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How the Looming Fight over Termination of Transfers under § 203 of the Copyright Act provides a Pause Point for Deeper Insights into the Current State of American Copyright Law

Jared Pickell

I. INTRODUCTION

There is a looming deluge of litigation between musical artists and record companies for the rights to sound recordings.¹ This serves as a pause point for an examination of American copyright law, specifically the duration of copyright protection, and how society fits into the copyright law under the Constitution.² The disputes involve musical artists filing notices and bringing actions to terminate unremunerative transfers of copyrights made to record companies.³ Upon successful termination of such transfers, the rights to the music, whether as sound recordings or musical compositions, will revert to the musicians. The first of such attempts to terminate transfers under § 203 of the Copyright Act of 1976 arrives in 2013.⁴

Defining authorship in the context of a musical work is a determinative factor of these debates, especially considering that the Copyright Act grants various rights to “authors,” but nowhere defines the term “author.”⁵ The Constitutional grant of intellectual property rights specifically mentions “authors:” “The 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.”⁶ As a matter of public policy, American copyright law needs to be more pro-author, and § 203 does not fully accomplish that policy.

¹ Larry Rother, *Record Industry Braces for Artists’ Battles over Song Rights*, N.Y. TIMES, Aug. 16, 2011, available at <http://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html>

² U.S. CONST. art. I, § 8, cl. 8.

³ Rother, *supra* note 1.

⁴ 17 U.S.C. § 203(a)(3) (2006). Section 203 relates to transfers granted on and after January 1, 1978, and provides that a copyright holder can terminate the grant at the end of thirty-five years from the date of execution. *Id.*

⁵ *See* § 101. This section provides definitions of the terms used in the Copyright Act.

⁶ U.S. CONST. art. I, § 8, cl. 8.

American copyright law should also encourage a robust public domain and should take into account where society stands in the context of the copyright law. The termination-of-transfers provision of § 203 feigns being a pro-author compromise, but in reality is anything but. Not only is § 203 not pro-author in practice; it also illustrates how much the current copyright law allies itself with publishers and distributors to the detriment of authors. This is not only a problem for its markedly anti-author considerations; more importantly, it ignores the notion that the copyright system is supposed to promote the general welfare through the advancement of ideas, knowledge, and the arts.⁷

This Comment will reexamine American copyright law, using § 203 and the current battles in the music industry, to show how the copyright law has gone astray from the underlying constitutional and philosophical justifications of copyright. It will utilize the termination-of-transfers disputes between musical artists and record companies to reexamine American copyright law to determine: (1) why § 203 as it stands is not the optimal mechanism for solving the underlying and overarching issues involved in these disputes; and (2) how § 203 provides a window into how off-course American copyright law has gone. In this regard, the discussion is framed as merely one between an artist with unequal bargaining power and a powerful record company or other content-producing and distributing entity; the societal interest in shortening copyright terms is conspicuously absent in the present debates. This Comment will address these issues at length.

Part II provides historical background on American copyright law and the constitutional power of Congress to enact copyright laws. Part III addresses relevant terminology and background to the issues surrounding the § 203 termination provisions and briefly discusses the

⁷ *Id.*

other termination provision in the Copyright Act under § 304.⁸ Part IV predicts the “winners” of the § 203 battles, and criticizes the copyright law generally because of these anticipated outcomes. Part V examines American copyright law through the lens of § 203 and suggests that copyright law has lost sight of constitutional and philosophical justifications for copyright. In addition, Part V suggests suggestions for how Congress can address and ameliorate these issues, especially the idea of “erring” on the side of authors and being mindful that the general welfare of society should be the driving force of American Copyright Law, under the Copyright Clause.

II. COPYRIGHT HISTORY AND THE CONSTITUTIONALITY OF COPYRIGHT DURATION IN CONJUNCTION WITH THE ‘TERMINATION OF TRANSFERS’ PROVISIONS

American Copyright Law is grounded in the Constitution of the United States.⁹ The “Copyright Clause” states: “The Congress shall have Power . . . to promote the Progress of Science¹⁰ and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹¹ Congress passed the first Act pursuant to this Clause in 1790.¹² The Act was described as “an act for the encouragement of learning,” which gave an initial copyright term of fourteen years to “books,” as well as to maps and charts.¹³ The 1790 Act also allowed for a renewal period of fourteen years if the author of the work followed proper renewal procedures.¹⁴

⁸ § 304.

⁹ *Feist Publications, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340 (1991); *see* U.S. CONST. art. I, § 8, cl. 8.

¹⁰ The term “Science” in the eighteenth century referred to what we would today call “knowledge” or “learning.” Paul Goldstein, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 41 (Rev’d Ed. 2003).

¹¹ U.S. CONST. art. I, § 8, cl. 8. This clause also covers patents and is also known as the “intellectual property” clause; this Comment will refer to it as the “Copyright Clause.”

¹² *See* Act of May 31, 1790, 1 STAT. 124.

¹³ Goldstein, *supra* note 10, at 41.

¹⁴ *Id.*

The Copyright Clause was, in large part, based on an earlier English law: the Statute of Anne of 1710.¹⁵ The Statute of Anne granted protection to authors themselves for new works, thereby seeming to break the stationers company’s historic publishing monopoly.¹⁶ This copyright statute was originally entitled “A Bill for the Encouragement of Learning and for securing the property of Copies of Books to the rightful Owners thereof.”¹⁷ This title¹⁸ seemed to suggest “an intent to create a permanent and perpetual property right,” which is what the booksellers of the stationers company wanted.¹⁹ But the statute in this form did not create such a permanent and perpetual right.²⁰ It included limits of protection of fourteen years for new books and twenty-one years for those already printed, with the ability to renew the copyright for an additional term of fourteen years if the author was still alive after the first term expired.²¹ The name of the bill was later changed—in order to dispel the notion that it was to convey a perpetual property right—to “A Bill for the Encouragement of Learning by Vesting the Copies of Printed Books in Authors, or Purchasers, of such Copies, during the Times therein Mentioned.”²²

This new term limitation greatly irritated the booksellers, and they filed a petition with Parliament in complaint, stating “if we have a Right for Ten Years, we have a Right for Ever.”²³

¹⁵ “A Bill for the Encouragement of Learning by vesting the Copies of Printed Books in Authors, or Purchasers, of such Copies, during the Times therein Mentioned,” 8 Ann., c. 19 (1710).

¹⁶ *Id.* at 40. The stationers company was a publisher’s guild that was granted exclusive rights by English monarchs to print and sell books, in exchange for monarchical control and censorship of the printed material. *Id.* The stationers greatly resisted the Statute of Anne because it peeled back from their monopoly by giving authors rights to their works, and because it also provided for limited terms of protection. *Id.*

¹⁷ Edward C. Walterscheid, *Defining the Patent and Copyright Term: Term Limits and the Intellectual Property Clause*, 7 J. INTELL. PROP. L. 315, 334–35 (2000).

¹⁸ *Id.* at 336 (One also simply cannot overlook the fact that the Statute of Anne contained in its title the words “an act for the encouragement of learning.” This language was meant to put a limit on the Statute of Anne, as was the similar language in the U.S. Constitution, “to promote the progress of Science.” The Statute of Anne was also a statute that regulated the printing trade, and was “aimed at controlling and limiting the rampant monopolies then extant in the booksellers trade.”).

¹⁹ *Id.* at 334–35.

²⁰ *Id.*

²¹ *Id.*

²² 8 Anne, c. 19.

²³ Walterscheid, *supra*, note 17, at 334–35.

This petition did not lead to an amendment of the bill, and the term limit remained.²⁴ By rebutting the stationers' complaints, the intent of British Parliament in the Statute of Anne, and accordingly the intent of the Framers in the United States Constitution, was to truly grant protection for "limited times."²⁵ The exact meaning of "limited times," however, varies greatly.²⁶

After the original 1790 Copyright Act, the ensuing history of U.S. copyright law has accommodated technological change by absorbing new media into various revisions of each subsequent copyright act, affording more and more varied protection to copyright owners.²⁷ Under the 1976 Act, "books" evolved into the category "literary works."²⁸ Maps and charts are now included in the category "pictorial, graphic, and sculptural works."²⁹ Music and lyrics fall into the category "musical works" and motion pictures are classified along with "other audiovisual works."³⁰ "Sound recordings" are also granted their own category.³¹ The advent of the Internet and other digital technologies has required reinterpretations of the statutory language in order to extend coverage to works in those platforms; surely the courts will need to continue this as current technologies become more sophisticated and new technologies are developed.³²

American copyright law has extended the statutory period of copyright protection in each new Act.³³ The 1831 Act increased the initial term of copyright to twenty-eight years, with a

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Infra* Part V.

²⁷ Compare 1790 Copyright Act with 1831 Copyright Act, 1909 Act (17 U.S.C. (1909)), and the 1976 Act (17 U.S.C. (1976)).

²⁸ § 102(a) (1976).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 10 (2004) ("The law's response to the Internet, when tied to changes in the technology of the Internet itself, has massively increased the effective regulation of creativity in America.").

³³ *Eldred v. Ashcroft*, 537 U.S. 186, 194–95 (2003) Justice Ginsberg succinctly summarized the history of statutory term limits at the outset of her opinion. *Id.* This Comment will later criticize the overall holding of the majority

renewal term of fourteen years.³⁴ The 1909 Act increased the renewal term to twenty-eight years.³⁵ The 1976 Act did away with the dual system of protection and adopted a unitary copyright term defined by the life of the author plus fifty years.³⁶ In 1998 Congress extended the duration of copyright protection to life of the author plus seventy years.³⁷ For works for hire under the current act, owners of copyrights get a term the shorter of 120 years from the date of creation or ninety-five years from first publication.³⁸

Given the above, it is questionable whether copyright duration is in fact “for limited times,”³⁹ especially considering that since 1976, the Copyright Act has had a unitary term measured by the life of the author, plus some number of years.⁴⁰ Also, throughout copyright history, there have been “tensions between the limited monopoly [granted to authors] and the free flow of information.”⁴¹ In addition to balancing the rights of the authors of musical works and the rights of record companies to whom such authors have transferred their rights,⁴² this Comment will consider whether American copyright law overprotects artists and publishers to the detriment of the public, as users of the artistic works, depriving the public of access to such works.⁴³ As James Madison wrote in The Federalist Number 43, “the utility of this power will

opinion here, as well as use dissenting opinions by Justices Stevens and Breyer to bolster this Comment’s argument. See *infra* Part V.

³⁴ *Eldred*, 537 U.S. at 194–95.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* This additional twenty years was an amendment called the Sonny Bono Copyright Term Extension Act (CTEA), which was at issue in the *Eldred* case. 537 U.S. 186 (2003). The petitioners only challenged the retroactivity of the CTEA, and not the length of the copyright term itself. *Id.* However, the dissenting opinions address that issue, as does this Comment.

³⁸ § 302(c).

³⁹ U.S. CONST. art. I, § 8, cl. 8.

⁴⁰ 17 U.S.C. § 302(a).

⁴¹ Samuel E. Trosow, *The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital*, 16 CAN. J. L. & JURIS. 217, 220 (2003).

⁴² Section 203 attempts to strike a balance between artists and the distributors within the content industries who purchased the artists’ copyrights, by giving the artists a chance to terminate such transfers after thirty-five years, in order for the authors to reap more monetary benefits from their work.

⁴³ “Although a copyright belongs to an author during its term, the ultimate purpose of this bargain is not to protect authors but rather to enrich the public domain. The cardinal principle in copyright law, then, is that any decision to

scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law [where] the public good fully coincides . . . with the claims of individuals.”⁴⁴

Copyright law should, in theory, incentivize authors to create, and “rights in our society cannot depend for their justification solely upon statutory or constitutional provisions.”⁴⁵ The Supreme Court has interpreted the economic philosophy behind the “Copyright Clause” as “the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors.”⁴⁶ This is consistent with Locke’s labor theory, which states that labor should be rewarded because it adds value to goods—here, copyrightable works of authorship.⁴⁷ Labor also converts goods from their “state of nature” into property, divining upon the laborer a possessory interest in such property.⁴⁸ Goods can be held analogous to ideas, and authors and creators labor in producing tangible expressions of ideas.⁴⁹ This is consistent with the general copyrightability requirements of “originality” and “fixation,”⁵⁰ which works must contain before authors can gain copyright protection.⁵¹

The definition of “author” is not expressly included in the Copyright Act, but an “author” is understood to be the creator of one of the types of protectable works listed in the Act.⁵² As long as the basic requirements of the law are met—originality of the idea and fixation of the idea

extend the law or to recognize new interests ought to be based on a realistic expectation that the public domain will bear new fruit.” H.R. REP. NO. 92-487, 92d Cong., 1st Sess. (1984).

⁴⁴ THE FEDERALIST NO. 43 (James Madison).

⁴⁵ Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 288 (1988).

⁴⁶ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

⁴⁷ *Id.* at 296–97.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” § 102(a).

⁵¹ *Id.*

⁵² § 102(a)(1)–(8); § 103(a) (“sound recordings” are protectable under §102(a)(7)). Thus, an author would be, for example, the writer of a novel or other literary work, the producer of a motion picture, and the writer of the music and the lyrics of a song.

in a tangible medium of expression—the “author” is entitled to copyright.⁵³ While copyright “vests” in an “author” at the moment of fixation, many musicians, as would-be “authors,” never really hold a copyright at all because they routinely assign their rights to publishers, distributors, and other members of content industries.⁵⁴

There are two “encroachments” on the author’s place in copyright today. The first is that authors lack bargaining power.⁵⁵ The second deals with new technological avenues for creating and disseminating works of authorship.⁵⁶ New technologies call into question “whatever artistic control the author may retain over her work.”⁵⁷ An important consideration to understand here is that “copyright is not just about getting paid; it is also about maintaining control, both economic and artistic, over the fate of the work.”⁵⁸ This consideration becomes clear when one remembers that inherent in intellectual property law is the idea of “property” itself, that is, ownership, which in turn implies control.⁵⁹

Technology itself commodifies music and makes music property, separate from the actual performing or playing of that music, from very simple forms of expression such as the writing of musical notation in sheet music, to the complex digital technologies of modern sound recordings.⁶⁰ In the Middle Ages, musical notation developed into something similar to what it is today, and the notion of the composer as author, able to make proprietary claims, as opposed

⁵³ § 201.

⁵⁴ This is especially true in the music industry record deal, whereby the artist signs his rights to the record company in exchange for the company’s services in the production, distribution, advertising, etc. of the record. Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 697–98 (2003).

⁵⁵ In the legislative history of § 203 of the 1976 Act, Congress states that the driving force of the termination of transfer provisions was unequal bargaining power between artists and publishers or producers of works, and the impossibility to determine a work’s value at the nascent stage of creation. H.R. Rep. No. 94-1476, at 124.

⁵⁶ *Id.*

⁵⁷ Jane C. Ginsburg, *The Author’s Place in the Future of Copyright*, 45 WILLAMETTE L. REV. 381, 382–83 (2009).

⁵⁸ *Id.* at 390.

⁵⁹ *Id.*

⁶⁰ Michael W. Carroll, *Whose Music is it Anyway?: How we Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1451 (2005).

to mere performance rights, began to emerge.⁶¹ Following the invention of the printing press, “music publishing began to take hold in the latter fifteenth century.”⁶² At this time, a composer only had the potentiality for a copyright in his composition as printed in a book, and that book was considered a form of property in which the musical expression was embodied.⁶³ The development of sheet music and perforated piano rolls in the nineteenth century were the next major technological innovations that furthered the concept of music as property.⁶⁴ These were followed by the development and use of the phonograph in the late nineteenth and early twentieth centuries, which were in turn followed by more sophisticated sound recording devices and methods.⁶⁵

These recording devices allowed the music recording industry to explode throughout the twentieth century and into the twenty-first century.⁶⁶ Sound recordings first received copyright protection in 1972.⁶⁷ Congress added § 203 to the 1976 Act with the purported intent to allow “authors” who had made unremunerative transfers to terminate such transfers so that copyright would revert back to the author.⁶⁸ Section 203 illustrates how far off-track American copyright law has gone.

III. TERMS AND BACKGROUND TO THE § 203 DEBATES

Prominent musicians have recently made headlines on the termination of transfers issued under § 203 of the Copyright Act.⁶⁹ Bob Dylan, Tom Petty, Bryan Adams, Loretta Lynn, Kris Kristofferson, and Tom Waits, among others, have already filed notifications with the Copyright

⁶¹ *Id.* at 1451.

⁶² *Id.* at 1456.

⁶³ *Id.*

⁶⁴ Lessig, *supra* note 32, at 108–09.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 17 U.S.C. §102(a)(7).

⁶⁸ *See supra* note 55.

⁶⁹ Rother, *supra* note 1.

Office, showing their intentions to reclaim their copyrights under § 203.⁷⁰ There certainly will be many more musical artists who follow this example, and the litigation battle is expected to be very intense.⁷¹ Don Henley, formally of the Eagles and founder of the Recording Artists Coalition, has been very outspoken on behalf of musicians' rights, framing the debate as essentially one of fairness.⁷² Mr. Henley believes that artists deserve to get their copyrights back because they created the music, that the record companies have profited enough from the music, and that many musical artists fell victim to unequal bargaining power and youthful ignorance of the law.⁷³

Victor Willis, original lead singer in the group the Village People, is another high-profile example currently making rounds in the media.⁷⁴ Mr. Willis filed papers in 2011 to reclaim the rights to the hit "Y.M.C.A." as well as thirty-two other Village People songs.⁷⁵ Mr. Willis currently earns royalties from Village People recordings of \$30,000 to \$40,000 a year, but if he successfully gains rights to the aforementioned recordings, that number would "triple or quadruple."⁷⁶ Mr. Willis's case also exhibits issues of "works for hire" and "joint authorship,"⁷⁷ discussed below.⁷⁸ While the termination provision of § 203 applies to all copyrightable works, terminations by musical artists are particularly relevant because so much is at stake economically

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Larry Rother, *A Village Person Tests the Copyright Law*, N.Y. TIMES, Aug. 17, 2011, available at <http://www.nytimes.com/2011/08/17/arts/music/village-people-singer-claims-rights-to-ymca.html>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Infra* Part III.

for all parties involved.⁷⁹ This is compounded by the uncertainty surrounding how § 203 will impact the recording industry.⁸⁰

The termination provision of § 203(a) states that “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 by the author.⁸¹ The statutory termination right cannot be assigned or waived in advance, and any contract clause claiming to do so is considered void, based on a theory of unequal bargaining power, and the impossibility of determining a work’s value until it has been exploited.⁸² The right to terminate any transfer or assignment of a copyrighted work “is the most important available to its author, because with that termination the author can receive the full benefit of all her other rights.”⁸³ Under § 106 of the Copyright Act, the exclusive rights of the owner of a copyright in a sound recording are the right to reproduce the work,⁸⁴ to prepare derivative works,⁸⁵ to distribute the work,⁸⁶ and the right to perform the copyrighted work publicly through a digital audio transmission.⁸⁷

The procedures for terminating transfers under § 203 can become immensely complicated. One exercising such rights must give advance notice between ten and two years before the date that such transfer’s termination window begins.⁸⁸ This termination window lasts for five years, starting at the end of thirty-five years from the date of the grant; if the artist—or

⁷⁹ Rother, *supra* note 74.

⁸⁰ *Id.*

⁸¹ § 203(a). Grants made prior to January 1, 1978 are governed by § 304, but this Comment does not address that provision except where it can provide clarification. *See* § 304.

⁸² H.R. Rep. No. 94-1476, at 124.

⁸³ Mark H. Jaffe, *Diffusing the Time Bomb Once Again—Determining Authorship in a Sound Recording*, 53 J. COPYRIGHT SOC’Y U.S.A. 139, 147 (2006).

⁸⁴ § 106(1).

⁸⁵ § 106(2).

⁸⁶ § 106(3).

⁸⁷ § 106(6).

⁸⁸ § 203(a).

his successors in interest—does not terminate within the proper time period, the artist’s termination rights disappear.⁸⁹ The heavy procedural requirements put a high burden on the author, and there certainly will be authors who fail to reclaim their works because they missed an important deadline.⁹⁰

Works for hire and dispositions by will do not count for § 203 purposes—if a work is considered a work for hire, the creator of the work never owned the copyright at all.⁹¹ Regarding grants made by joint authors, termination must be accorded by a majority vote.⁹² This makes the complicated task of determining the statutory “author” of a sound recording all the more important. Also, the grantee may continue to exploit a derivative work prepared under authority of the grant before the grant’s termination.⁹³ Litigating these issues makes matters even more difficult, especially arguments over whether certain creations are works for hire or joint works. Before discussing the ramifications of such classifications, it is necessary to understand some of the complex terminology of copyright and the music industry.

The 1976 Act defines “sound recordings” as “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work”⁹⁴ A sound recording⁹⁵ and the underlying musical composition⁹⁶ are each afforded separate copyright protection.⁹⁷ A musical composition,⁹⁸ for

⁸⁹ *Id.*

⁹⁰ These strict procedural requirements are inconsistent with the 1976 Act in general, which, unlike the 1909 Act, did away with publication and notice requirements for works to gain copyright protection. Under the 1976 Act, protection begins at the moment of fixation.

⁹¹ § 203(a).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ § 101.

⁹⁵ § 102(a)(7). § 102(a)(7) protects the particular series of sounds collected in the ‘sound recording,’ *not* the song being recorded (the ‘musical work’) nor the physical object in which the sound recording and the musical work are embodied (the ‘phonorecord’). H.R. Rep. No. 94-1476, at 5669.

⁹⁶ § 102(2).

⁹⁷ *Id.*

⁹⁸ *Id.*

example, would be the melody, harmony, and lyrics as written by the composer, whereas a sound recording is the “rendition” of the song as embodied in a phonorecord,⁹⁹ including artistic decisions made by vocalists, instrumentalists, musical directors, and recording engineers.¹⁰⁰ Because a sound recording may arise from the varied contributions of several people, one must determine who has a stake in the sound recording as an “author” and in what proportions. Congress ducked this question when it passed the 1976 Act, leaving the matter to be determined by the “employment relationship and bargaining among the interests involved.”¹⁰¹ The issue of copyright ownership in a sound recording, therefore, is one that may be resolved by contract according to the copyright law; but in practice and in the judicial treatment of such issues, it has been decidedly more complex than mere contractual terms.¹⁰²

The 1976 Act defines “joint works” as “work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”¹⁰³ Inseparable here means that each contribution has little or no independent meaning standing alone; interdependent means that each contribution has some meaning when standing alone, but each achieves its primary significance because of some combination—e.g., music and lyrics making up a song.¹⁰⁴ Joint authors must make copyrightable contributions, and those with non-copyrightable contributions can protect their rights through contract or assignment.¹⁰⁵ Combining each contribution into the inseparable whole will sustain uncopyrightable ideas if the requisite intent of the parties is that their contributions be so combined to make them joint

⁹⁹ “Phonorecords’ are material objects in which sounds . . . are fixed by any method now known or later developed,” which includes vinyl records, compact discs, tapes, digital MP3 files, and any other method. § 101.

¹⁰⁰ *Id.*

¹⁰¹ H.R. Rep. No. 94-1476, at 5669.

¹⁰² *Id.*

¹⁰³ § 101 (2000).

¹⁰⁴ *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991); *see also* H.R.Rep. No. 1476, 94th Cong., 2d Sess. 120 (1976).

¹⁰⁵ *Childress*, 945 F.2d at 505.

authors.¹⁰⁶ This highlights some confusion and ambiguity in determining who is a joint author, and this has potential ramifications for § 203 termination of transfers of sound recordings because of the unique issues of authorship presented by sound recordings. Joint owners are treated as tenants in common, entitled to equal undivided interests in the whole work; so each joint author has the right to use the copyrighted work as he wishes, subject to account to other joint owners for any profits made.¹⁰⁷ This gets especially problematic for artists trying to reclaim their rights if the engineer/producer is an employee of a record company, potentially making their share in the joint work amenable to the work for hire doctrine.¹⁰⁸

The 1976 Act defines “works for hire” as “a work employed by an employee within the scope of his or her employment.”¹⁰⁹ The second part of the § 101 definition specifically enumerates nine categories in which “a work specially ordered or commissioned” constitutes a work for hire.¹¹⁰ While sound recordings are not listed, compilations¹¹¹ are; so if an album can be considered a compilation, sound recordings could in theory be works for hire under the second prong.¹¹² Usually, however, issues with works for hire and sound recordings are resolved under the employer-employee relationship.¹¹³ In *CCNV v. Reid*, the Supreme Court held the “federal common law” of agency law regarding “works for hire” governs the term “employee.”¹¹⁴ If a sound recording—or any other work—is deemed a work for hire, then “the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns

¹⁰⁶ 1 Nimmer & Nimmer, § 6.03, at 6–7.

¹⁰⁷ 2 Patry on Copyright § 5:7.

¹⁰⁸ *Id.*

¹⁰⁹ § 101.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See* *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135 (2d Cir. 2010).

¹¹³ *Id.*

¹¹⁴ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989).

all of the rights comprised in the copyright.”¹¹⁵ Finding that a work is a “work for hire” destroys any hope of an artist attempting to assert termination rights because works for hire are exempt from § 203’s reach.¹¹⁶

Another termination-of-transfers provision, § 304(c) applies to works that were in their first or renewal term on January 1, 1978, and allows the author or her successors in interest to terminate transfers *made before that date*, so as to recover the thirty-nine years of additional protection added to the 1909 Act’s twenty-eight-year renewal term.¹¹⁷ The thirty-nine-year extension term represents a completely new property right, and there are strong reasons for giving the author, who is the fundamental beneficiary of copyright under the Constitution, an opportunity to share it. In addition, § 304(d) governs terminations where the work was subsisting in its renewal term on the date the CTEA was enacted¹¹⁸ if the § 304(c) termination right had expired by that date, and the author or owner of the termination right must not have previously exercised her § 304(c) termination right.¹¹⁹ If those three conditions are met, all of the § 304(c) provisions apply to § 304(d) provisions, which in certain limited circumstances allows the author to recapture the twenty-year period added to the CTEA.¹²⁰

The copyright law in the context of the music industry is extremely complex. There are two different types of copyright owners, those who own the copyright to the musical composition,¹²¹ and those that own the copyright to the sound recording.¹²² Each of these owners is granted numerous rights, some of which are subject to compulsory licensing

¹¹⁵ § 201(b).

¹¹⁶ *See* § 203(a).

¹¹⁷ § 304(c). (nineteen years added to 1976 Act, plus an additional twenty years added under the Sonny Bono Copyright Term Extension Act in 1998).

¹¹⁸ § 201 (1998) (enacted on October 27, 1998).

¹¹⁹ § 304(d).

¹²⁰ *Id.*

¹²¹ § 102(a)(2).

¹²² § 102(a)(7).

provisions.¹²³ This complex system became even more complicated with digital distribution technologies.¹²⁴ With the current debate over § 203, there is big money at stake for both musical artists and record companies.¹²⁵ Control of the separate rights inherent in copyright allows for various licensing opportunities, which is where holders of copyright make their money.¹²⁶ A disproportionately large number of copyrights are owned by the “Big Four”—Sony BMG, Universal Music Group, EMI, and Warner Music Group.¹²⁷ The big players of the music industry are facing potentially devastating economic losses upon the termination of the many transfers of rights they received starting in 1978.¹²⁸ Thus, the record companies have incentives to do whatever it takes to block the efforts by artists to reclaim their rights. The more successful the record companies are at this endeavor, the more the notion of copyright as “promoting Science and the useful Arts” is ignored for the sake of other considerations—namely, an industry’s bottom line.

In the modern music industry, when a musical artist is “discovered” by a record company, the company will extend the artist a record deal.¹²⁹ In the contract, there will usually be provisions stating both that any work produced by the artist is a “work for hire,” and that the artist assigns all interest in any work he creates to the record company.¹³⁰ The record company will advance the artist some funds, which are recouped from record sales, and provide the artist with use of the studio, and with producers, engineers, and other musicians.¹³¹ After the album is

¹²³ Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 697–98 (2003).

¹²⁴ *Id.*

¹²⁵ *Id.* at 700.

¹²⁶ *Id.* at 707.

¹²⁷ *Id.* at 720.

¹²⁸ *Id.*

¹²⁹ PHILIP H. ENNIS, *THE SEVENTH STREAM: THE EMERGENCE OF ROCKNROLL IN AMERICAN POPULAR MUSIC* 268 (1992).

¹³⁰ Scott T. Okamoto, *Musical Sound Recordings as Works Made for Hire: Money for Nothing and Tracks for Free*, 37 U.S.F. L. REV. 783, 783–84 (2003).

¹³¹ *Id.*

made, the record company will promote it and do its best to sell it.¹³² But at some point the musical artist might have a falling out with his record label, at which point he will demand the return of his sound recording, his artistic creation.¹³³

The record company can then respond that the album is a “work for hire” and that the artist never owned it at all.¹³⁴ The record company can also point to the assignment clauses in the contract.¹³⁵ The company could also argue that, even if the work is not a work for hire, the sound recording is a “joint work” produced by “joint authors.” These joint authors, in addition to the artist trying to reclaim his rights, might consist of the producer, sound engineer, the studio musicians, and anyone else involved in the creation of the work.¹³⁶ In theory, these individuals would all have a copyright in their contribution to the work, but, because they are often employees of the record company—with the exception of the producer in many cases—their portion of ownership goes directly to the company. This is why the determination of who the author or authors of a sound recording are is exceedingly important in the current debate under § 203.

IV. PREDICTING THE WINNERS OF THE § 203 BATTLES AND CRITICIZING THE COPYRIGHT ACT—WHO IS THE AUTHOR OF A SOUND RECORDING

Determining the authorship of a sound recording can be extremely complex.¹³⁷ The continuing uncertainty in this regard could lead to extensive and expensive litigation, and might also lead to forceful attempts of renegotiation. The Copyright Office’s discussion of sound recordings states that “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

¹³² Ennis, *supra* note 129, at 266.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See* § 101.

¹³⁷ Jaffe, *supra* note 83, at 139.

contribution of the person or persons responsible for capturing the sounds to make the final recording.”¹³⁸ Neither the Copyright Office nor Congress has specified which of the numerous performers who contribute to a sound recording can claim authorship.¹³⁹ Congress decided, in the end, to leave it to “the employment relationship and bargaining among the interests involved.”¹⁴⁰

The Copyright 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,” and the duration of the copyright lasts until seventy years after the death of the last surviving joint author.¹⁴¹ There are contrasting judicial approaches in construing this definition. The most commonly held view is that “each individual contribution in a joint work be independently copyrightable.”¹⁴² The Second Circuit, in *Childress*, adopted this approach,¹⁴³ as did the Ninth Circuit.¹⁴⁴

The Second Circuit and the Ninth Circuit disagree, however, on the nature of “intent” as understood in the definition of a joint work.¹⁴⁵ *Childress* held that people are joint authors only if both of them—or all of them if more than two people are at issue—fully intended to both merge their contributions into one whole work and to share the rights in that work as joint authors.¹⁴⁶ Thus this standard looks to both objective and subjective manifestations of intent.¹⁴⁷ The Ninth Circuit, under *Aalmuhammed*, requires that the “putative joint authors must make objective manifestations of a shared intent to be coauthors,” and they do not have to have the

¹³⁸ *Id.* at 145.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 146 (citing H.R. Rep. No. 92-487, 1570 (1971)).

¹⁴¹ 17 U.S.C. § 101.

¹⁴² Jaffe, *supra* note 83, at 175.

¹⁴³ *Childress v. Taylor*, 945 F.2d 500, 506 (2d Cir. 1991).

¹⁴⁴ *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 1999).

¹⁴⁵ *Compare Childress*, 945 F.2d, *with Aalmuhammed*, 202 F.3d.

¹⁴⁶ *Childress*, 945 F.2d at 506.

¹⁴⁷ *Id.* at 509.

subjective intent to share in the rights underlying the joint work.¹⁴⁸ Because of this lack of uniformity, as well as difficulties in proving either subjective or objective intent, this will be a big point of contention in the litigation between record companies and artists. Again, this all hinges on the concept of authorship within American copyright law, and in this context, “joint” authorship.

With sound recordings, those with possible claims to authorship as contributors to the work are the artist herself, the producer, the sound engineer, and any other contributing or back-up musicians.¹⁴⁹ The producer is very involved in the recording process, therefore some courts consider producers joint authors under certain conditions. *Staggers v. Real Authentic Sound* suggests that the contributions of a producer, especially when the producer exercises control of the recording process, may constitute joint authorship.¹⁵⁰ Producers, besides the musical artists, probably have the strongest claim to be a joint author under the current copyright law.

A recording’s sound engineer may also have a property interest in the recording. A sound engineer usually mixes the master recording and is “hired by either the record company or the artist, and is often paid as an employee.”¹⁵¹ Thus the sound engineer’s work product could be considered a work for hire.¹⁵² There is also some case law holding that a sound engineer for a live performance might be a joint author of the accompanying sound recording.¹⁵³ In theory at least, under the current system, if a sound engineer can be considered a joint author, and the sound engineer’s contribution to the sound recording was a work for hire, then the rights of a sound engineer in a sound recording could have gone to the record company. This gives the

¹⁴⁸ Jaffe, *supra* note 83, at 177 (citing *Aalmuhammed* 202 F.3d at 1234).

¹⁴⁹ *See* § 101.

¹⁵⁰ *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 63 (D.D.C. 1999); *see also* *Shady Records v. Source Enterprises*, 351 F. Supp. 2d 74 (S.D.N.Y. 2004).

¹⁵¹ Jaffe, *supra* note 83, at 172.

¹⁵² *Id.*

¹⁵³ *Systems XIX v. Parker*, 30 F. Supp. 2d 1225, 1228 (N.D. Cal. 1998).

record company more power at the expense of the musical artist because a majority of joint authors are required to agree to terminate transfers.¹⁵⁴ If courts allow record companies to retain copyrights under this theory, the public and the copyright law will be greatly damaged because this does not square well with the Copyright Clause and its purpose of “promoting Science and the useful Arts.”¹⁵⁵

Other possible joint-author claimants are those instrumentalists and vocalists that contribute to a recording as back-up musicians. There are many instances where a record company employs these individuals and thus if they had a joint authorship stake, it would belong to the record company as a work for hire. But the case of *Ulloa v. Universal Music* shows the potentiality for the “chaotic and uncertain litigation that can ultimately result if the performances are not deemed works for hire.”¹⁵⁶ Ulloa was an unsigned vocalist who happened to visit Shawn Carter’s (Jay-Z’s) recording studio on the day that he was recording a song that later became a hit.¹⁵⁷ Ulloa sang a short vocal phrase in the song for Carter, who later used it in the recording.¹⁵⁸ The two never discussed any terms, and after the song became a huge hit, Ulloa brought an infringement action against Carter and Universal, as well as a claim that she was a joint author of the song.¹⁵⁹ The court denied Ulloa’s claim for joint authorship, under the *Childress* standard of intent, holding that Carter showed no intent to share in the authorship of the song in question.¹⁶⁰ The court found, however, that Ulloa did have a claim for infringement since she contributed a copyrightable expression.¹⁶¹

¹⁵⁴ § 203.

¹⁵⁵ U.S. CONST. art. I, § 8, cl. 8.

¹⁵⁶ Jaffe, *supra* note 83, at 183 (citing *Ulloa v. Universal Music & Video Distribution Corp.*, 303 F. Supp. 2d 409 (S.D.N.Y. 2003)).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Ulloa*, 303 F. Supp. 2d at 412–14.

¹⁶¹ *Id.*

According to the current state of the law, musical artists and producers who exercised significant control in the recording process will most likely be deemed coauthors of a sound recording. The claims of the other individuals who contributed to the sound recording, while tenable, most likely will not resolve in a finding of joint authorship by the courts.¹⁶² Joint authorship could be found in certain circumstances—for instance, if any of those individuals contributed a large amount to the sound recording and the requisite intent was found under the “easier” standard of *Aalmuhammed*.¹⁶³ Because of the divisibility of copyright implicit in joint authorship, even if the artist successfully terminates his transfer under § 203, the rights received might be a mere fraction of the copyright as a whole, with the rest going to the other joint authors—assuming a majority authorized the termination.¹⁶⁴ In addition, musical artists face formidable opponents in record companies that have every incentive to prevent the musicians from successfully exercising their rights under § 203.¹⁶⁵

A somewhat novel argument that record companies could make under current law revolves around “compilations.”¹⁶⁶ Record companies could argue that the second part of the work-for-hire definition applies to musical recording artists, and that an album is a compilation for the purposes of defining copyright ownership.¹⁶⁷ The statutory definition of works for hire includes compilations, and at least one court has held that a musical album is a compilation for infringement purposes.¹⁶⁸ In *Bryant*, plaintiffs-appellants appealed the district court’s grant of a

¹⁶² *Id.*; *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991).

¹⁶³ The Ninth Circuit only requires objective intent on both putative joint owners, while the Second Circuit requires both objective and subjective intent. *Compare Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 1999), *with Childress*, 945 F.2d.

¹⁶⁴ *See* § 101.

¹⁶⁵ Loren, *supra* note 123, at 720.

¹⁶⁶ A “compilation” is defined as “a work formed by the collection and assembling or 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.” § 101.

¹⁶⁷ *Bryant v. Media Right Productions, Inc.*, 603 F.3d 135 (2d Cir. 2010).

¹⁶⁸ *Id.* at 142.

single statutory damage award for each album infringed by defendant-appellee, even though the appellants had properly obtained and registered a copyright in each individual song on the album.¹⁶⁹ Appellants argued that each song on each album qualified as a separate work since each song had its own copyright, and that the infringing appellee sold the songs individually.¹⁷⁰ The Second Circuit rejected this argument and affirmed the district court, relying on the Conference Report accompanying the Copyright Act.¹⁷¹ The report stated that a compilation results from the process of selecting and arranging preexisting material of all kinds, “regardless of whether . . . the individual items in the material have been or ever could have been subject to copyright.”¹⁷² The court went on to state that an album fits into the definition of a compilation because it is a “collection of preexisting materials—songs—that are selected and arranged by the author in a way that results in an original work of authorship—the album.”¹⁷³ Appellants also argued that because each song has “independent economic value” and was sold separately as well as in conjunction with the albums, there should have been a statutory damage award for each song.¹⁷⁴ The court rejected this argument by construing the language of the statutory damages provision to not allow for such reasoning.¹⁷⁵

If an album is a “compilation” for copyright purposes, record companies may be able to argue that an album is “a work specially ordered or commissioned” and constitutes a work for hire under the second part of the work for hire definition—this ordinarily cannot be done because “sound recording” is not one of the enumerated works here.¹⁷⁶ The fact that record companies, under the current statutory and case law, stand a chance to succeed on this theory, illustrates the

¹⁶⁹ *Id.* at 137.

¹⁷⁰ *Id.* at 140.

¹⁷¹ *Id.*

¹⁷² *Id.* (citing H.R. Rep. No. 1476).

¹⁷³ Bryant, 603 F.3d at 140–41.

¹⁷⁴ *Id.* at 141.

¹⁷⁵ *Id.* at 142.

¹⁷⁶ § 101.

strong impetus for reexamining our copyright scheme. This reexamination needs to not only strengthen authors' rights, but also needs to be mindful that in order to "promote the Progress of Science," Congress must consider the rights of society in general.¹⁷⁷

This all has to be weighed against a proper construction of the important language in the Copyright Clause, "for limited times."¹⁷⁸ The fact that record companies stand a chance to retain copyright to a work authored by other individuals thirty-five years after the work's creation—and continuing much longer under the relevant statutory period—illustrates just how off-track the copyright law has become. Freedom of contract principles should not be allowed to override the Constitution, and copyright law needs to take this into account—the current copyright term greatly

exceeds the economic incentive necessary to spur significant creative activities. Such long terms largely reflect a focus on protecting the property rights of the copyright owner without regard to the ultimate underlying goal of copyright, which is to enable the public to gain free and unhindered access to creative endeavors.¹⁷⁹

It is worthwhile to note that in 1999, Congress amended the Copyright Act so that sound recordings fit within the definition of "works for hire."¹⁸⁰ But only months later, Congress repealed the amendment after an outcry by recording artists.¹⁸¹ "Because our Constitution was designed to protect genuine authors, the legal fiction of corporate 'authorship' as embodied in the work-for-hire doctrine should be limited to situations where it is necessary to properly provide for the 'progress of the arts' and to reward creators."¹⁸² Record companies' efforts to get a work declared a work for hire and thus block a recording artist's attempt to reclaim her rights

¹⁷⁷ U.S. CONST. art. I, § 8, cl. 8.

¹⁷⁸ *Id.*; *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 37 (2003) (Congress may not "create a species of perpetual patent [or] copyright.>").

¹⁷⁹ Andrew Beckerman-Rodau, *The Problem with Intellectual Property Rights: Subject Matter Expansion*, 13 *YALE J. L. & TECH.* 36, 67 (2010–11).

¹⁸⁰ Jaffe, *supra* note 83, at 141.

¹⁸¹ *Id.*

¹⁸² *Id.* at 191.

are not done pursuant to the “progress of the arts,” and therefore violate the constitutional language.¹⁸³ But under the current copyright scheme, record companies attempting to use the works for hire provision in such a way is perfectly legal.¹⁸⁴ This is why Congress must revise the Copyright Act so that it comports with the Constitution and copyright theory; specifically, “authors” should be given rights to their creative works, “for limited times,” and for the purpose of promoting knowledge, learning, and the general welfare of society.

Furthermore, the public should be the primary beneficiary of any copyright statutory scheme. When the public is in fact the primary beneficiary because creativity and progress are being promoted, the public’s and the author’s economic interests become aligned. Essentially, society is willing to allow creators of artistic works a limited monopoly of limited duration to incentivize those authors and others in the promotion of progress and knowledge.

V. EXAMINING AMERICAN COPYRIGHT LAW THROUGH THE LENS OF § 203

The divisiveness surrounding § 203 and terminating copyright transfers in the music industry provides an opportunity to critique the current state of American copyright law. In the context of the music industry, copyright law today provides too much protection to a small number of very large and economically powerful record companies. There are four major record companies that dominate the industry and all are members of the Record Industry Association of American (RIAA), “a group with significant influence in the music industry and in Congress.”¹⁸⁵ It is these record companies who reap enormous profits from our copyright law because the duration of the copyright term is so long. The author’s life plus seventy years is not a “limited time” and it gives copyright holders too much time to economically exploit a copyrighted

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 686 (2003) (these four are Sony BMG, Universal Music Group, EMI, and Warner Music Group).

work.¹⁸⁶ In addition, such lengthy protection is not needed in order to promote the progress of knowledge for the sake of the general welfare.¹⁸⁷

A. THE PROBLEM WITH FRAMING THE § 203 DEBATES IN PURELY ECONOMIC TERMS

The free transferability of intellectual property rights allows for the author to benefit economically upon transferring those exclusive rights.¹⁸⁸ Since copyright contains an infinitely divisible “bundle of rights,” authors can freely license any part of their rights to a particular work to anyone else to use according to the terms of a contract.¹⁸⁹ This is where copyright is lucrative economically. But the fact that the dialogue is framed only in economic terms illustrates that the copyright system has gone astray and is ignoring the justification for incentivizing creators: to increase the public welfare and to promote knowledge, ideas, and the arts to better society.¹⁹⁰

As the duration of protection under the copyright law becomes further extended, the public’s benefit begins to decrease because the public has less access—from an economic standpoint—to the work. The bargain has changed, and works are deferred from entering the public domain. This is allowable up to a certain point, namely, for “limited times,” but the current statutory periods far exceed such language.¹⁹¹ The music industry and other content industries rich in copyright ownership are very powerful and continue to successfully lobby Congress for their favor.¹⁹² For “each time copyrights are about to expire, there is a massive

¹⁸⁶ U.S. CONST. art. I, § 8, cl. 8.

¹⁸⁷ *Id.*

¹⁸⁸ § 106. The six exclusive rights of the copyright law are the right to reproduce copies or phonorecords; to prepare derivative works; to distribute copies or phonorecords; to perform the work publicly; to display the work publicly; and to perform the work publicly by means of a digital audio transmission. *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ U.S. CONST. art. I, § 8, cl. 8.

¹⁹¹ The current copyright term is life of the author plus seventy years. § 302. Compare this to the duration of patent protection—twenty years from date application was filed. § 154(a)(2). The duration for design patents is fourteen years from the date of the grant. § 173.

¹⁹² *Elfred*, 537 U.S. at 554–55.

amount of lobbying to get the copyright term extended” whereby record companies argue that they “promote Progress.”¹⁹³

But the argument that record companies “promote Progress” by enabling the production and distribution of sound recordings as musical albums only goes so far. Under the current copyright law, copyright in works for hire last the shorter of ninety-five years from publication or 120 years from creation.¹⁹⁴ Even assuming a record company published a work immediately after its creation, the copyright lasts ninety-five years, which is far too long for a monopoly in a work at the public’s expense. So too does the duration of copyright for those works not works for hire—seventy years after the author’s death.¹⁹⁵ When musical and other artistic works become merely an “undifferentiated product,” the work of art becomes valued only for its profitability, without regard for its potential contribution to knowledge and learning, and to aesthetics.¹⁹⁶ This mentality, driven by the content industries, removes the social bargain aspect of the Copyright Clause from the equation and illustrates further that the terms of copyright protection are too lengthy.¹⁹⁷

There has also been an increasing “concentration and integration of media”¹⁹⁸ throughout the twentieth century.¹⁹⁹ The four largest recording labels²⁰⁰ control 84.8 percent of the American music market, and the five largest cable companies account for seventy-four percent of American cable subscribers.²⁰¹ This “narrowing has an effect on what is produced. The product

¹⁹³ Lessig, *supra* note 32 at 217–18.

¹⁹⁴ § 302(c).

¹⁹⁵ § 302(a).

¹⁹⁶ Stacy F. McDonald, *Copyright for Sale: How the Commodification of Intellectual Property Distorts the Social Bargain Implicit in the Copyright Clause*, 50 *HOW. L.J.* 541, 543–44 (2007).

¹⁹⁷ *Id.* at 547 (“Monopolistic protection is only the means to achieve public interest goals rather than being the primary goal of the copyright system.”).

¹⁹⁸ Lessig, *supra* note 32, at 162.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*; see Loren, *supra* note **Error! Bookmark not defined.**

²⁰¹ Loren, *supra* note 185 at 165.

of such large and concentrated networks is increasingly homogenous. Increasingly safe. Increasingly sterile.”²⁰² The limited monopolies under the Copyright Clause clearly took into account that economics and market forces play a role in the balance between stimulating creativity and maintaining a robust public domain.²⁰³ But the Framers did not intend to make economics and bottom-lines the driving force of the copyright system.²⁰⁴ Rather, they intended that intellectual property law be used to promote the general welfare and to aid in the betterment of society as a whole.²⁰⁵ This is forgotten in many instances, as copyrighted works have become merely “the object of a market transaction devoid of any other use or value besides profit.”²⁰⁶

The Supreme Court stated in *Twentieth Century Music Corp. v. Aiken* that

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.²⁰⁷

When the terms of copyright protection are no longer for “limited times,” the purposes of promoting knowledge and the useful arts not only cease to exist, but are negated.²⁰⁸

Justice Breyer’s dissent from *Eldred v. Ashcroft* aptly states the premise under which this Comment argues is an adequate alternative that Congress should undertake.²⁰⁹ After numerous citations to the history of the copyright law in the United States and England, as well as citations to case law and the House Reports from both the 1909 Act as well as the Berne Convention

²⁰² *Id.* at 166.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ U.S. CONST. art. I, § 8, cl. 8.

²⁰⁶ McDonald, *supra* note **Error! Bookmark not defined.**, at 554.

²⁰⁷ *Twentieth Century Music Corp. v. Aiken*, 44 U.S. 151, 156 (1975).

²⁰⁸ *Id.*

²⁰⁹ *Elfred v. Ashcroft*, 537 U.S. 186 at 242–67 (2003) (Breyer, J., dissenting).

Implementation Act of 1988, Justice Breyer makes a strong policy argument for limited copyright protection.²¹⁰ He operates from the following initial assumptions:

We should take the following as well established: that copyright statutes must serve public, not private ends; that they must seek “to promote Progress” of knowledge and learning; and that they must do so both by creating incentives for authors to produce and by removing the related restrictions on dissemination after expiration of a copyright’s ‘limited Time.’²¹¹

Justice Breyer goes on to assert that the Sonny Bono Copyright Term Extension Act of 1998 (CTEA) seeks, as its primary legal effect, to “grant the extended term not to authors, but to their heirs, estates, or corporate successors.”²¹² The CTEA’s “practical effect is not to promote, but to inhibit, the progress of Science.”²¹³ For the motivation for the creativity of authors is the reward of *limited* exclusive use to the authors of their creative works.²¹⁴ Since this reward is the means to spur creativity, and not an end of the creativity, the reward is limited so that its beneficiaries, the public, “will not be permanently deprived of the fruits of an artist’s labors.”²¹⁵ Life of the author plus seventy years deprives the public from the fruits of an artist’s labor and ignores the constitutional impetus for copyright protection—to promote the general welfare.²¹⁶

B. COPYRIGHT LAW AND § 203 MUST PROMOTE THE GENERAL WELFARE

When the impetus for copyright protection becomes overly commodified, and the underlying rationale of promoting knowledge and the arts becomes marginalized, copyright law loses site of the importance to fortify society with a large public domain and a large cultural commons with aesthetic and intellectual value, and not just commercial value. There is an

²¹⁰ *Id.*

²¹¹ *Id.* at 247–48.

²¹² *Id.* at 243.

²¹³ *Id.*

²¹⁴ U.S. CONST. art. I, § 8, cl. 8.

²¹⁵ *Elfred*, 537 U.S. at 246 (Breyer, J., dissenting) (citing *Stewart v. Abend*, 495 U.S. 207, 228 (1990)).

²¹⁶ U.S. CONST. art. I, § 8, cl. 8.

inherent aesthetic quality and value to the arts that is completely separate from the ability of art to be exploited economically. When commercial value becomes the dominant force in the creation of art, the aesthetic quality of creative works suffers. While American copyright law needs to provide financial incentives to “authors,” those incentives must be directed in such a way that does not ignore that such incentives exist for the purpose of promoting the general welfare and for creating a society rich in culture and knowledge.

The termination-of-transfers provision of § 203 is only good public policy insofar as it allows authors to reclaim the rights to their creations through operation of law. Section 203, however, does nothing to change the excessively long duration of copyright protection. The economic benefit seems to be that, assuming a musician can leap through the procedural and litigation hurdles and reclaim his copyright, he will benefit from said copyright through the duration of his life, and his heirs or devisees will reap the full benefit for seventy additional years.²¹⁷ This is beneficial to society, from a fairness standpoint, only to the extent that it disallows record companies, who used unequal bargaining power to gain artists’ copyrights, to continue benefiting from the work. There is indeed a congressional view that “a primary rationale for extending the copyright term is to assure authors and their dependents ‘a fair economic return.’”²¹⁸ But again, seventy years after the death of the author is not a “limited time,” and § 203 does not take this into account.

Furthermore, Congress has authorized a copyright term that can extend over five times longer than the patent term.²¹⁹ The first copyright and patent statutes, both enacted in 1790,

²¹⁷ See § 203.

²¹⁸ Walterscheid, *supra* note 17, at 393–94 (citing 141 Cong. Rec. S3390 (1995), containing Senate debate of the CTEA, also noting that extending the term of the 1976 Act would allow “authors to reap the full benefits to which they are entitled from the exploitation of their creative works”).

²¹⁹ *Id.* at 388–90.

contained terms of protection of fourteen years.²²⁰ Now, the statutory term for patents is twenty years, while the term for copyrights is the life of the author plus an additional seventy years, or for works for hire, the shorter of ninety-five years after publication or 120 years after creation.²²¹ Using as a baseline for the copyright term of ninety-five years, since 1790 “the statutory patent term has increased by 43% but the statutory copyright term has increased by almost 580%.”²²²

One might make the counterargument that patentable inventions, for example, drugs and other devices for public health, have more important uses to society than works of authors governed by copyright. But this does not justify the large gap between copyright and patent terms of protection.²²³ While a life-saving drug might have more immediate impact on society than a book or a sound recording, a person inventing such a drug needs the requisite knowledge—an idea expressed in a tangible form of expression, governed by copyright law. Even without making a value judgment between patented works and copyrighted works, the Constitution’s “intellectual property clause” refers to both patents and copyrights.²²⁴ Thus, the difference in statutory terms of protection between patents and copyright is especially illustrative of how far off track copyright law has gotten, and this is detrimental to the public welfare.

In the legislative history of § 203 of the 1976 Act, Congress stated that the driving force of the termination-of-transfer provisions was unequal bargaining power between artists and publishers or producers of works, and the impossibility to determine a work’s value at the nascent stage of creation.²²⁵ But if unequal bargaining power was really a concern of Congress here, why allow the party with the upper hand, the publishers, thirty-five years to exploit the

²²⁰ Act of May 31, 1790, 1 STAT. 124.

²²¹ See 35 U.S.C. § 155; § 302.

²²² *Id.* at 389.

²²³ See *supra*, note **Error! Bookmark not defined.**

²²⁴ See U.S. CONST. art. I, § 8, cl. 8.

²²⁵ H.R. Rep. No. 94-1476, at 124.

copyrighted creation?²²⁶ Section 203 fails to properly restore the balance of bargaining power in copyright because it does not take thirty-five years to determine the market value of music sound recordings.

In addition, § 203 and the 1976 Act copyright extensions fail to fully take into account the public’s stake in the copyright equation. For in the promotion of “the Progress of Science and Useful Arts,” for whom should the benefits of such promotion be made if not for the society generally?²²⁷ Indeed, “market mechanisms should facilitate creativity and move from protecting economic interests of copyright owners to ensuring authorship flourishes as well as enable greater author-reader connections.”²²⁸ Here, author-reader can be substituted with a broader concept—author as creator of any artistic work, and reader as the one who uses, enjoys, and absorbs such works.²²⁹ Having a copyright law that heavily favors the content industries—in lieu of a more author-friendly statutory scheme—“creates a market for literary and artistic work that does not encourage the development of authorship and the process of creativity needed for the production of works for the public.”²³⁰

When the incentives that Congress was supposed to provide to authors to create artistic works—those that should advance knowledge and advance the arts—devolve into purely economic incentives for those companies exploiting the arts, there is a problem. Further, when publishers exploit artistic works for purely economic incentives, knowledge and the arts are not progressing to their fullest extent. Because publishers have made large investments in searching for exploitable works, producing them, and distributing them, “any form of enjoyment by the

²²⁶ § 203(a).

²²⁷ U.S. CONST. art. I, § 8, cl. 8.

²²⁸ Alina Ng, *Authors and Readers: Conceptualizing Authorship in Copyright Law*, 30 HASTINGS COMM. & ENT. L.J. 377, 416 (2008).

²²⁹ *Id.*

²³⁰ *Id.* at 415.

public is an externality that must be internalized to ensure that the investment made in the work is fully recovered.”²³¹ Again, this ignores the interest of the public welfare within the copyright scheme.

C. SUMMARY

While copyright law needs to encourage economic investment in the production of copyrightable works in order to incentivize authors and creators, Congress must balance this against ensuring some underlying aesthetic quality of such works. But the driving force for publishers and the content industry is not artistic integrity or aesthetic quality, but rather, that they receive an acceptable return on their investment.²³² The free market forces that influence this equation are necessary and are what makes the copyright system function properly.²³³ When copyright protection is too robust in favor of content industries, however, the public suffers and is deprived of creative works in two ways. The first is that long copyright terms prevent works from entering the public domain for far too long. The second is that those artistic works, denied entry into the public domain, are also aesthetically and qualitatively anemic. When knowledge and learning suffer, the public suffers.

VI. CONCLUSION

With the current debate regarding the § 203 provisions, we will see the record companies using the full extent of their arsenal to retain their ownership of sound recordings. This ownership will be at the direct expense of the authors who unwittingly assigned away their rights to their creations, and ultimately, at the expense of the public domain and of society as a whole. This cannot stand. Our copyright law needs to reflect other values besides economic and commercial bottom lines. The Constitution demands it, as do any sound intellectual property

²³¹ *Id.* at 416–17.

²³² Ng, *supra* note 228, at 417.

²³³ *Id.*

theories. How we define authorship is a determinative factor of these debates, especially considering the constitutional language of granting, for limited times, rights “to Authors” to “promote the progress of Science.” Our copyright law not only needs to be more pro-author and pro-artist, but also “pro-public domain,” and needs to take into account where society stands in the context of the copyright law—that intellectual property in general is “considered [to be] a social bargain in which inventors and writers are rewarded for their ideas and expression, on the condition that their creations eventually will be freely available to everyone.”²³⁴ These policies and those mentioned above need to be the driving force of our copyright law.

²³⁴ Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 784 (2003).