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Aaron Samuel Fischer

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AVOIDING TERMINATION:

HOW THE MUSIC INDUSTRY SHOULD DEAL WITH THE IMMINENT BATTLE OVER COPYRIGHT TERMINATION RIGHTS

BY AARON FISCHER

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I. INTRODUCTION

The music industry is built on ownership in both intellectual and tangible property. The business is based on acquiring the intellectual property of artists and fixing it into a tangible form that can then be marketed and sold. This formula worked well for the industry for many decades, generating substantial revenue for both labels and artists. Recently, with the advent of the internet, the tangible property rights of the industry have become increasingly more difficult to protect.ⁱ In the near future the industry will similarly struggle to protect their intellectual property rights. This struggle will take place in the context of the impending between artists and labels concerning copyright termination rights.

For most property transactions, a deal is a deal. For example, if you buy a house the former owners cannot return twenty years later and repossess and your home.ⁱⁱ In terms of personal property, this principle is certainly applicable.ⁱⁱⁱ Copyright owners, however, are allowed to extinguish granted rights of use due to the Copyright Act of 1976.^{iv} The provision, popularly known as the “Termination Provision”, provides artists a “second bite at the apple.”^v This provision gives the artist the option to terminate the original grant of ownership within certain protocols.^{vi} But why is this provision and process necessary? It is often stated that the ultimate market value of creative works is one of the most difficult to predict.^{vii} Thus, fairness requires an opportunity for artists to profit after the true value of their works can be determined by the public’s response.^{viii}

This issue is a very heated topic in all art forums, but none more important or impending than in the music industry.^{ix} The music industry has already suffered huge financial losses from the emergence of the internet in recent decades, resulting in both piracy and reduced sales,

especially among new releases.^x This has left record labels more dependent than ever on sales from their back-dated catalogs of works.^{xi}

The termination provision allows artists to terminate a grant of copyright 35 years after first publishing. Because the Copyright Act amendments first went into effect in 1978, the year 2013 will present the first opportunity in which musicians can terminate these grants over their works.^{xii} Some popular musicians, such as Bruce Springsteen, Billy Joel and Kenny Rogers to name a few, have already applied for such termination.^{xiii}

However, the record labels are not expected to relinquish their property rights without a fight. The argument posed by most of the industry executives, including Steven Marks, general counsel for the Recording Industry Association of America, is that the master recordings are the property of the record labels in perpetuity as opposed to property of the musicians who created the songs.^{xiv} This argument is based on the theory that the recordings are “works for hire,” created by artists who are employees of the labels, not individual performers.^{xv}

Many artists and their attorneys do not agree with the labels about this theory. When determining if a work is indeed a “work for hire” one must look at the typical conditions of employment.^{xvi} At first glance this inspection does not favor the industry, as artists are typically “advanced” money by the labels to make their albums, which is then charged back against any royalties the artist may earn.^{xvii}

Many experts, including attorney Lita Rosari, believe that this issue will reach the Supreme Court due to the number of artists who feel so strongly about their rights and will refuse to settle.^{xviii} However others, such as Daryl Friedman, Washington representative of the Recording Academy (Grammy Awards), proffer hope that this may lead to open negotiations

between artists and labels to agree to a “broad consensus in the artistic community, so there doesn’t have to be 100 lawsuits.”^{xxix}

Although this issue is incredibly complicated and has vast implications, there are a few things that are certain; the recording industry is about to be fundamentally changed due to the legal impact of the Copyright Act of 1976 and both sides need to prepare for this inevitable legal consequences. This article will postulate in detail the claims of both sides and present possible solutions to this important issue from a label’s perspective.

II. OVERVIEW OF COPYRIGHT ACT

A. History

Although Copyright Law has existed in the United States since the Constitution first empowered Congress to promote the “useful Arts, by securing for limited times to authors... the exclusive Right to their respective Writings”, it has changed and evolved over time. The first official act in the United States was passed in the Copyright Act of 1790.^{xx} This Act was based on the early English statute, the Statute of Anne (1710), which first recognized the ownership rights of authors, as opposed to just printers and booksellers.^{xxi} This statute gave an author the exclusive right to print his or her work for fourteen years, with a fourteen year renewal term for a living author.^{xxii}

This Statute was revised over a hundred years later with the Copyright Act of 1909. This revision granted the author a longer duration from the date of publication by extending the duration of exclusive ownership from fourteen to twenty-eight years, as well as including an automatic renewal term of twenty-eight years that could be exploited by either the author or his or her heirs.^{xxiii} This change gave the authors more rights and control over their works, as well as

providing for their heirs to have rights to how the works would and could be used after an author's death.^{xxiv}

In 1976 the laws were changed again to comply with changes in technology, lending to the development of the motion picture, radio, television and recording industries.^{xxv} The most significant change in the Copyright Act of 1976 extended the protection given to authors to their lifetime plus fifty years.^{xxvi} As author Emily Burroughs notes, "This extension conformed to the duration requirements of the Berne Copyright Convention, an international standard originally adopted in 1886 by Belgium, France, Germany, Italy, Luxemburg, Spain, Switzerland, Tunisia, and the United Kingdom."^{xxvii}

B. Termination Rights

The 1976 Act also brought with it the advent of termination rights. These rights are divided into two types depending on the timing of the copyright: pre-1978 works and post-1978 works.^{xxviii} Termination rights for pre-1978 works is a less important issue for the recording industry because Section 304(c) grants an author the right to terminate only after 56 years from the earliest recognition of the artists' copyright interest which was not created until February 15, 1972.^{xxix} This means that termination rights to these sound recordings will not be able to be addressed until February of 2028. Ironically, this makes the older group of recordings the second group to be dealt with, and they will most likely follow the protocol set forth by the post-1978 works.

This lends even more focus to how the post-1978 works will be treated. In writing the Act, Congress acknowledged the disparity in negotiation power between labels and artists, as well as the complexity of determining the value of a work before commercial exploitation.^{xxx} In dealing with these complexities, the Act provides an unalienable right of termination to vest in

the author thirty-five years from the publication date.^{xxxii} However, the right is not automatic and strict guidelines on how to terminate such a grant are enumerated in the Act.^{xxxiii} The most important things these guidelines provide are a window in which a copyright holder may terminate a grant and steps for how the author should go about doing so.^{xxxiii} The Act states:

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 years from the date of execution of the grant, whichever term ends earlier.^{xxxiv}

The Act also provides that the author, or his or her duly authorized agent, must submit the termination request in writing, with advanced notice, to those they wish to exercise the rights against.^{xxxv} The Act also provides a dead author's surviving family, namely widows or widowers and children or grandchildren with the ability to exercise the right of termination.^{xxxvi} The interest is divided equally among the number of surviving heirs, thus creating multiple interests in the same copyright.^{xxxvii}

The Act further provides a formula for how termination rights function with respect to joint authors.^{xxxviii} This is a very important provision because many musical works will have more than one author. For example a band may have many members, or even a solo artist may have worked on a collaboration. As previously mentioned, a dead author's rights may be divided among his children or grandchildren, thus creating another way in which multiple parties may have an interest in a single copyright. As with the rights themselves, they differ for pre and post-1978 grants. This issue centers on the post-1978 rules because of their looming importance and the fact that they can be exercised first. In relation to post-1978 works by joint authors, a grant of copyright may only be terminated by a majority of the granting authors.^{xxxix} However, if a grant is terminated by such a majority of joint authors, the rights will revert to all authors, not just the

terminating majority.^{xli} This is just another hurdle that joint authors will have to overcome when attempting to execute a termination right. Other joint authors may not feel the need to terminate or not want to be bothered with the process. The hiring of an attorney and paperwork alone may deter an author from exercising his or her rights. In addition to the time and financial expenditures needed to exercise the termination right, many authors will be deterred when the profitability of such termination is not certain. There is also the prospect of authors who do not want the extra responsibility of handling the distribution of their recordings after termination of a copyright grant. All of these factors are hurdles that joint authors may face when attempting to get a majority to exercise termination rights.

Perhaps the most important aspect of the Act is the provision that a termination right may not be contracted away.^{xlii} This provision was most likely provided to protect unsuspecting authors against grantees that may have attempted to derail this issue by having the would-be authors sign away their termination rights.

Just as important as what the Act provides, is what it excludes. Excluded from protection of termination rights are “works made for hire” and “derivative works.”^{xlii} Derivative works may be used, with authorship vesting in the grantee if they are:

[P]repared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.^{xliii}

The more important and more effective exclusion, however, is for “Work Made For Hire.” A work made for hire is where:

[T]he employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.^{xliv}

In the case of the artist/label debate, the question of who is the author of the copyrighted work is of critical importance. If the label is found to be the author under the “work for hire” doctrine, then the artist will have no claim to termination rights since the label (employer) would be the rightful author and therefore owner of the copyright.

Another avenue in which labels may attempt to deny termination rights is titled in the Copyright Act as “Contributions to Collective Works.” This provision states:

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.^{xlv}

This argument is viewed as weaker than its “works for hire” counterpart and has only been mentioned by the labels to bolster their overall argument that the artist has no right of termination.^{xlvi}

III. IMPORTANCE OF OUTCOME FOR BOTH SIDES

It is fairly obvious what is at stake in this impending legal battle: money, and lots of it. For the artists, it is a way for them to wield a stronger negotiating stance with those looking to publish and sell their works. Some advocates for the artists’ side see it as a way of collecting back taxes; the record companies have been making large profits off of the artists’ works for years and now the artist can be fully compensated for their efforts.^{xlvi} The real difficulty for the artists lies in what to do next if they are successful in terminating their copyright grants. Success on the issue of termination rights would seem to lead to even more uncertainty concerning the next course of action. Do artists simply renegotiate with the same labels for higher profits or do they look elsewhere to be compensated? Perhaps they try to publish their works on their own. It

is even possible that a new market may emerge for bidders for the artists' works. At the very least, it is uncertain what paths will be available to artists if they do win the battle over termination rights. What is even less certain is which path will prove to be the best when weighing the factors of profitability and convenience. Who is to say that even if the artists win the legal battle and are able to terminate grants of their works that they will be in a better place than had they not terminated? However, even with the future being uncertain, there is no doubt that many artists will want the opportunity to test these uncharted waters.

What is at stake for the labels is a little less vague. The labels feel the need to preserve their rights in these works to maintain their way of doing business as it now exists. In the past several decades, labels have already taken a big hit financially with the advent of the internet, leading to piracy, digital downloading and file-sharing.^{xlvi} The industry as a whole suffered record losses in sales, dropping from \$14.6 billion to nearly \$6.3 billion during the decade ending in 2009.^{xlix} As stated earlier, the labels' existing and especially older catalogues of music have become an increasingly important avenue for revenue as the internet provides new ways for emerging artists to bypass the traditional label-heavy business model of success in the industry.ⁱ An unidentified source for the labels' side said that even the big four (Sony BMG, Warner, Universal, and EMI) were divided on how to approach the issue, with some preferring a lengthy court battle and others fearful that such a battle could yield a potentially devastating result, thus preferring a compromising solution.ⁱⁱ The potential of winning in court should not be overlooked. If the labels can win on their argument that artists are employees and thus their works are owned by the labels, the labels could maintain the status quo in doing their business. This would be the most beneficial outcome for the labels and would create no uncertainty on how to proceed. Still if the outcome of a court battle does not yield a positive result, the labels could find themselves

held hostage by the artists' newly acquired negotiating position. As is the case for artists, if the termination rights battle is lost by the labels more questions will most likely be raised rather than answered about how the industry will proceed to do business.

IV. LEGAL ARGUMENTS

A. Works For Hire

The “works for hire” debate is expected by both sides to be the most highly litigated issue in the forthcoming lawsuits.^{lii} The reason for this is fairly obvious. If the record labels are successful in showing that all sound recordings are indeed “works for hire” the issue will end right there. Any court ruling on this issue will provide the basis for which all legal proceedings on termination rights in the music industry will follow. The magnitude of such a decision is both exciting and frightening for those in the industry. As previously mentioned, there seems to be a split amongst the four largest record labels involved in the debate, some preferring to take their battle to the courtroom, while others are fearful of the outcome of such a strategy.^{liii} Whatever forum this battle takes place in, whether the boardroom or the courtroom, one thing is for certain: the debate over recordings being works for hire will be the crux of the outcome. For this reason, it will also be the focus of the inquiry in this article.

i. History

The most heavily anticipated debate for the labels, will be that the copyrighted works were in fact works for hire and therefore the labels are actually the rightful copyright owners.^{liv}

As the Copyright Act states :

A “work made for hire” is--

- (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 signed by them that the work shall be considered a work made for hire.^{lv}

The Act goes on to state further that if a work is deemed a “work for hire”, the employer will be credited as the author of the work for copyright purposes.^{lvi}

When addressing if a work is one made “for hire”, the court must first determine if the work was made by an employee or a commissioned independent contractor.^{lvii} Although the Act itself does not define what an “employee” is or what “scope of employment” means, there is binding case law on the subject.^{lviii} Before the U.S. Supreme Court rendered the decision in Community for Creative Non Violence v. Reid in 1989, there were several jurisdictional splits on how to determine if one was an “employee”.^{lix} The four differing views were: (1) that a work was prepared by an employee whenever the hiring party retained the right to control the product; (2) that a work was prepared by an employee when the hiring party had actually wielded control with respect to the creation of a particular work; (3) that the term “employee” as used in the statute carried its common-law agency meaning; and (4) that the term “employee” only referred to formal, salaried employees.^{lx} The Supreme Court resolved this issue by stating that “employee” should retain the meaning commonly given to it under agency law.^{lxi}

The court went on to further explain this meaning by stating a list of factors to be used when determining if a work was created as an employee by stating:

Among the ... factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party... No one of these factors is determinative.^{lxii}

The Court also used the Agency law principles in determining the meaning of “scope of employment.”^{lxiii} The Restatement's three-part test determines whether the conduct:

- (1) was of the kind the employee is employed to perform, (2) occurred
- (2) substantially within the authorized time and space limits of the employment,
- and (3) was actuated, at least in part, to serve the employer.^{lxiv}

When weighing these factors in determining if one is an employee or independent contractor, the Court further stated that none of the factors is more important than the other and all should be given the weight determined by the facts of the case in determining the outcome.^{lxv}

In a more recent case in the Ninth Circuit, the court ruled in favor of finding a work for hire where the work was created at the “instance and expense of the commissioning party.”^{lxvi} The Court further explained that when one commissions a project and bears the financial burden of the project, the work will be presumed a “work for hire” and that the claim may only be rebutted by evidence that the parties agreed that the work would not be one made for hire.^{lxvii} The “instance and expense” test was first developed in a 2004 Second Circuit Case, Martha Graham Sch. And Dance Found., Inc. v. Martha Graham.^{lxviii}

ii. Labels’ Argument

Unfortunately the labels will bear the burden of proof in showing that artists are indeed employees and that their works were created under the scope of their employment under the agency principles.^{lxix} This may not be an easy burden to bear. Recording artists are not traditional employees such as executives or secretaries. However, their conduct should still be analyzed under these principles.^{lxx} Labels will likely argue that the artists are in fact employees based on the following factors: (1) the label contracts a deadline for the works to be created; (2) sound recordings are the regular business of the labels; (3) the label has control over the ultimate

production and distribution of the work; and (4) the duration of the length of the parties' relationship (often a label signs an artist for a multi-album deal, especially bigger artists).

If the labels are successful in showing that artists are indeed their employees, they will next need to prove that the works were made in the scope of their employment.^{lxxi} Once again, the agency principles must be satisfied.^{lxxii} The first and third prongs (the kind of work to be performed, and if the work was done at least in part to serve the employer) are fairly easily met under this analysis.^{lxxiii} An artist should be found to be employed to produce sound recordings, which the label intends to use.^{lxxiv} This traditional relationship is found consistently within the recording industry.^{lxxv}

The second test, referring to the time and space requirements is more difficult to prove.^{lxxvi} Recording artists are not usually given working hours dictated by the labels.^{lxxvii} They are typically given freedom in determining when and even where to record, although they are usually given deadlines for handing in completed works.^{lxxviii} However, it is likely that a court would find that the nature of the recording industry is unique and therefore determine that this factor also meets the agency principles.^{lxxix}

After weighing these factors, however, it is probable that a court will find that artists are more like independent contractors as opposed to employees.^{lxxx} If this is found to be the case, the employment prong of the test would not apply to artists.^{lxxxi} This is detrimental for labels because the artists have a stronger argument, as will be discussed later, when it comes to the independent contractor argument.^{lxxxii}

However, a very strong argument in favor of the record labels may be found in a typical agreement between the artists and the label.^{lxxxiii} Many artists sign agreements with labels that include language stating that their sound recordings are "works for hire" with the record labels

being the author.^{lxxxiv} As stated earlier, in §101 of the Copyright Act, one may contract that a work is one “made for hire” absent the condition of one being an employee.^{lxxxv} This argument is very strong for those labels with the vision to see the implications of including such a clause. Courts are generally very reluctant to rule against a term that has been negotiated between two parties, especially when one party is relying on the enforcement of that term, as record labels would be in this case.^{lxxxvi} Record labels enter into negotiations with the artists with the expectation that they will be able to use the works granted to them as “works for hire” indefinitely and that finding against this term would be unfair to their expectations when entering contract negotiations.^{lxxxvii}

iii. Artists’ Argument

Artists are likely to attack the work for hire argument on several points. The first argument is that artists are not employees of the record label.^{lxxxviii} As stated earlier, the burden for proving that artists are employees lies on the record labels and is not easily met. One expert, June M. Besek, Executive Director of the Kernochan Center for Law, Media and the Arts at the Columbia University School of Law, agrees that the labels will fail in proving artists are their employees.^{lxxxix} Besek states:

“This is a situation where you have to use your own common sense...Where do they work? Do you pay Social Security for them? Do you withdraw taxes from a paycheck? Under those kinds of definitions it seems pretty clear that your standard kind of recording artist from the ’70s or ’80s is not an employee but an independent contractor.”^{xc}

Over the years, courts have come up with a list of factors that will most likely determine that artists are independent contractors and not employees.^{xc} The often most heavily weighed factor, which was determinative in Community for Creative Non Violence v. Reid, is the hiring party’s control over the means and manner of the works’ production.^{xcii} It is often the case that

artists control their own creative processes; hiring producers, and deciding when and where to work.^{xciii} Although labels do retain rights to final approval and deadlines, courts tend to give more consideration to close supervision than to general guidance.^{xciv} Although this is not always the case, many artists with creative control will argue this point fervently.

Another considerable factor is that artists typically provide their own instruments and tools for recording their works. This is a factor that courts tend to find leading to an independent contractor status.^{xcv} Furthermore, artists are typically taxed as “self employed” individuals, yet another factor that strengthens their argument for independent contractor status.^{xcvi} These factors will most likely culminate in a ruling that artists are not employees if this issue is brought to trial. If recording artists are found to be independent contractors, their recordings are not “works for hire” as they would be for an employee.

Another argument that artists may make is that any clause in a contract between them and their label counterpart making their recordings “works for hire” is not valid. They will argue that these clauses are “an agreement to the contrary” to the termination rights provision. These types of agreements are specifically stated to be invalid under §203(a)(5) of the Copyright Act.^{xcvii} This was found to be the case in the 2002 Second Circuit decision, Marvel Characters, Inc. v. Simon.^{xcviii} In Marvel, the court ruled that a settlement of litigation that made one party agree not to exercise a termination right was an “agreement to the contrary” to the provisions in §203.^{xcix} The court emphasized throughout their opinion that Congress had expressed their intent on this matter.^c This interpretation of Congress’ intent is also shared by renowned copyright expert David Nimmer, who professes that:

The parties to a grant may not agree that a work shall be deemed one made “for hire” in order to avoid the termination provisions if a “for hire” relationship ... does not in fact exist between them. Such an avoidance device would be contrary to the statutory provision that “[t]ermination of the grant may be

effected notwithstanding any agreement to the contrary.” ... [I]t is the relationship that in fact exists between the parties, and not their description of that relationship, that is determinative.^{ci}

Although this is not the view of every jurisdiction, artists may use this case as precedent to avoid any “work for hire” clause they may have agreed to with the label in an effort to exercise their termination rights. To do so, as Nimmer describes, the artist will have to show that the relationship between themselves and the label was not of the “at hire” variety.^{cii} This means that they will have to demonstrate that their original relationship with the label did not create a work for hire in relation to their created works. The precedent set by the Marvel case would only invalidate an agreement after a copyrighted work has been granted for use to cancel the termination right of that grant. To clarify, if a work is not originally one made for hire, the parties cannot agree later to deem it as such to deny one party their right of termination. Although Marvel dealt with a pre-1978 work and was brought by a comic book author’s heirs, it should still be persuasive to the plight of a recording artist, since the primary concern of the case was the treatment of contracting away termination rights.

B. Derivative Works Argument

Record labels do have another means of attack on an artist’s termination rights provided in the Copyright Act.^{ciii} Copyright authorship rights of derivative works of copyrighted material made before the termination of a grant of copyright remain with the grantee as stated in §203(b)(1):

A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.^{civ}

Labels are expected to argue that, upon reception of the sound recordings from artists, the recordings are often re-mastered and fine-tuned before being commercially released.^{cv} Therefore changing the actual recording being used from the one the artist created.^{cvi} In Mills Music, Inc. v. Snyder, the Supreme Court ruled that the crux of determining if a derivative work survives a termination right of a copyright transfer is when the work was prepared.^{cvii} If the work was prepared before the termination of the grant, as would be the case in the labels' argument, then the Court found the derivative work to survive the author's termination right.^{cviii} Therefore, labels could look to Mills for backing when arguing that the sound recordings they possess are derivative works.^{cix}

Unfortunately for record labels, this argument will most likely fail. The recording must be able to stand alone as its own creation, and therefore a simple re-mastering of a track for better sound quality will most likely not suffice as a derivative work.^{cx} However, as technology has progressed over the years this type of thinking may be applicable to electronic music, which is often remixed, changing a substantial aspect of the recording. For the first wave of artists however, the derivative works defense will most likely be found not to apply, as a derivative work will typically need to include original material.^{cx}

V. ADDITIONAL CASE LAW

A. Penguin v. Steinbeck

A very important case that will surely be analyzed in any future litigation on the issue of termination rights is the Second Circuit case Penguin v. Steinbeck.^{cxii} In this case, the heirs of author John Steinbeck attempted to exercise their termination rights of a pre-1978 work against the publishing company.^{cxiii} However in 1994, prior to her death, Elaine Steinbeck, John's widow, entered a new agreement with the publisher which left her with a higher royalty rate and

advance but contracted away her termination rights.^{cxiv} The district court held this contract provision invalid against the Copyright Act when, after her death, the surviving heirs of Steinbeck attempted to exercise their termination rights.^{cxv} However upon appeal, the Second Circuit reversed the decision of the district court deciding that Elaine Steinbeck used her termination right as a “bargaining chip” in her 1994 negotiations with the publisher thus providing her a second bite and “exhausted the single opportunity provided by the statute”, as the court interpreted its meaning.^{cxvi}

As copyright expert David Nimmer notes, the outcome of this case provides for an interesting and bumpy road ahead for future termination rights battles.^{cxvii} The most obvious obstacle created is that the Second Circuit’s decision “directly negates the plain language and intent of the statute.”^{cxviii} It also “superimposes state contract law over the federal copyright statute to evaluate the legitimacy of federal copyright interests. Not only does this unpredictable standard invite litigation, it heralds further inconsistent law among the circuits.”^{cxix} In addition, the ruling has a dominant negative effect for authors’ children and grandchildren.^{cxx} Nimmer also predicts that this outcome will invite “protracted litigation” as the pre and post-1978 statutes include the same language in their termination provisions.^{cxxi} This is another example of jurisdictional splits and a need for Congressional action in regards to termination rights.

B. Fifty-Six Hope Road Music Ltd. v. UMG Recordings, Inc.

Another case that is likely to influence the future right of termination rulings was decided recently in the Southern District of New York. This too was a case involving pre-1978 copyright grants (the earliest a post-1978 grant can be terminated is 2013). What makes this case particularly interesting however, is that sound recordings were involved. The case, Fifty-Six Hope Road Music Ltd. v. UMG Recordings, Inc., was brought by the descendents of the late

great Reggae singer, Bob Marley, against his record label for unpaid royalties.^{cxxii} The family members believed that upon Marley's death in 1981, the rights in his copyrighted works passed onto them as per the Copyright Act of 1909.^{cxxiii} However, the court ruled that, pursuant to a 1972 agreement between Marley and UMG, the sound recordings were works for hire, owned in perpetuity by the label.^{cxxiv} The language in the agreements that directed the court's decision reads:

[A]ll recordings featuring the Artist and recorded by the Company ... in pursuance hereof are the absolute property of the Company and the Company will continue to account to the Artist for the royalties thereon both during the period and thereafter... [Under the 1972 Agreement, Island was] entitled to the sole and exclusive right in perpetuity throughout the territory of production reproduction sale and distribution ... and performance (including broadcasting) throughout the Territory by any and every means whatsoever of recordings incorporating the Artist's performances.^{cxxv}

Marley had also agreed to contracts with similar phrasing in 1974 and again in 1975.^{cxxvi} The court applied the "instance and expense" test laid out in the Martha Graham case, and held that indeed the recordings were made at the instance and expense of UMG.^{cxxvii} The court stated:

The plain language of the 1972, 1974, and 1975 Agreements clearly demonstrate that the Sound Recordings were created at the instance of Island and that Island had the right to direct and supervise the manner in which Bob Marley created the Sound Recordings. Each of the agreements obligated Bob Marley to produce "sufficient acceptable recordings" to comprise a specific number of albums for Island within the term of each agreement.^{cxxviii}

When addressing the arguments of the plaintiffs regarding that the recordings were not works for hire, under the pretense that Marley exercised creative control over the recordings, the court stated:

Plaintiffs contend that Bob Marley selected the recording studios, chose the musicians and songs to record, and determined when the group recorded. The fact that Marley may have exercised artistic control over the recording process, however, is legally irrelevant; what is dispositive is that Island had the contractual *right* to accept, reject, modify, and otherwise control the creation of the Sound Recordings.^{cxxix}

This shows the court's desire to defer to a contract signed by two willing parties when investigating a "work for hire" claim; a very favorable fact indeed for record labels with similar artist agreements.

Although this case refers to pre-1978 copyright law and is based on a renewal claim and not a termination claim, it could have great significance on how future termination cases are resolved.^{cxxx} It is a clear showing of favorable treatment for the record labels' "works for hire" arguments. It stands to reason that most record labels would include similar language in their agreements with artists, which could conceivably lead courts to rule that sound recordings are indeed "works for hire", owned by the record companies.

C. Marvel Worldwide, Inc. v. Kirby

A similar case to the Bob Marley case was tried just months ago, again in the Southern District of New York.^{cxxxi} Although this case revolved around comic books and not sound recordings, a similar ruling to the Bob Marley case was reached. The crux of the decision was again copyright ownership of pre-1978 works.^{cxxxii} In Marvel Worldwide, Inc. v. Kirby, Kirby was a comic book artist who had first illustrated such famous comic book titles for Marvel as The X-Men and The Incredible Hulk.^{cxxxiii} After Kirby's death in 1994, his heirs sued Marvel claiming an interest in the copyright to the characters Kirby had allegedly created.^{cxxxiv} Citing Fifty-Six Hope Road Music Ltd., Graham, and CCNV, the court ultimately ruled that the illustrations were works for hire and therefore Marvel was the rightful author.^{cxxxv}

The court examined several factors that could be construed favorably for record labels. Perhaps the most important factor, as in the Marley case, was that Kirby had signed an agreement that his works were for hire and that Marvel was the rightful author of all works created by him.^{cxxxvi} The court found this dispositive in its ruling on this case.^{cxxxvii}

Another important factor was that all of Kirby's works had to be approved before they were to be published or even paid for.^{cxixviii} Kirby was paid for his works, as were all free-lance artists used by Marvel, on a per publishable page basis.^{cxixix} This payment method may be viewed as similar to artists' contracts where they will be paid only upon completion of an approved album by royalties from album sales. Even if this argument is not convincing, it at least shows that a private contractor can still be held to have created a work for hire. Furthermore, the fact that Kirby had used his own tools, the court said, did nothing more than to prove he was a private contractor and not an employee.^{cxl} He was still able to contract his authorship rights away as an independent contractor.^{cxli}

Perhaps the only questionable factor in relating this case to a sound recording is the question of: whether the work was commissioned? This is a determining factor however, because as the Court stated, "The Second Circuit's jurisprudence concerning the status of commissioned works under the 1909 Act creates an almost irrebuttable presumption that any person who paid another to create a copyrightable work was the statutory 'author' under the 'work for hire' doctrine."^{cxlii} The same should be true for works under the 1976 Act.

Can a record label's relationship with a recording artist be seen as commissioning the artist to produce the sound recordings? On one hand, the label does advance the artist money to record and does wield some control over the final work to be recorded and ultimately published. This would seem to be in the label's favor. On the other hand, some artists have already written and recorded some of their songs prior to signing a record deal and therefore it might be found that the approval of the new recording and not the actual work is what is really being commissioned. This scenario would be most prevalent in artists who have recorded demo tapes of their works to pitch to various record labels in hopes of getting signed. This may assist the

artist. What about an artist with a multi-album deal? This gets even more complicated, as some songs may have been written and recorded earlier while others may be at the instance and expense of the label. Either way, this seems to be the most likely grounds for recording artists to rebut the idea that even as an independent contractor and not an employee, they were commissioned to produce the sound recording and it is therefore a work for hire.

VI. PAST CONGRESSIONAL ACTION

By no means is the issue of termination rights one that has just snuck upon unsuspecting labels. Record labels have known about this impending issue since the adoption of the Copyright Act of 1976. In a pre-emptive strike, record companies lobbied for a bill passed in 1999 that would have explicitly stated that all sound recordings were works for hire, thus thwarting any effort of artists to exercise termination rights.^{cxliii} This bill was passed discretely and without debate, spearheaded by then copyright counsel to the Republican chairman of the Judiciary Committee and congressional aid, Mitchell Glazier.^{cxliv}

In response to this bill's passing, recording artists pled to Congress to overturn the work for hire language in the bill which would have given the record labels ownership in perpetuity over artists' sound recordings.^{cxlv} Headed by Don Henley of the band the Eagles and singer Sheryl Crow, the effort was successful and a little over a year later the bill was repealed.^{cxlvi} "Work for hire was never intended to apply to sound recordings. That came about because of movies and books," Henley stated, and "sound recordings somehow got added to the list and then taken off again."^{cxlvii}

An important question raised in this short but fiery exchange was: had Congress overstepped its bounds when passing a bill that so effected the outcome of copyright law?^{cxlviii} This question was soon after addressed in a Supreme Court case Eldred v. Ashcroft.^{cxlix} This case was in response

to President Clinton's Adoption of the Sonny Bono Copyright Term Extension Act, which lengthened the copyright protection afforded to authors in order to conform to those durations being used in Europe.^{cl} Eldred challenged the Act on the grounds that it was unconstitutional and lost.^{cli} The Supreme Court had upheld the Appellate Court's view that "Congress has the power under the Copyright Clause to extend retrospectively the term of existing copyrights."^{clii}

This is important because it sets a precedent that Congressional action that retroactively affects copyright law is constitutional. This may ultimately play a role in the outcome of this debate, as any lawsuit over termination rights is likely to either reach the Supreme Court or merit Congressional action. Record companies may also use this precedent to lobby Congress to assist in the effort to resolve any confusion over the future of the termination rights battle before a court ruling affects the issue.

VII. FUTURE IMPLICATIONS

A. Summary

The issue of termination rights is going to be a huge factor in the music industry moving forward. This fact is obvious. What is less obvious is how the labels should approach dealing with this issue. It would seem that the most favorable outcome would be for a court to rule that sound recordings are enforceable works for hire and therefore the labels are the rightful authors. As this article explains, there are several difficulties in doing so. The simplest way, but least likely to be found in the labels' favor, is to argue that recording artists are their employees and that all works created were done so as a condition of their employment. Unfortunately for the labels, this argument will most likely fail. A court will most likely find that recording artists are independent contractors.

Under the assumption that artists are independent contractors, the labels will then have to prove that the works were commissioned by the labels and that valid agreements exist with the recording artists stating that the sound recordings produced would be deemed works for hire, authored by the label. This may or may not be easy for the labels to prove, depending on their forethought of this issue in contract drafting as well as if paying an artist an advance against royalties constitutes the expense portion of the “instance and expense” test. Another problem may be the forum where the suit is brought. Although it seems that the Southern District of New York would be the most favorable for the record labels, will they be able to move the case there? Will another district be as helpful to the labels?

Another factor facing both parties is the cost of litigation. Termination rights issues are not simple issues and surely will result in multiple costly and lengthy suits. One would assume that labels are better equipped for the battle, as they not only have more to lose but have more assets at their disposal than most recording artists. However, one should not underestimate the fight in the artists to stand up for what they believe in. Although this is most likely a business element to the record labels, the artists will most likely view this as an attack of their essential rights and will not give up easily. This reasoning can be assumed for the likes of an artist such as Bruce Springsteen who has deep pockets and has already filed termination notices. Many artists will be fighting for the principle of their cause, not the financial reward associated with victory.

These are all factors that will decide the outcome of this issue if it is indeed brought before a court. Therefore the labels must ask themselves if the inevitable law suits that will result from the artists’ filing for termination rights is the best way to go about resolving this issue.

B. Unforeseen Issues

Perhaps the biggest issue that is not at the forefront of the debate over termination rights is: if an artist does successfully exercise the right of termination, what is the next cause of action? At the moment there does not seem to be a very lucrative or trustworthy alternative market for sound recordings. Certainly there are products and industries that thrive on the use of copyrighted sound recordings that would still be willing to pay for the right to use them. Products such as mobile phone ringtones, television shows, and motion pictures will not just shut down if they cannot license sound recordings from record labels anymore. But where would they go for these licenses? Although the artists that have properly terminated grants to record labels may recapture their copyrights and the exclusive right to license them, will there be that much demand or profit to be made that such an artist will benefit from retaining this exclusive right? The circumstances of this dilemma will undoubtedly vary from artist to artist but still the uncertainty of the outcome should provide some leverage for the labels when discussing terms with artists.

The uncertainty in this area may also prove to be a huge opportunity for the business minded to make huge profits. If artists are able to terminate their grants to record labels, they are likely to prefer any method of licensing over using the labels which they have just fought so hard against. This presents a huge opportunity for anyone with the forethought to set up licensing companies for artists, much like ASCAP is for labels, to dominate a new field. Of course for this to be relevant, artists, and influential ones at that, will have to successfully terminate their grants of copyright. Until 2013, no artist can recapture their rights through termination, leaving the near future the best time for action for labels to address termination rights.

VII. Proposed Approaches For Labels

A. Declaratory Judgment

As stated in the preceding section, the most favorable outcome for the labels would be for a court to rule that the sound recordings were commissioned projects done at the labels' expense and therefore are works for hire. It is also obvious that the most likely district to find favor for this approach is in the Southern District of New York, based on the favorable outcomes for labels in the aforementioned case law. Therefore, one approach labels may want to consider is a pre-emptive strike in the form of filing for declaratory judgment in the Southern District of New York.

“A declaratory judgment is appropriate when it will ‘terminate the controversy’ giving rise on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion.”^{cliii} The controversy in question must also be of a “justiciable” nature, being able to be remedied by the court.^{cliv} Furthermore, the controversy must fit into the statutorily-defined subject matter jurisdiction of the federal courts.^{clv} This can be accomplished if the complaint qualifies for federal question or diversity jurisdiction.^{clvi}

The likelihood for success of such a case is highest in this district and so is the opportunity to file such a claim. The Southern District Court has jurisdiction over several counties in New York State, including New York County, the home of Manhattan. Manhattan is also the home to the headquarters of many of the United States' major record labels. The Southern District is a United States Federal Court and a copyright claim is likewise a federal question, making the Court a proper venue.^{clvii}

In addition, the Marvel v. Kirby case was brought as a declaratory judgment in the Southern District Court.^{clviii} As discussed earlier, this case involved copyright “work for hire” issues, as would any declaratory judgment filed by a record label concerning termination

rights.^{clix} Marvel was ultimately decided on summary judgment for the comic book publisher, and therefore serves as favorable precedent for the Southern District to find that a record label should be able to file a declaratory judgment on similar copyright claims.^{clx}

Therefore, one approach to the termination rights issue may be to wait for a claim for termination rights to be issued by an artist, or his or her attorney, residing in Manhattan and seek an injunctive declaratory judgment in the Southern District of New York Court. It is very likely with many artists already having filed for termination rights, that an opportunity to take this action already exists. Declaratory judgment proceedings are often brought when they would help “would-be defendants to minimize avoidable losses by selecting the time, place-and, effectively the possibility-of court adjudication.”^{clxi} This is certainly the case here.

The termination right issue should be found to meet these standards and therefore should survive to a hearing before the court. The facts of the case will be at least “relatively undisputable” as they consist mostly of work product and contracts as well as documented behavior and studio time. The most favorable opportunity for a label to bring such a suit will be one in which there is an artist agreement with similar language to the UMG/ Bob Marley deal, stating that the sound recordings are works for hire authored by the label.

It is probable that this approach will turn out heavily favorable to the labels if a proper case can be brought in the Southern District of New York. Because the court resides over Manhattan, the home of many large industries, it is viewed as one of the more influential and active federal courts in the country. A finding of declaratory judgment for the label-side of this issue in this court will go far in preserving the business interests of the music industry.

B. Lobby For Congressional Legislation

Although a declaratory judgment ruling in favor of the record labels' work for hire argument would be a huge blow against artists looking to exercise termination rights, it may not govern all such termination requests or even be successful. Perhaps another approach may be for labels to lobby Congress to settle this dispute. The labels can argue that this issue will be heavily litigated and most likely reach the Supreme Court if the battle takes that path to resolution. As Eldred v. Ashcroft showed us, the Supreme Court will most likely not interfere with a clear Congressional expression on this issue, as the court affirmed the constitutionality of Congress imposing retro-active legislation that affects copyright law.^{clxii}

It can also be argued that Congress needs to step in to clarify its intent on this issue. At the very least, the intent of Congress is unclear as to how a court should proceed with the issue of copyright termination. Congressional action would allow Congress to proactively express its view on this issue, taking the power out of the hands of the courts. This would lead to a more concrete understanding of how both parties should proceed to deal with copyright termination.

The labels would obviously prefer for Congress to pass a law that makes all sound recordings works for hire. This result is doubtful however, due to the definite and strong resistance that artists and their attorneys will have to such law. As a matter of fact, any proposed legislation should be expected to be met with a vigorous fight by the artists. However, record labels have much case law and contract law on their side and may be able to persuade Congress to see things their way, preserving their way of doing business going forward.

This approach should be taken quite seriously, even if labels do not believe it will have much chance of success. This is because Congressional expression on the issue will be binding in all courts therefore producing the most favorable and efficient outcome for the labels. If

Congress did express intent that some, or all, sound recordings were works for hire, the labels would have a heavy piece of weaponry in their arsenal for the inevitable termination rights battle.

C. Settlement

One thing that must not be lost sight of is that the music industry is a business. At the end of the day, labels must do what is necessary to give them the best financial footing moving forward. Perhaps, reaching settlement with artists over termination rights issues would be the best approach. The most effective way to do this may be to identify artists who will have a high chance of success in exercising termination rights and offer them a new deal. In the long run, giving artists a higher percentage to exploit their work may be the lesser evil when confronted with the option of an artist taking their business elsewhere. Furthermore, the labels should have quite a bit of leverage in making these negotiations. Many qualifying artists will not be able to demand much higher royalties as their album sales are most likely not as lucrative as they once were. Also, the alternative route for an artist to sell and market his or her sound recordings will be very difficult, time consuming and unproven as opposed to just accepting slightly higher royalties in a system that already functions relatively efficiently. It should be pointed out that to effectively settle for these terms, it would be favorable for labels to allow the artist to exercise his or her termination right, then immediately after enter into a new contract. This would avoid falling into the trap of voiding agreements that contract away termination rights.

Another issue that record labels will want to factor in when approaching settlement agreements with artists is the money that may be saved from not engaging in lengthy litigation. The cost of litigation in these suits will be extremely high with all that is at stake. It is definitely worth an attempt to settle with disgruntled artists. Perhaps the two sides are not as far apart on

the issues as it would seem. Settlement discussions would discover just how far apart the sides are and if an agreement can be made without heading to court.

IX. CONCLUSION

The music industry is facing one of its most historical legal battles in the near future over termination rights. Undoubtedly, much time and effort will be spent by both labels and artists to clarify how copyright law should be interpreted. Although it is impossible to predict an outcome, as in most heated battles, it is time to prepare for the fight. The labels can best do this by seeking declaratory judgment rulings, lobbying Congress for support, and discussing the issues with artists to better understand where their adversaries thoughts are. Through these processes the labels can increase their chances of preserving their way of doing business as it has existed for decades. Due to the importance of the termination rights issues, no time or effort should be lost in preparing for 2013, when the termination provisions can first be fully exercised. It is imperative for labels to take action now, as it is certain that artists will be ready to confront this issue when their first chance arrives.

ⁱ Larry Rohter, Record Industry Braces for Artists' Battles Over Song Rights, N.Y. TIMES, Aug. 16, 2011, at C1, available at <http://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html>.

ⁱⁱ Kal Raustiala & Chris Sprigman, The Music Industry Copyright Battle: When is Owning More Like Renting?, FREAKONOMICS.COM (Aug. 31, 2011, 10:38 AM),

<http://www.freakonomics.com/2011/08/31/the-music-industry-copyright-battle-when-is-owning-more-like-renting>.

ⁱⁱⁱ Unless the seller is a thief or other unauthorized seller

^{iv} Eriq Gardner, Village People Singer's Copyright Fight Could Change Music Industry, BILLBOARD.BIZ (Aug. 18, 2011), <http://www.billboard.biz/bbbiz/industry/legal-and-management/village-people-singer-s-copyright-fight-1005319552.story>.

^v Id.

^{vi} Id.

^{vii} Id.

^{viii} See Raustiala, supra note 2

^{ix} See Rohter, supra note 1

^x Id.

^{xi} Id.

^{xii} See Gardner, supra note 4

^{xiii} See Rohter, supra note 1

^{xiv} Id. (a lobbying group in Washington that represents the interests of record labels.)

^{xv} Id.

^{xvi} Id.

^{xvii} Id.

^{xviii} Id. (an entertainment lawyer specializing in soul, funk and rap artists who has filed termination claims on behalf of clients.)

^{xix} Id.

^{xx} U.S. Const. art. I, §8, cl. 8. See Emily Burrows, Termination of Sound Recording Copyrights & the Potential Unconscionability of Work for Hire Clauses, 30 Rev. Litig. 101, 103 (2010)

^{xxi} Id.

^{xxii} Id.

^{xxiii} Id.

^{xxiv} Id.

^{xxv} Id. at 104

^{xxvi} 17 U.S.C. §203(a) (2006)

^{xxvii} See Burrows, supra note 22, at 104

^{xxviii} 17 U.S.C. §304 (2006)

^{xxix} See Burrows, supra note 22, at 104

^{xxx} Id. at 105

^{xxxi} 17 U.S.C. §203(a)(3) (2006)

^{xxxii} Id.

^{xxxiii} 17 U.S.C. §203 (2006)

^{xxxiv} 17 U.S.C. §203(a)(3) (2006)

^{xxxv} 17 U.S.C. §203(a)(4) (2006)

^{xxxvi} 17 U.S.C. §203(a)(2) (2006)

^{xxxvii} Id.

^{xxxviii} 17 U.S.C. §203(b)(3) (2006)

^{xxxix} Id.

^{xl} Bobby Rosenblum, A Very Welcome Return: Copyright Reversion and Termination of Copyright Assignments in the Music Industry, Ent. & Sports Law., SUMMER 1999 3, at 7

^{xli} 17 U.S.C. §203(a)(5) (2006)

^{xlii} See Burrows, supra note 22, at 105

^{xliii} 17 U.S.C. §203(b)(1) (2006)

^{xliv} 17 U.S.C. §201(b) (2006)

^{xl v} 17 U.S.C. §201(c) (2006)

^{xlvi} See Gardner, supra note 4

^{xlvii} See Rohter, supra note 1

^{xlviii} Id.

^{xl ix} Id.

^l Id.

^{li} Id.

^{lii} Id.

^{liii} Id.

^{liv} Id.

^{lv} 17 U.S.C.A. § 101 (2006)

^{lvi} Id.

^{lvii} Community for Creative Non Violence v Reid, 490 US 730 (1989)

^{lviii} 132 A.L.R. Fed. 301 (1996)

^{lix} Id.

^{lx} Id.

^{lxi} Id.

^{lxii} Reid, 490 U.S. 730 at 751-52

^{lxiii} See Burrows, supra note 22, at 114

^{lxiv} Restatement (Second) of Agency §228 (1958).

^{lxv} Reid, at 751

^{lxvi} Twentieth Century Fox Film Corp. v. Entm't Distrib., 429 F.3d 869, 881 (9th Cir. 2005)

^{lxvii} Id.

^{lxviii} Martha Graham Sch. and Dance Found., Inc. v. Martha Graham, 380 F.3d 624, 632 (2d Cir. 2004)

^{lxix} See Burrows, supra note 22, at 114

^{lxx} Id.

^{lxxi} Id.

^{lxxii} Id.

^{lxxiii} Id.

^{lxxiv} Id. at 115

^{lxxv} Id. at 125

^{lxxvi} Id. at 115

^{lxxvii} Id.

^{lxxviii} Id.

^{lxxix} Id.

^{lxxx} Id.

^{lxxxi} Id.

^{lxxxii} Id.

^{lxxxiii} Id. at 125

^{lxxxiv} Id.

^{lxxxv} 17 U.S.C.A. § 101 (West)

lxxxvi See Burrows, supra note 22, at 125

lxxxvii Id.

lxxxviii Id. at 114

lxxxix See Rohter, supra note 1

xc Id.

xc i See Burrows, supra note 22, at 115

xc ii Id.

xc iii Id.

xc iv Id.

xc v Id. at 117

xc vi Id.

xc vii Peter S. Menell & David Nimmer, Pooh-Poohing Copyright Law's "Inalienable" Termination Rights, 57 J. Copyright Soc'y U.S.A. 799, 819 (2010)

xc viii Id.

xc ix Marvel Characters, Inc. v. Simon, 310 F.3d 280, 291 (2d Cir. 2002)

c Id.

ci Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 11.02[A][2] (2000 ed.)

c ii Id.

c iii See Burrows, supra note 22, at 129

c iv 17 U.S.C. §203(b)(1) (2006)

c v See Burrows, supra note 22, at 129

c vi Id.

c vii Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985)

cviii Id.

cix See Burrows, supra note 22, at 129

cx Id.

cxi Id.

cxii Penguin Group (USA) Inc. v. Steinbeck, 537 F.3d 193 (2d Cir. 2008)

cxiii Id.

cxiv Id.

cxv Id.

cxvi Id. at 204

cxvii Peter S. Menell & David Nimmer, Judicial Resistance to Copyright Law's Inalienable Right to Terminate Transfers, 33 Colum. J.L. & Arts 227, 233 (2010)

cxviii id

cxix id

cxx id

cxxi id

cxxii Fifty-Six Hope Rd. Music Ltd. v. UMG Recordings, Inc., 08 CIV 6143 DLC, 2010 WL 3564258 (S.D.N.Y. Sept. 10, 2010)

cxxiii Id.

cxxiv Id.

cxxv Id.

cxxvi Id.

cxxvii Id.

cxxviii Id.

cxxxix Id.

cccc Id.

cccxix Marvel Worldwide, Inc. v. Kirby, 777 F. Supp. 2d 720 (S.D.N.Y. 2011)

cccxix Id.

cccxix Id.

cccxix Id.

cccxix Id.

cccxix Id.

cccxix Id.

cccxix Id.

cccxix Id.

cxli Id.

cxli Id.

cxlii Id. at 738

cxliii Larry Rohter, Legislator Calls For Clarifying Copyright Law, N.Y. TIMES, Aug. 28, 2011, at C1, available at <http://www.nytimes.com/2011/08/29/arts/music/representative-john-conyers-wants-copyright-law-revision.html>.

cxliiv Id. (Mitchell Glazier is now the chief lobbyist for the recording industry association.)

cxliiv Id.

cxliiv Id.

cxliiv Id.

cxliiv Id.

cxlix Eldred v. Ashcroft, 537 U.S. 186 (2003)

^{cl} Yemi Adeyanju, The Sonny Bono Copyright Term Extension Act: A Violation Of Progress
And Promotion Of The Arts, 2003 Syracuse L. & Tech. J. 3

^{cli} Eldred, 537 U.S. 186

^{clii} See Adeyanju, supra note 146

^{cliii} Fed. R. Civ. P. 57

^{cliv} Id.

^{clv} 1 Federal Rules of Civil Procedure, Rules and Commentary Rule 57

^{clvi} Id.

^{clvii} Goldstein v. California, 412 U.S. 546 (1973)

^{clviii} Kirby, 777 F. Supp. 2d 720

^{clix} Id.

^{clx} Id.

^{clxi} Lorelei Ritchie De Larena, Re-Evaluating Declaratory Judgment Jurisdiction in Intellectual
Property Disputes, 83 Ind. L.J. 957, 965 (2008)

^{clxii} Eldred, 537 U.S. 186