipate from regaining their copyright interests.

**IV. Criticism of Congress's Legislative Intent**

While Congress intended to protect the original artists from “unremunerative transfers” or inadequate compensation for works that might later become very successful, this intent is based on unfounded assumptions. In enacting Section 203, Congress adopts a “stereotypical view” that assumes that all artists are “ naïve [or unsophisticated] business people” who are coerced into giving up their intellectual property rights. Congress failed to recognize the mutually beneficial relationship between artists and record labels that makes production and distribution of music possible.

**A. Musicians Depend on Record Labels to be Successful**

Congress’s intent to protect artists in enacting section 203 of the Copyright Act of 1976 is in fact counterproductive for musicians, who depend on the record labels to further their music careers. The reality in the music industry is that musicians need record labels to be successful—at least in terms of popularity, as well

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36. *Id.* (emphasis added).
37. See discussion supra Part III.A.
38. See discussion infra Part IV.
39. See generally Bohannan, *supra* note 20, at 569 (“[T]he general trend in copyright law has been an expansion of the rights of copyright owners at the expense of public access and improvements to copyrighted works.”).
40. See Jones, *supra* note 11, at 90 (“The 1976 Act[ ] . . . was motivated in part by the desire of the United States to join the Berne Convention . . . . The desiderata of international trade . . . were sufficiently compelling for the United States to join the Berne Convention in 1988.”); Bohannan, *supra* note 20, at 581-82 (“Indeed, the Copyright Act reflects all of the hallmark characteristics of a special-interest statute.”).
43. See Parks, *supra* note 3, at 1 (“These provisions find their basis in the stereotypical view of creators as naïve business people who, as a matter of policy, must be protected . . . .”).
44. *Id.*
45. *Id.* (“Historically, in order to market and distribute their works as broadly as possible, creators – author’s, artists, musicians – have had to contract with larger [record labels].”).
as financially.47 “There’s not really any evidence of anybody succeeding having gone direct” without a record label.48 Even those artists who start their careers as internet sensations eventually end up “combining with a conventional record label.”49

Musicians need record labels to make or produce their music initially, and subsequently, to “market and distribute” their work.50 In most cases, the record label “pays all of the initial costs to make the record, including the studio costs, the hiring of additional musicians, engineers, and producers.”51 Record labels spend billions of dollars every year “developing and promoting new and established artists.”52 Moreover, record labels often spend millions of dollars in the costs of making a particular album available to consumers.53 Without the distribution and marketing power of record labels, a musician would be unable to reach the same success or any success at all, even if that musician had created a musical masterpiece.54

Thus, even supposing that Congress is correct in assuming that artists are in an “unequal bargaining position”55 when negotiating assignment agreements with the record labels, such purportedly disadvantaged position does not result in injustice or unfairness for the artists, since they still benefit substantially from entering into such agreements.

B. Section 203 Overlooks the Record Labels’ Risk and Investment

Congress does accurately point out that it is impossible for musicians to predict the commercial potential of a given work of art at the time of conception.56 Similarly, record labels do not possess a crystal ball that can predict the future success, or lack thereof, of a particular work.57 Record labels are in the same position as the artists at the time they agree to produce a song in exchange for an assignment of copyright interests.58 While a particular work could potentially be very successful, resulting in under-compensation of the artist, that same work could very well be utterly unsuccessful, resulting in over-compensation of the artist.59

47. See id. ("Major labels invest $1m . . . in each new act, who could not afford to make records and videos and go on tour without that backing . . . .").
48. Id.
49. Id.
50. Parks, supra note 3, at 1.
51. Busch, supra note 4. While Busch points out that these costs are considered advances on the artist’s future royalties, the typical new artist could never afford the cost of producing an album without the record label’s sponsorship.
52. Youngs, supra note 46.
53. Id. ("Behind every record that you buy, a record company’s been putting often millions . . . into getting that record to them, and to help an artist realise a creative vision.").
54. See generally id.
56. Id.
57. See Youngs, supra note 46 ("[L]abel executives point out that they take the risk and recoup their investment in fewer than one in five cases.").
58. See id.
59. Id. ("[L]abel executives point out that they take the risk and recoup their investment in fewer than one in five cases."). The actual compensation of the artists depends on the type of contract: many times the contracts provide for the losses of a prior unsuccessful record/album to be paid first before
Nevertheless, it would be absurd to grant record labels the power to terminate or nullify an assignment agreement and demand repayment of all costs and losses from the artist if a particular work is unsuccessful. Artists are induced into giving up their copyrights precisely because they cannot afford to take on the risks and costs of production and distribution. If the record labels had the possibility of passing on any losses to the artists, the artists would no longer have an incentive to enter into assignment agreements. Similarly, record labels are induced into taking on the risks, the costs, and any losses because in exchange the artist will give up their copyright interests to the work. Record labels were historically able to make a healthy profit because they could continue to profit from successful albums to compensate for the cost of production and recover the losses from unsuccessful works. In other words, record labels (like any other reasonable investor) were only willing to take on the risks involved in the production of music, because they would also reap the reward. Congress, through Section 203, allows record labels to take all the risk, but then steals the reward (copyright ownership) to give it back to the artists, who will now reap the reward virtually risk-free.

Copyright protection is precisely aimed (or at least it should be) at rewarding risk and investment, and at preventing others from “free-rid[ing]” on another's creative work and investment in such work. Courts have held that copyright protection “is intended to motivate the creative activity . . . by the provision of a special reward, namely, the legal protection afforded to such creative property through copyright.” Moreover, “the law directs its incentives towards the person who initiates, funds and guides the creative activity . . . but for whose patronage the creative work would never have been made.” With respect to production or creation of music, the artists provide their creative talent, but it is the record labels that take on most, if not all, of the risk and expenses. Thus, a reasonable sequitur would be to allow the record labels, and not only the artists, to benefit from and enjoy the reward of copyright protection.

the artist earns royalties for a subsequent successful album. While this might seem one-sided in favor of the record labels, the artist—after an unsuccessful record—has a second chance to release an album that might be more successful and profitable, rather than merely being forgotten as another unsuccessful artist. Moreover, these agreements exist only “as long as the artist finds it in their best interests to do so.” Busch, supra note 4.

60. See Youngs, supra note 46.
61. Busch, supra note 4.
62. Id.
63. Bohannan, supra note 20, at 580 (“The creation of these works involves considerable risk and investment, yet once the works are produced, others could free-ride by copying successful works cheaply and easily.”).
65. Id.
66. See Youngs, supra note 46 (“[L]abel executives point out that they take the risk and [only] recoup their investment in fewer than one in five cases . . . . Behind every record that you buy, a record company’s been putting often millions of dollars into getting that record to [consumers], and to help an artist realize a creative vision.”).
The year 2013 was greatly anticipated by many artists, as it was the very first time that any artist could assert termination rights under the shorter thirty-five-year-period provided by section 203 of the Copyright Act of 1976. Bob Dylan, Bruce Springsteen, Billy Joel, Ray Charles, Victor Willis (original singer of the Village People), among several other artists, have already taken advantage of this opportunity and have served notices of termination on the current holders of the copyright interests they transferred during or after 1978.

Artists/musicians have already obtained their first small but potentially significant victory. Victor Willis, the original lead singer of the Village People and co-author of some of the English adaptations of the Village People’s songs, served Scorpio Music S.A and Can’t Stop Productions, Inc. with notices of termination of his copyright grants to thirty-three musical compositions. Scorpio Music S.A. and Can’t Stop Productions, Inc. filed a complaint on July 14, 2011, challenging the validity of the notice of termination, seeking a judgment declaring that Willis had no copyright interest in the compositions, and asking for an injunction preventing Willis from making any claims to the compositions. The court held that Willis could unilaterally seek termination of his copyright grant, because he executed a grant separately from the other co-authors. Thus, the court granted Willis’s motion to dismiss the complaint. Scorpio Music S.A. and Can’t Stop Productions, Inc. had no option but to file an amended complaint, this time seeking a declaratory judgment as to the percentage of interest in the copyright that was subject to termination by Willis. This issue is still in dispute, but Willis’s partial victory has set the first precedent for other artists seeking to exercise their termination rights.

The effect that these newly vested termination rights will have on record labels, consumers, the artists themselves, and the music industry as a whole is uncertain but soon to be seen. Hitherto, the termination provision of the Copyright Act

68. Parks, supra note 3, at 3 (Ray Charles’s children seek to terminate assigned copyright interest under both Section 304 for rights that were assigned prior to 1978 and under Section 203 for songs that were assigned after 1978.).
69. Perpetua, supra note 3 (These artists include, inter alia, Tom Petty, Loretta Lynn, Tom Waits, and Bryan Adams.).
70. Id.; Parks, supra note 3, at 5.
72. Id.; Parks, supra note 3, at 5. These termination notices affect only the copyright interest in the composition of the songs that were transferred by Willis to Can’t Stop Productions, Inc., who subsequently assigned them to Scorpio Music S.A. However, it does not affect termination of copyright interests in the sound recordings, which is now owned by Universal Music Group. Termination of such rights, in time, will involve other issues like whether such work constituted a work made for hire, as discussed infra Part VI.A.
73. Willis, 2012 WL 1598043 at *1.
74. Id.
75. Id.
76. Id.
77. Id.
of 1976 is "essentially . . . untested."78 Perhaps more accurately stated, Section 203 is in the midst of being tested, as none of the rights or claims of the aforementioned artists have been conclusively adjudicated or otherwise resolved.79 Nevertheless, two things seem certain: first, "[a] storm of . . . litigation is inevitable,"80 and second, the effects of successful terminations by the artists could potentially be devastating for the record labels and an already fragile music industry.81

A. Impact on Record Labels

Termination rights pose a threat to the stability of the record labels,82 which new artists depend on and which those artists now seeking termination also depended on to make their music successful and attain the recognition they currently enjoy.83

Record labels are perhaps the ones who will be most severely affected or impacted by the now present danger of Section 203 termination rights.84 "With physical distribution [astonishingly85] declining, label success is increasingly dependent on the ability to manage sound recording rights in the digital environment."86 The year 2013 is only the beginning of a long chain of reversionary rights that will continue to become due.87 For the record labels, "the prospect of those underlying assets steadily reverting to individual artists (and other contributing 'authors') is unsettling,"88 and could prove to be the end of an already low-profit business.89

While the record labels are producing new music, "[i]ncome from the sales of current records may not be sufficient to replace the income lost from the great hits of the past."90 Record labels depend on the revenue generated by those "hits from the past," because the sale of new music has dropped drastically with "the rise of the

78. Parks, supra note 3, at 3.
79. Id. at 5.
80. Id.
81. See Busch, supra note 4 (discussing the fragility of record labels because of the adverse effects of the internet, music piracy, and free music services on the sales of albums, which record labels depended on).
82. Parks, supra note 3, at 2.
83. See id. at 1 ("Historically, in order to market and distribute their works as broadly as possible, creators – author's, artists, musicians – have had to contract with larger [record labels].").
84. See id. at 4 ("[T]he stakes [are] particularly high for music labels, whose business is based primarily on the ownership and exploitation of sound recordings.").
85. For a historic and more numerically precise account of the decrease sales of albums and subsequently CDs, see Busch, supra note 4.
86. Parks, supra note 3, at 4.
87. Id. (unless of course, the first wave of termination claims is unsuccessful, which would deter future attempts to terminate copyright transfers).
88. Id.
89. See Busch, supra note 4 (discussing the low revenues of record labels and predicting the emergence of a new business models for the music industry to survive).
internet and illegal downloads, and also with the emergence of "streaming services such as Pandora, Spotify and YouTube." The demise of record labels would not only be devastating for the music industry, but it would also affect other industries like the film and literary industries "that depend upon the creation and [effective] exploitation of copyrightable works." Without record labels, it would be very difficult for new and established artists to produce, market, and distribute their music.

B. Impact On Consumers

Currently, consumers, not the record labels, have the "upper-hand" in the music business. With services like Spotify, Pandora, and iTunes Radio, consumers can stream and listen to any song they want from their computers, phones, or tablets almost anywhere. This could all change if artists are able to exercise their termination rights.

Spotify, Pandora, and iTunes Radio, all negotiate licensing fees directly with the record labels, which allows them to provide their customers with free streaming music. If the music labels lose their copyrights to the licensed songs, this could not only result in inevitable litigation over the already standing licensing contracts, but this might also mean consumers would lose their ability to listen to their favorite songs and records. Bob Dylan, Bruce Springsteen, Billy Joel, Ray Charles, and Victor Willis are only among the first wave of artists to exercise their termination rights.

In 2014, the copyright assignments of songs that were produced in 1979 will be terminable, and in 2015 the copyright assignments of songs that were produced in 1980 will be terminable, and so on. For example, The Eagles have already filed termination notices to two of their albums, the "The Long Run" and "Eagles Live." The effective date of termination for "The Long Run" is September 25, 2014, and the effective date
of termination for “Eagles Live” is November 8, 2015. In the upcoming years, there will be an unending chain of reversionary rights that will become due and will eventually affect a myriad of songs that listeners still long for.

The business model of companies like Spotify is already fragile, limiting the inventory of songs available to consumers will only diminish their probability of success, which is ultimately unfavorable to consumers. Rather than negotiating only with major record labels, companies like Spotify and Pandora would be forced to negotiate with each individual artist or with countless small independent record labels that would have to emerge to assist inexperienced artists with distribution of their newly regained songs (or rights to those songs). Such individualized negotiations will require much more resources, and Spotify, Pandora, and the like will likely have to pay higher licensing fees, which will inevitably be passed on to the consumer.

C. Impact on the Artists or Successors

While many artists have long awaited this day—when they can finally reclaim ownership of their copyrights and profit from their work—many are likely to be disappointed. From the outset, exercising their termination rights will not be an easy feat for many artists. Record labels will fiercely resist losing their assigned copyrights and will do all they can to prevent artists from recapturing those rights. This is particularly true for works that still hold a substantial value. Even assuming an artist is able to easily reclaim ownership of his or her copyrights, as commentators have noted, recapturing copyright ownership is not equivalent to automatic profit.

First, termination does not affect derivative works created prior to the effective date of termination. Original owners will be unable to prevent others from profiting from derivative works created under a pre-termination license. The owner of a reversionary right is also not entitled to share in the profits from such derivative works.

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101. See Gobry, supra note 97.
102. See generally Busch, supra note 4 (predicting the emergence of small independent labels in the music industry targeting only particular areas to minimize distribution costs and maximize profits). This would effectively mean the end of the widespread distribution of music achieved by large music labels, because small record labels would only target specific markets.
103. See Casselman, supra note 41, at 29.
104. See Johnson, supra note 100 (discussing the “headaches” authors and artist have been going through to exercise their termination rights under Section 203’s predecessor, Section 304).
105. Id. (“The most famous example is the termination notices filed by the heirs to the creators of Superman, Jerry Siegel and Joseph Shuster, who rather famously sold their rights to the Man of Steel for $130 in 1938 only to watch it evolve into a billion-dollar enterprise. DC Comics has put up a legal battle that has lasted nearly a decade, and has devolved into a DC suit against even their attorney, Marc Toberoff.”).
106. Id. (“[T]he headaches [artists] have to go through to reclaim rights [under Section 304] seems to be directly proportional to [the] perceived value in the present day.”).
107. See Casselman, supra note 41; Parks, supra note 3.
108. Casselman, supra note 41, at 29.
109. Id.
works.\textsuperscript{110} Therefore, the grantees, rather than the original authors, will continue to profit from royalties and licensing fees originating from derivative works even after termination of the grant.\textsuperscript{111}

Second, artists and successors run the risk that after receipt of a termination notice, the grantee may “engage in a flurry of downstream licensing to cover the exploitations the grantee did not previously authorize.”\textsuperscript{112} In other words, the grantee might now authorize or license uses they did not authorize before in an attempt to completely exploit the work before the copyright reverts to the original author.\textsuperscript{113} Whether such licenses include creation of derivative works or making the work widely available for a low cost, this will certainly and substantially diminish the value of the work for the recapturing author or successors.\textsuperscript{114}

Third, termination under Section 203 has no effect on the transferee’s rights outside of the United States.\textsuperscript{115} The power of the Copyright Act of 1976 and Section 203 is limited to the United States; foreign exploitation of an assigned copyright cannot be terminated.\textsuperscript{116} Thus, the artist’s ability to fully exploit their newly regained rights is also substantially limited in this way.

The fourth and final limitation on the artists’ ability to profit (and perhaps the most important limitation) is their lack of resources.\textsuperscript{117} While distribution costs are now lower due to the digitalization of music, “even in a digital era, exploiting and distributing creative content requires considerable resources and skills that most artists do not have.”\textsuperscript{118} Record labels, by contrast, do have those resources and skills and they continue to be in the best position to maximize the value of a copyrighted work.\textsuperscript{119}

To summarize, termination rights will probably be of little value to artists and successors; however, these termination rights threaten to end the status quo of the music industry, where record labels are still managing to survive and consumers finally have the upper hand.

VI. POTENTIAL SOLUTIONS AND PREDICTIONS

Under Section 203, the transfer of any copyrighted work, except a “work made for hire,” is terminable after thirty-five years from the transfer.\textsuperscript{120} A work made for hire is created on behalf of an employer and technically always belongs to the

\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Casselman, supra note 41, at 31.
\textsuperscript{115} Id. at 29.
\textsuperscript{116} Id.
\textsuperscript{117} Parks, supra note 3, at 5.
\textsuperscript{118} Id.
\textsuperscript{120} 17 U.S.C. § 203 (2002).
employer rather than the actual author. Hence, works made for hire are logically excluded from the purview of Section 203. It also seems logical for record labels and their counsel to place their hopes of successfully defending against termination rights on the "work made for hire" exception. Nevertheless, a uniform application of the exception by the courts seems unlikely. The only conclusive and definitive solution to the problems generated by Section 203 is amending the statute to exclude sound recordings, either under the protection of the "work made for hire" doctrine or independently. Alternatively, a renegotiation, as opposed to termination, of the existing transfers between the parties could provide a less ideal, but more immediate solution.

A. The "Work Made for Hire" Doctrine is not the "Catch-All" Solution

Record labels, artists, and most commentators anticipate that the issue of whether a work is determined to be a work made for hire under section 101 of the Copyright Act of 1976 will be the crux of the litigation over these newly vested termination rights. Works made for hire are excluded from the works or transfers that are terminable by the original author under Section 203. Under the Copyright Act, "an author's ability to terminate a prior grant in the copyright... does not apply to a 'work made for hire' because the copyright in such a creation never belonged to the artist... it belonged at the outset to the party that commissioned the work." However, courts cannot apply the "work made for hire" exception uniformly across the board in all cases.

Section 101 of the Copyright Act of 1976 defines a "work made for hire" as follows:

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

121. See 17 U.S.C. § 101 (2010); Playboy Enters., v. Dumas, 53 F.3d 549, 554 (2d Cir. 1995) ("Once it is established that a work is made for hire, the hiring party is presumed to be the author of the work.").
122. Johnson, supra note 100 ("'I think the big battleground is whether these work-for-hire provisions are going to be valid in these recording contracts,' says Greg Gabriel of Kinsella, Weitzman, Iser, Kump & Aldisert. 'That's the million-dollar question that gives the labels extra leverage.'").
123. Playboy, 53 F.3d at 555 (holding question of whether a work was made for hire is a mixed question of law and fact and "whether those facts, as a matter of law," show that a particular was made for hire).
124. See, e.g., Parks, supra note 3, at 5; Johnson, supra note 100; Casselman, supra note 41, at 29; Beldner, supra note 5.
127. See Playboy, 53 F.3d at 555 (holding that the question of whether a work was made for hire is a mixed question of law and fact); Johnson, supra note 100 ("[C]ourts will look at how the work was actually performed.").
signed by them that the work shall be considered a work made for hire.128

Many venture to say that courts will undoubtedly rule in favor of the record labels finding the assigned works to be works made for hire under this definition.129 Most commentators predict that record labels will argue that the author’s (musician’s) contribution is merely part of a collective work, and thus their performance qualifies as a work for hire under Section 101.130 This would effectively make the employer, in this case the record label, the original copyright owner, preventing the artists from claiming any copyright interest in a particular work.131 However, determination of whether a particular work meets this definition requires an inherently factual analysis, and this is not likely to be the definitive solution in all or even most cases.132

Many courts have now adopted an approach that is very favorable to the record labels, holding that, “whenever a work is produced at the ‘instance and expense’ of the hiring party,” there is a “presumption in favor of finding work-for-hire ownership.”133 But, even this approach requires a factually intensive analysis. To determine if a particular work meets the “instance and expense” test, courts consider the following factors: “(1) At whose instance the work was prepared; (2) whether the hiring party had the power to accept, reject, modify, or otherwise control the creation of the work; and (3) at whose expense the work was created.”134 To determine if the “instance” requirement was satisfied, courts consider whether “the motivating factor in producing the work was the employer who induced the creation.”135 The requirement of “control” aids the analysis of the “instance” requirement: the greater the extent of such supervision the “more likely it is that the work was created at the commissioning party’s instance.”136 The “expense” requirement is satisfied when the author is paid “a sum certain for his or her work,”137 as such payment “bear[s] the hallmark of the wages of an employee.”138 Contrastingly, “where the creator of a work receives

130. Parks, supra note 3, at 3; Johnson, supra note 100 ("[T]here has been speculation that the labels would try to challenge terminations by claiming that an album falls into a category that does qualify [as a work made for hire], like a collective work or compilation.").
131. Playboy, 53 F.3d at 554.
132. See id. at 555 (holding that the question of whether a work was made for hire is a mixed question of law and fact and “whether those facts, as a matter of law,” show that a particular was made for hire).
134. Id. at 1058 (citing Twentieth Century Fox Film Corp. v. Entm’t Distrib., 429 F.3d 869, 879, 881 (9th Cir. 2005)).
135. Id. at 1059 (citing Twentieth Century, 429 F.3d at 879).
136. Id. at 1060 (citing Twentieth Century, 429 F.3d at 880).
137. Id. at 1058 (citing Playboy, 53 F.3d at 555).
138. Id. (citing Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc., 375 F.2d 639, 642-43 (2d Cir. 1967)).
royalties as payment, that method of payment generally weighs against finding a work-for-hire relationship." 139

Thus, while most assignment contracts contained provisions designating the recordings as works made for hire owned by the record labels and not subject to termination, those contracts are not determinative. 140 Even under such a contract, a court is unlikely to find a work to be made for hire if the record label exercised minimal control and merely provided resources for production and distribution. 141 Similarly, in spite of the contractual provisions, a court is unlikely to find that a work was made for hire if the artist received or continues to receive royalties as a method of payment (which is usually the case). 142 In fact, most assignment contracts also contain safeguard terms providing in the alternative that if such recordings are not works made for hire, they are assigned to the record label, in which case they would be subject to termination. 143 Thus, record labels cannot rely on the "work made for hire" doctrine as a definitive solution in all cases. 144

B. Congress Should Amend Section 203 to Exclude Sound Recordings

The only viable solution to ensure that copyright transfers of sound recordings are not terminated—and therefore prevent the adverse impact on record labels, consumers, and the artists (or successors)—is to amend section 203 of the Copyright Act of 1976.

Congress could amend Section 203 directly by expressly creating an exception for sound recordings within the text of the statute. Alternatively, Congress could take a more familiar route by reenacting into law section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, which attempted to

139. Siegel, 658 F. Supp. 2d at 1058 (citing Dumas, 53 F.3d at 555).

140. Johnson, supra note 100 ("[S]ome of the pacts from the late 1970s identify an artist as working ‘for hire,’ but in another provision make clear that they are not employees of the label. Moreover, language spelling out that an artist is ‘for hire’ doesn’t necessarily negate a termination right; courts will look at how the work was actually performed."); see Busch, supra note 4 ("[I]n this type of contract the artist gives up the rights to their copyright in a sound recording in exchange for the opportunity to record and have a record released.").

141. See Twentytieth Century, 429 F.3d at 880; Siegel, 658 F. Supp. 2d at 1058 ("[T]he costs or expense in physically creating the work itself (the money spent to purchase the paper on which the dialogue and story elements was printed, the typewriter used to put into concrete form the author’s concepts of the same, and the pencils and ink needed to draw the illustrations, etc.)" was not enough to satisfy the requirement).

142. See Busch, supra note 4 ("The typical royalty rate for an artist is a percentage of the wholesale price of records sold and is around 9-12%.").

143. Johnson, supra note 100 ("[S]ome of the pacts from the late 1970s identify an artist as working ‘for hire,’ but in another provision make clear that they are not employees of the label. Moreover, language spelling out that an artist is ‘for hire’ doesn’t necessarily negate a termination right; courts will look at how the work was actually performed."); see Busch, supra note 4 ("[I]n this type of contract the artist gives up the rights to their copyright in a sound recording in exchange for the opportunity to record and have a record released.").

144. See Johnson, supra note 100 ("The situation has set up a forensic-like analysis of contracts written more than a generation ago, some of which contain conflicting language.").
amend the definition of a work made for hire under section 101 of the Copyright Act of 1976 to include "sound recordings." 145

Through section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, Congress conclusively categorized sound recordings as "works made for hire" under Section 101. 146 This amendment would have effectively solved the problem of whether a particular sound recording was a work made for hire by automatically converting all sound recordings into works made for hire. However, the certainty and clarity provided by the amendment was short-lived; following substantial protests by artist groups, the music industry in an attempt to compromise submitted a joint recommendation to Congress to repeal the amendment. 147 As a result, Section 101 now provides, in pertinent part:

In determining whether any work is eligible to be considered a work made for hire . . . neither the amendment contained in section 1011(d) . . . nor the deletion of the words added by that amendment—
(A) shall be considered or otherwise given any legal significance, or
(B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination. 148

In other words, courts cannot rely on the 1999 amendment to determine whether a sound recording constituted a work made for hire.

All of the uncertainty and possibly devastating effects of Section 203 would have been avoided but for Congress's wavering and giving in to special interests. The only manner to remedy the situation is for Congress to firmly reenact section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, or amend Section 203 to exclude transfers of sound recordings from its purview. This would effectively prevent artists from terminating copyright assignments and the music industry would not be adversely affected.

C. Artists and Record Labels Should Renegotiate Copyright Transfers to Ameliorate the Effects of Section 203

While an Amendment to Section 203 would provide a more conclusive and definitive solution to the uncertainty created by Section 203, a more plausible and immediate solution is for record labels and artists to renegotiate, rather than terminate, the original copyright assignment. 149 "There is incentive on both sides of the

146. Id.
147. Parks, supra note 3, at 3.
149. See Hanswirth, supra note 119, at 60 (courts "will honour the subsequent agreement, and either extinguish the termination right or restart the 35-year termination clock").
termination table to negotiate rather than litigate, as litigation would be much more costly but not necessarily more effective or beneficial for either party.

For record labels, renegotiating might not be ideal, but it is certainly better than losing their copyrights altogether. Section 203 gives them the opportunity to negotiate with the terminating author exclusively for a limited period of time. Section 203(b)(4) "provides that between the notice of termination and the date of effective termination, only the original grantee may negotiate a new grant." By taking advantage of this opportunity, record labels get to renegotiate copyright assignments without any competing bids or offers being made to the recapturing artist. Even if a particular work does not generate substantial revenues for the label, negotiating would still be beneficial to prevent the recapturing artist from setting a precedent or an example for other artists in the future.

Even though artists are initially limited to negotiating only with the original grantee, renegotiating is still in the authors' best interests. "For artists, the prospect of copyright ownership is attractive, but the fact remains that even in the digital era, exploiting and distributing creative content requires considerable resources and skills that most individual artists do not have." The fact is that record labels "are still in the best position to get maximum value for the exploitation of copyrighted works." Not only do record labels have more resources, business connections, and experience, but they also would retain ownership of the copyright interests in derivative works as well as all rights outside of the United States. This means that artists would very likely be able to profit more from renegotiating the terms of a copyright assignment or transfer than from actually terminating that assignment. Moreover, while litigation would be expensive for both sides, record labels would generally be in a better position to cover those costs. For artists, however, "fighting a court battle will

150. Parks, supra note 3, at 5.
151. See generally id. at 6 ("There are few clear winners when judge or jury decides the parties' fates.").
152. Not only would the record labels lose their ability to continue to exploit and profit from the copyrighted work, but losing the copyright would also create significant problems and probably lead to litigation over outstanding licensing contracts. See Hanswirth, supra note 119, at 59 ("This may present a conundrum for any business involved in licensing or otherwise exploiting copyrights that were assigned to it after 1 January 1978.").
154. See Johnson, supra note 100 (interviewing a well-regarded entertainment attorney who poses the question of whether it is worth it for labels to fight for the rights to works that do not even make $100 per year, and whether it would set a precedent if they decide not to).
155. See discussion supra Part V.C.
156. See Parks, supra note 3, at 5.
157. See Parks, supra note 3, at 5.
158. Hanswirth, supra note 119, at 60.
159. See Parks, supra note 3, at 5 ("[T]ransferees retain the right to distribute 'derivative works' created before termination, meaning that as a practical matter, the author and grantee will remain partners in exploiting a given work well beyond termination. Notably, termination only pertains to rights under US law, and does not affect international rights that oftentimes are included in the same, broad agreements.").
Thus, if the purpose of termination rights is to remunerate artists, renegotiating, rather than terminating an assignment or transfer, would be the best way to accomplish that objective. Artists should resist the urge to exercise their termination rights and instead use that right as leverage—as a negotiation tool to achieve a more favorable assignment agreement.162

Finally, a successful negotiation of an amicable resolution between the parties would also be in the best interest of consumers. Consumers want to preserve the wide availability of songs and records without sacrificing affordability. Such availability and affordability of music is more effectively achieved by reassigning copyrights to the original transferee (record labels).163 In fact, record labels have achieved wide and affordable availability of music by licensing the use of their assigned works to streaming services, which are often available at no cost or at a very low cost to consumers.

VII. CONCLUSION

In enacting section 203 of the Copyright Act of 1976, Congress intended to provide a remedy or some sort of protection for artists against unremunerative transfers of their copyright interests.164 This legislative intent is premised on the assumption that artists are “naïve [or unsophisticated] business people” who are taken advantage of by large production companies or record labels.165 However, at least with respect to sound recordings and the relationship between musicians and record labels, such assumption is not entirely accurate; both parties benefit (at different degrees) from their contractual agreements. Therefore, sound recordings should be excluded from the aegis of Section 203. By reenacting the provisions of section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999,166 Congress could reaffirm that sound recordings are to be construed as works made for hire. This would effectively prevent artists (or their successors) from attempting to recapture rights that were once voluntarily relinquished, and prevent the negative impact that termination would have on the record labels, the consumers, and the artists or their successors.

In the meantime, record labels, artists, successors, and their respective counsel should engage in mutually beneficial negotiations. An agreement between the parties without unnecessary litigation would be favorable to all, including consumers. Artists would likely be better served by utilizing their newly vested termination rights as a

161. Hanswirth, supra note 119, at 60.
162. See Parks, supra note 3, at 6 (“Serving a notice of termination creates the leverage Congress intended, which can be wielded as a litigation sword as a last resort, but is better used as a tool to reset and reformulate any existing relationship that remains fundamentally sound.”).
163. Id. at 5 (“[T]here is an ongoing need for partners to assist with the marketing of creative works in a sustained and meaningful way, and the most convenient way to do so is by reestablishing a relationship with the existing transferee.”).
165. Parks, supra note 3, at 1.
bargaining tool, rather than to regain copyright interests that are unlikely to yield the profits they anticipate. The record labels would also be in a better position by renegotiating their copyright assignments than by potentially losing them altogether. Finally, consumers would also benefit from an amicable resolution that would preserve the status quo of the music industry, where consumers are able to enjoy music at a relatively low cost without resorting to illegal downloads.