NOTES

TERMINATION RIGHTS IN THE MUSIC INDUSTRY: REVOLUTIONARY OR RIPE FOR REFORM?

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When Congress passed the Copyright Act of 1976, it enacted Section 203, which allows authors to terminate transfers of the copyright in their works thirty-five years after the transfer. Congress intended this to be the author's "second chance" after having made a disadvantageous first deal, either due to a lack of bargaining power or an inability to predict the work's future value. Within the music industry, the impact of Section 203 has been contested, with some arguing that it will fundamentally shift the balance of power between recording artists and songwriters (the authors) and record labels and music publishers (the transferees), and others expecting that the provision will provoke contentious litigation of Section 203's statutory exceptions. Because the first works reached termination eligibility in 2013, the effects of Section 203 remain unclear. In this Note, I argue that, even if an author circumvents the statutory exceptions, Section 203 is largely ineffective because several factors prevent a clean severance of the relationship between the author and transferee. Complications related to jointly authored works, the jurisdictional limitation to the United States, and contract provisions that survive post-termination create a situation where the author may regain his or her U.S. copyrights but will remain tethered to the transferee. Although an author could theoretically self-administer his or her U.S. copyrights or transfer these rights to a new transferee, the economically rational option is to retransfer the copyrights to the original transferee. This result precludes any significant impact on the music industry's power dynamics, despite Congress's (and the authors') initial hopes that Section 203 would be a tool for change.

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Introduction

What do The Eagles, Billy Joel, Paul McCartney, Prince, and Bruce Springsteen have in common? In addition to being hugely popular musicians, prolific songwriters, and Rock and Roll Hall of Fame inductees,[1] each has exercised a statutory right under the Copyright Act of 1976 that enables them to terminate transfers of the copyright ownership in their works.[2] This right applies to transfers of ownership made on or after January 1, 1978, and provides for termination thirty-

[1] The Eagles were inducted in 1998, while Billy Joel, Paul McCartney, and Bruce Springsteen were each inducted in 1999. Prince was inducted in 2004. *See Inductee Explorer*, Rock & Roll Hall of Fame, http://www.rockhall.com/inductees (last visited Aug. 5, 2018).

[2] 17 U.S.C. § 203 (2012). *See, e.g.*, Ed Christman, *Reversion Rights: Will 2013 Be a Game-Changer?*, Billboard (Dec. 27, 2012, 2:30 PM), http://www.billboard.com/biz/articles/news/1483926/reversion-rights-will-2013-be-a-game-changer (listing several authors who have filed termination notices).

five years after the date of execution.[3] The first works reached termination eligibility in 2013, and thousands more from the late 1970s and 1980s become eligible each year.[4]

When Congress created the termination right, it intended to give authors a second chance after having made a disadvantageous deal, either because of the author's lack of bargaining power or inability to foresee the work's potential market value.[5] Within the music industry, record labels and music publishers (the transferees) have historically held a substantial amount of power over recording artists and songwriters (the authors).[6] Some believe that termination could be a game-changer for the industry's balance of power,[7] arguing that it could make record labels and music publishers obsolete.[8] Others claim that the right will not have its desired effect, arguing that transferees will adapt their behavior to protect their investments and that authors will be deterred by costly and confusing termination procedures.[9] Even if the terminations *can* be implemented, there is a more serious issue at hand, which this Note addresses: whether Section 203, as applied to the music industry, is even capable of accomplishing its intended purpose. This Note concludes that it is not.[10]

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3 17 U.S.C. § 203(a). For the purposes of this paper, the term "author" refers to recording artists and songwriters (the creators of the copyrighted works), and the term "transferees" refers to record labels and music publishers (the recipients of copyright ownership in works via contractual transfer).

4 By April 2013, nearly 600 termination notices had been filed, with that number increasing each year. *See* Ted Johnson, *Legal Landmark: Artists Start to Reclaim Rights to Their Music*, Variety (Apr. 16, 2013, 4:00 AM), http://www.variety.com/2013/biz/features/artists-reclaim-rights-to-music-1200334132.

5 *See infra* Part I (describing the legislative history and justifications for Section 203).

6 *See, e.g.*, Donald S. Passman, All You Need to Know About the Music Business 68 (8th ed. 2013) ("Historically, record companies held the keys to the kingdom."); *id.* at 221 ("Following the turn of the twentieth century, and well into the 1940s, publishers were the most powerful people in the music industry."). For more information about the power dynamics in the music industry, see *infra* Section I.D.

7 *See, e.g.*, *Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 86 (2014) [hereinafter 2014 Hearings] (statement of Jodie Griffin, Senior Staff Attorney, Public Knowledge) ("[Section 203] has the potential to transform the recorded music business . . . [and] to empower artists to reclaim control over their own works and promote accountability among intermediaries that aggregate artists' copyrights.").

8 *See, e.g.*, Jessica Johnson, Note, *Application of the Copyright Termination Provision to the Music Industry: Sound Recordings Should Constitute Works Made for Hire*, 67 U. Miami L. Rev. 661, 677 (2013) ("Mass termination of copyright grants in sound recordings would destroy the music industry . . . [and] would deliver a fatal blow to record labels across America.").

9 *See* Christman, *supra* note 2; *see also infra* Section I.C.

10 Section 203 is often incompatible with the business reality in which these transactions occur. For example, Section 203 applies just to copyright transfer and only to U.S. rights, but music industry contracts provide for a global transfer of rights and cover more rights and obligations than simply the copyright transfer. *See infra* Part III.

The applicability of Section 203's statutory exceptions—works made for hire[11] and derivative works[12]—to the music industry will likely be addressed in coming years through litigation.[13] However, other largely ignored considerations pose formidable barriers to Section 203's utility for authors. Even if the copyright transfers for sound recordings and musical works are terminable, this Note argues that complications relating to joint authorship, Section 203's jurisdictional limitation to only U.S. rights, and surviving contractual provisions make it nearly impossible to sever the relationship between the author and the transferee. The enduring relationship between the parties not only decreases the terminated work's value in subsequent transfers but creates a logistical nightmare in the digital marketplace, where rights are licensed on a worldwide basis.

Given that the rational author would seek to maximize his return in the marketplace, this Note concludes that the only viable result is to retransfer the works to the original transferee.[14] But it is questionable how much of a royalty increase the author can actually extract once the transferee is aware of its leverage and the author's limited alternatives. At best, Section 203 may result in a marginal increase in authors' financial positions upon retransfer. At worst, Section 203 is not invoked at all, because authors could determine that the increase is not worth bearing the costs of termination and resulting disputes. Either way, Section 203 fails to achieve its purpose of author empowerment because it perpetuates the status quo, keeping the core relationship between authors and transferees intact.

This Note evaluates the applicability of Section 203 to the music industry, concluding that Section 203 fails to fulfill its intended purpose of liberating the author from the transferee, preventing any meaningful reorganization of power in the music industry. Part I reviews the history of copyright termination in the United States, describes the procedure for invoking Section 203, sets forth commentators' evaluations of the right, and describes the power dynamics in

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[11] 17 U.S.C. § 203(a) (2012). A work made for hire is a work prepared in the scope of employment or a particular type of commissioned work. *Id.* § 101. For more information, see *infra* Section II.A.

[12] 17 U.S.C. § 203(b)(1). A derivative work is a work "based upon one or more preexisting works." *Id.* § 101. For more information, see *infra* Section II.B.

[13] *See* Christman, *supra* note 2 (explaining that winning the termination debate will require "deep pockets" to fund ongoing litigation).

[14] See *infra* Part IV for a full discussion of the author's lack of alternatives post-termination. *See also* Ed Christman, *Inside the Secretive, Difficult Struggle Between Artists & Labels Over Album Copyrights*, BILLBOARD (Sept. 28, 2017), https://www.billboard.com/articles/business/7981597/album-copyrights-master-recordings-1976-law (explaining that record labels are willing to negotiate because they are unwilling to return the works to the authors).

the music industry. Part II considers the applicability of Section 203's statutory exceptions (works made for hire and derivative works) to the music industry. Part III argues that, even if musical works and sound recordings escape the exceptions discussed in Part II, a clean severance of the author-transferee relationship is prevented by possible joint authorship with transferees, Section 203's jurisdictional limitation to U.S. rights, and surviving contract provisions. Part IV evaluates an author's post-termination options, concluding that the most rational option is to renew with the prior transferee, creating yet another situation in which the transferee has leverage over the author. The original relationship between the parties is preserved, thus precluding any significant impact on the music industry's power dynamics. Absent legislative reform, this Note determines that Section 203 is nothing more than a costly process with little practical significance for authors.

I
What Is the Termination Right?

Section 203 was born from a lengthy and contentious struggle between authors and transferees. This struggle led to a provision that is extraordinarily complex and has attracted substantial scholarly criticism, both for its theoretical underpinnings and practical execution. This Part describes Section 203's history, its current form, and principal critiques. This Part also outlines the relationships between the major players in the music industry, as understanding the power dynamics at play is essential when evaluating Section 203.

A. The History of Reversion Rights in Copyright and the Birth of Section 203

The concept of reverting ownership of works after the passage of a specified period of time has always been embedded in U.S. copyright law.[15] The Copyright Act of 1790 established two fourteen-year terms, the second of which reverted ownership to a surviving author.[16] This had little practical effect, however, because default contractual

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[15] For a comprehensive history of reversion rights, see Lionel Bently & Jane C. Ginsburg, *"The Sole Right . . . Shall Return to the Authors": Anglo-American Authors' Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 Berkeley Tech. L.J. 1475 (2010).

[16] An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books, to the Authors and Proprietors of Such Copies, During the Times Therein Mentioned, 1 Stat. 124, § 1 (1790). Note that use of the term "author" in Section I.A refers more broadly to persons who create copyrighted works, and is not limited to authors in the music industry.

practice required authors to transfer both terms at once.[17] The 1909 Copyright Act provided for two twenty-eight-year terms but did not specify whether the second term could be assigned to the transferee at the initial transfer or must vest in the author.[18] The United States Supreme Court allowed dual-term transfers, expressing a reluctance to treat authors paternalistically.[19]

In the 1960s, the Copyright Office considered shifting copyright law to a single term lasting until fifty years after the author's death.[20] The Register of Copyrights noted the failures of the reversion system under the 1909 Copyright Act,[21] but proposed limiting transfers which did not provide for continuing royalty payments to twenty-year terms, citing authors' poor bargaining position and their inability to accurately foresee a work's value.[22] The Register's proposal generated immediate opposition, with copyright transferees contesting the author's poor bargaining position in the initial transfer[23] and arguing that reversions are paternalistic.[24]

Despite these arguments, the resulting bill permitted authors or their heirs to terminate transfers of their works thirty-five years after the transfer's execution, provided that they serve a written notice to the transferee at least two years before the effective date of the termination.[25] The bill excluded works made for hire[26] and allowed transferees to retain the right to exploit any derivative works prepared

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17 *See* Bently & Ginsburg, *supra* note 15, at 1554.

18 An Act to Amend and Consolidate the Acts Respecting Copyright, 35 Stat. 1075, § 23 (1909).

19 *See* Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 656–57 (1943) ("We are asked to recognize that authors are congenitally irresponsible . . . and therefore assignments made by them should not be upheld. . . . We [are unable to] justify us as judges in importing into Congressional legislation a denial to authors of the freedom to dispose of their property . . . .").

20 Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law (1961), *reprinted in* 3 George S. Grossman, Omnibus Copyright Revision Legislative History, pt. I, 47–49 (2001) [hereinafter Legislative History].

21 *See id.* at 92 (explaining that "it has largely failed to accomplish [its] purpose . . . and has been the source of much confusion and litigation").

22 *See id.* at 92–94.

23 *See* Transcript of Meeting on General Revision of the U.S. Copyright Law (1961) (statement of Motion Picture Association of America) ("To those who must . . . bargain daily with . . . forceful, hard-headed representatives of creative artists, the notion that authors in the modern world need special legal protections against unremunerative transfers is simply unrealistic."), *reprinted in* 3 Legislative History, *supra* note 20, pt. II, at 362.

24 *See id.* at 105 (statement of Joseph S. Dubin, Universal Pictures, Inc.) ("There's no requirement to treat the author as a poor, helpless, almost infantile individual who doesn't know his right and has to be protected by an omniscient Congress.").

25 H.R. 11947, 88th Cong. § 16(a)(1)–(2) (1964).

26 *Id.*

under the initial transfer.[27] The provision applied "notwithstanding any agreement to the contrary," so that authors could not contractually waive their termination right.[28] However, transferees were given first priority in regaining the terminated rights: Authors could renegotiate with the original transferee prior to the termination, but were prohibited from dealing with anyone else prior to the effective date of termination.[29] This bill resulted from substantial compromise between authors' and transferees' representatives.[30] In passing Section 203 in 1975, Congress explicitly acknowledged that this provision was necessary to "safeguard[ ] authors against unremunerative transfers. . . . because of the unequal bargaining position of authors."[31]

B. Implementing Section 203

Invoking Section 203 entails several procedural requirements.[32] Authors or their heirs have a five-year window during which the effective date of termination may occur. The termination window begins either thirty-five years after the work's publication or forty years after the work's transfer, whichever comes first.[33] For a work transferred and published in 1978, for example, the eligible termination window begins in 2013 (thirty-five years after publication) and ends in 2018 (five years after the termination window began). Thus, the terminating party may choose any date between 2013 and 2018 as the date on which the rights will revert to them.

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27 *Id.* § 16(b)(1).

28 *Id.* § 16(a)(1). This is notably different from the prior reversion systems, where authors could transfer their future ownership interest in the work at the initial transfer. *See supra* notes 18–21 and accompanying text.

29 H.R. 11947 § 16(b)(2)(A).

30 *See* H.R. REP. NO. 94-1476, at 124 (1976) ("Section 203 reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved."); *see also Hearing on H.R. 4347 Before the Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong. 1866 (1965) (statement of Abraham L. Kaminstein, Register of Copyrights) ("Most amazing to those of us closely involved in the development of the bill is what has happened . . . [to the] termination-of-transfers provision . . . . This, which was once by all odds the most explosively controversial provision in the bill, appears to have largely receded as an issue."), *reprinted in* 7 LEGISLATIVE HISTORY, *supra* note 20, at 1866.

31 H.R. REP. NO. 97-1476, at 124.

32 Note that Section 203 applies to works that were transferred on or after January 1, 1978. Works transferred prior to this date are covered by Section 304, which is slightly more complicated in execution, but achieves the same purpose. *See* 17 U.S.C. § 304(c)(3), (d)(2) (2012). This paper focuses exclusively on Section 203, although many of the issues implicated by Section 203 are also applicable to Section 304. *See* 3 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 7:49 (2018).

33 17 U.S.C. § 203(a)(3) (2012). The distinction between publication and termination is meant to account for works which were contractually transferred at one time, but not published until years later. H.R. REP. NO. 94-1476, at 126.

The terminating party must serve an advanced written notice to the transferee, stating when the termination will take effect.[34] This notice must be served at least two years before the effective date of termination but can be served up to ten years in advance.[35] The notice of termination must be recorded with the Copyright Office before the effective date of termination, and must comply with the Register of Copyright's regulations.[36] In the time between serving the notice and the effective date of termination, the terminating party cannot prospectively transfer the rights in the work to anyone but the original transferee.[37] On the effective date of termination, the rights revert to the terminating party, and that party is free to make further transfers.[38]

C. Critical Perspectives on Section 203

Commentators have criticized Section 203 for being both unduly intricate and theoretically flawed. Though meant to benefit authors, some claim that its complexity renders it nearly useless.[39] The intricacies of the provision result in rights forfeiture for the under-informed.[40]

In addition to its technicalities, critics allege that Section 203's theoretical premise is flawed: Congress meant to provide authors with an opportunity for increased compensation from their works,[41] but the provision actually reduces the amounts that authors receive because of the inability to predict the economic success of works prior to

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[34] 17 U.S.C. § 203(a)(4).

[35] *Id.* For the work transferred and published in 1978, recall that the termination window was from 2013 to 2018. If the terminating party wanted termination to take effect in 2013, they could have sent notice anytime between 2003 and 2011. If the terminating party wanted termination to take effect in 2018, they could have sent notice anytime between 2006 and 2016. For a valid termination, the terminating party must have sent notice by 2016 at the latest.

[36] *Id.* § 203(a)(4)(A)–(B).

[37] *Id.* § 203(b)(4). This provision gives the original transferee a preference in obtaining the rights. *See supra* note 29 and accompanying text.

[38] *Id.* § 203(b)(2)–(3). Transfers of joint works require the consent of the majority of the work's rights holders. *Id.* § 203(a)(1), (b)(3).

[39] *See* Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 36 (2010) (contending that the requirements are so demanding as to make the right "largely illusory"); Tim Wu, *On Copyright's Authorship Policy*, 2008 U. CHI. LEGAL F. 335, 354 (2008) (stating that the right is "less known and less used than was intended").

[40] *See* Molly Van Houweling, *Authors Versus Owners*, 54 HOUS. L. REV. 371, 383–84 (2016) ("The difficulties . . . may be overcome by good lawyering for those authors who can afford it . . . . But authors who want to reclaim rights . . . may be intimidated by the intricate provisions and unable to afford legal advice.").

[41] *See, e.g.*, Senator Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, 59 U. PITT. L. REV. 719, 735–36 (1998) (arguing that this was the rationale behind enacting Section 203).

exploitation.[42] Transferees, aware that they have only thirty-five years to recoup their investment and seeking to minimize losses, undervalue the works at the initial transfer of ownership.[43] Authors agree to transfer at an undervalued price, either because they lack bargaining power[44] or because they expect to receive a greater return when they invoke Section 203 in thirty-five years.[45] However, only authors of the most successful works will invoke Section 203; the cost of regaining rights is not worthwhile for those works that are no longer generating any income.[46] These most successful works may generate more revenue post-termination (and thus provide the author with greater compensation), but the vast majority of authors who never invoke Section 203 remain undercompensated.[47]

Despite these critiques, authors and transferees continue to take termination of copyright transfers seriously, believing it to be a significant and useful tool.[48] Therefore, it is necessary to evaluate the provision's implications for the music industry.

D. The Dynamics Between Authors and Transferees in the Music Industry

Before considering Section 203's application to the music industry, it is useful to understand the relationships at issue. There are

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[42] *See* Kate Darling, *Occupy Copyright: A Law & Economic Analysis of U.S. Author Termination Rights*, 63 BUFF. L. REV. 147, 163–64 (2015).

[43] *See, e.g.*, *id.* at 164–65 (explaining that a termination right for authors results in a lower valuation for the initial assignment of the copyrighted work); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1229 (1996) (noting that publishers may react to termination rights by reducing the price paid for the works at their initial transfer).

[44] *See* Sterk, *supra* note 43, at 1228–29 (discussing the unequal bargaining power that results from the inability to determine a work's value until after it has been exploited).

[45] *See* Maureen A. O'Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. COPYRIGHT SOC'Y U.S.A. 425, 442 (2003) (arguing that optimism bias causes authors to believe that their works will be economically viable after thirty-five years, despite contradictory statistical evidence).

[46] *See* Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329, 1352 (2010).

[47] *See, e.g.*, Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1807 (2012) (arguing that unsuccessful authors "los[e] twice" by not getting a high initial transfer price and not benefiting from termination rights); Loren, *supra* note 46, at 1353 ("If the bargained for price for the transfers includes a discount for the possibility of termination, then unsuccessful authors may be suffering at the cost of extremely successful ones."). *Contra* Darling, *supra* note 42, at 167 (arguing that this result could be desirable, because it induces creators to innovate with the hope that they will reap the highest rewards).

[48] *See, e.g.*, Complaint at 2, McCartney v. Sony/ATV Music Publ'g LLC, No. 17-cv-00363, 2017 WL 194336 (S.D.N.Y. Jan. 18, 2017) (seeking a declaratory judgment that notices of termination were valid and will result in re-vested ownership). The parties have since settled. Order, *McCartney*, 2017 WL 194336 (No. 17-cv-00363).

two separate copyrights in music: the musical work (the composition, the music and lyrics)[49] and the sound recording.[50] Two types of transferees have emerged around these two copyrights: music publishers for musical works and record labels for sound recordings.

While the content handled is distinct, music publishers and record labels have remarkably similar business models. Both contract with authors for a transfer of the ownership of the copyrighted work and distribute these works to the public.[51] These entities collect revenue from the use of the works and split it with the author.[52] They use their portion of the income derived from older, successful works to fund the creation and distribution of new works.[53] The transferees hold a prominent role in the music industry because they were once essential to the distribution of music to the masses.[54] Songwriters rarely had sufficient leverage to convince recording artists to perform their songs without a music publisher's influence,[55] and few recording artists had the resources to manufacture and distribute sound recordings to retailers throughout the United States, let alone internationally.[56] Although some contend that the digital age has enabled many authors to operate independently,[57] the market still favors the transferees,[58]

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49 17 U.S.C. § 102(a)(2) (2012).

50 *Id.* § 102(a)(7).

51 Record labels and music publishers also spend money on author development, marketing, and promotion. They also license works to third parties. *See, e.g.*, Passman, *supra* note 6, at 63–64, 222 (explaining the various functions performed by record labels and music publishers).

52 *See id.* at 88–92, 220–21 (describing the typical royalties that authors may receive under recording and publishing contracts).

53 *See* Larry Rohter, *Record Industry Braces for Artists' Battles Over Song Rights*, N.Y. Times (Aug. 15, 2011), http://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html (discussing record labels' disproportionate reliance on sales from older recordings, due to the substantial decrease in new music sales caused by illegal internet downloads); *see also* Randy S. Frisch & Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 Colum.-VLA J.L. & Arts 211, 215–16 (1993) (noting that significant revenue comes from catalog sales, and that older records generate higher profits per record).

54 *See* Passman, *supra* note 6, at 68 ("Historically, record companies held the keys to the kingdom."); *id.* at 221 ("Following the turn of the twentieth century, and well into the 1940s, publishers were the most powerful people in the music industry.").

55 *See id.* at 221–22 (explaining that publishers control the right to create a sound recording from a musical work).

56 *See, e.g.*, *id.* at 68, 179–80 (describing the challenges to large-scale distribution and estimating the cost of radio promoters, who get records played on the radio, to range from $75,000 to $400,000 per single). Even today, many independent labels transact with major label distributors because distribution is so costly. *See id.* at 67.

57 *See, e.g.*, Jane C. Ginsburg, *The Author's Place in the Future of Copyright*, 45 Willamette L. Rev. 381, 388 (2009) ("The technology that brings works directly to users' computers and personal portable devices no longer requires traditional publishing's infrastructure of intermediaries . . . . [E]very author can be a publisher."); David Dante Troutt, *I Own Therefore I Am: Copyright, Personality, and Soul Music in the Digital*

because their resources fund innovation and distinguish their works from the millions available online.[59] For the works that are currently or soon-to-be eligible for termination (those created in the late 1970s–1980s), the major transferees were the primary, if not exclusive, mode of exploitation. If Section 203 achieves its intended purpose, these parties stand to lose a substantial portion of their catalog and income.[60] Thus, these parties are at the forefront of advocacy against the applicability of Section 203 in the music industry, primarily arguing that musical works and sound recordings are not terminable at all because they fall within Section 203's statutory exceptions.

II
Statutory Exceptions to Section 203

Section 203 has two statutory exceptions: It does not apply to works made for hire[61] or derivative works.[62] The transferees are incentivized to classify transferred works into one of those excepted categories because foreclosing Section 203 allows the transferees to maximize the amount of time that they can derive revenue from the works and recoup their investment.

A. Works Made for Hire Exclusion

A work made for hire is a work that is created within the scope of employment, or a particular type of commissioned work.[63] Because

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Commons, 20 Fordham Intell. Prop. Media & Ent. L.J. 373, 436 (2010) ("For artists, it is as if technology has birthed a potentially pure system, a state of creative nature where . . . delivery of one's work to a curious audience is unimpeded by costly intermediaries.").

[58] The three major labels are Universal Music Group, Sony Music, and Warner Music Group. In 2016, the major labels controlled 68.7% of the global market for recorded music. *See* Mark Mulligan, *Global Market Shares 2016: Sony and Warner Gain on Universal, as Indies Rule*, Music Bus. Worldwide (Feb. 26, 2017), http://www.musicbusinessworldwide.com/global-market-shares-2016-sony-and-warner-gain-on-universal-as-indies-rule/. The three major publishers are (not coincidentally) Universal Music Publishing Group, Sony/ATV, and Warner/Chappell Music Publishing. The music publishing industry is slightly less concentrated, with the major publishers holding 59% of the market share for the 4th Quarter of 2016. *See* Ed Christman, *Music Publishers' 4th Quarter Report: Top 3 Companies Have the Same No. 1 Song*, Billboard (Feb. 3, 2017), http://www.billboard.com/articles/business/7677913/music-publishers-4th-quarter-report (see pie chart with company market shares).

[59] *See* Kevin Parks, *From Ray Charles to "Y.M.C.A."—Section 203 Copyright Terminations in 2013 and Beyond*, Licensing J., Mar. 2013, at 1, 5 (noting that "even in the digital era, exploiting and distributing creative content requires considerable resources and skills that most individual artists do not have").

[60] *See supra* note 52 and accompanying text.

[61] 17 U.S.C. § 203(a) (2012).

[62] *Id.* § 203(b)(1).

[63] *Id.* § 101.

authorship in a work made for hire automatically vests in the party for whom the work was created,[64] Section 203 is not applicable; there is no initial transfer to eventually terminate.

Given the attractiveness of dispensing with Section 203 entirely, scholars speculate that transferees will focus on this argument to prevent authors from invoking Section 203.[65] Section 203 rights are inalienable,[66] but transferees insist upon contractual provisions stating that the transferred works are works made for hire as an attempt to remove the works from Section 203's scope.[67] However, this contractual language is not legally enforceable; whether a work qualifies as a work made for hire is based on statutory interpretation and judicial precedent, not on what is agreed to in a contract.[68] While not legally enforceable, this anticipatory classification may mislead uninformed authors into believing that their works were always works made for hire, convincing them that termination is futile.[69]

Because some authors are savvy enough to recognize that the contractual language does not dictate whether Section 203 applies to their works, one must consider whether a court would deem musical works and sound recordings as works made for hire beyond Section 203's purview. A work qualifies as a work made for hire if it is (1) prepared by an employee in the scope of employment,[70] or (2) commissioned for use in a statutorily enumerated way, if the parties agree in writing.[71]

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64 *Id.* § 201(b).

65 *See, e.g.*, Jorge L. Contreras & Andrew T. Hernacki, *Copyright Termination and Technical Standards*, 43 U. Balt. L. Rev. 221, 243 (2014) ("The work-made-for-hire exception is arguably the most important and least clear element of the Section 203 termination right."); Ryan Vacca, *Work Made for Hire—Analyzing the Multifactor Balancing Test*, 42 Fla. St. U. L. Rev. 197, 238–39 (2014) (selecting this issue as a case study because of its ripeness for litigation).

66 17 U.S.C. § 203(a)(5). *See supra* note 28 and accompanying text.

67 *See* William Henslee & Elizabeth Henslee, *You Don't Own Me: Why Work for Hire Should Not Be Applied to Sound Recordings*, 10 J. Marshall Rev. Intell. Prop. L. 695, 713 (2011) (noting that record companies already use a standard work for hire clause in recording contracts); Alfred C. Yen, *Private Ordering and Notice Failure in the Shadow of Termination*, 96 B.U. L. Rev. 927, 931–32 (2016) (describing the two types of contractual provisions through which a party could attempt to establish work made for hire status).

68 *See* Yen, *supra* note 67, at 932 (explaining that parties cannot contractually agree to declare work made for hire status if that work does not satisfy the statutory basis for work made for hire treatment).

69 *See id.* at 932–33.

70 17 U.S.C. § 101.

71 *See id*. The enumerated categories are: as part of a collective work, a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, or an atlas. *Id.*

1. *Scope of Employment*

To be a work made in the scope of employment, a court must consider whether the party who created the work is an employee or an independent contractor, using the factors set forth in *Community for Creative Non-Violence v. Reid*.[72] Although the classification of musical works and sound recordings remains inconclusive, scholars have expressed doubts that these works could qualify as works made for hire under *Reid*.[73] Authors are not typically paid as employees;[74] they are highly skilled and create using their own spaces and tools;[75] and the transferees do not provide employee benefits[76] or subject authors to employee tax treatment.[77] If authors are unlikely to be considered employees, the scope of employment classification likely fails.[78]

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[72] 490 U.S. 730, 750–52 (1989). These factors, based on the common law of agency, include details regarding the work itself (e.g., whether the hiring party has control and discretion over how the work is done), as well as the relationship between the parties (e.g., whether the hiring party pays employment benefits; the tax treatment of the hired party), among other things. *Id.* at 751–52.

[73] *See* Henslee & Henslee, *supra* note 67, at 709–12 (applying the *Reid* factors to the record label-author relationship and concluding that Congress did not anticipate this type of relationship under the work made for hire doctrine); Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 379 (2002) (discussing how most creative participants in sound recordings are independent contractors, rather than record label employees); Vacca, *supra* note 65, at 252–53 (noting that the most important *Reid* factors weigh in favor of authors as independent contractors, whereas the least important factors favor the record labels).

[74] Vacca, *supra* note 65, at 242–43 (noting that advances and royalties indicate independent contractor status).

[75] *Id.* at 244–45 (explaining that authors' unique skill and creative independence suggest independent contractor status).

[76] *See* 2014 Hearings, *supra* note 7, at 36 (statement of Casey Rae, Vice President for Policy and Education, Future of Music Coalition) ("If an artist is an employee, why aren't they provided with a retirement package or health insurance benefits like executives or even office assistants?").

[77] Vacca, *supra* note 65, at 241–42 (noting that record labels "rarely withhold income taxes or contribute to social security" (quoting M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC 203 (8th ed. 2000))).

[78] Note that musical works and sound recordings could potentially be works made for hire under Section 101(1) if created in the context of a loan-out corporation. *See, e.g.*, Aaron J. Moss & Kenneth Basin, *Copyright Termination and Loan-Out Corporations: Reconciling Practice and Policy*, 3 HARV. J. SPORTS & ENT. L. 55 (2012) (exploring the conflict between termination rights and loan-out corporations and evaluating potential legislative and contractual solutions to alleviate the tension). The viability of this argument remains an open question. *See* Sean Stolper, *Termination Rights: An In-Depth Look at Looming Issues Under the Copyright Act of 1976*, 13 TEX. REV. ENT. & SPORTS L. 33, 57 (2011) (noting that the nullification of termination by loan-out corporations remains untested by litigation); *cf.* Donaldson Publ'g Co. v. Bregman, Vocco & Conn, Inc., 375 F.2d 639, 643 (2d Cir. 1967) (finding that an author was not an "employee" of his own corporation and thus had renewal rights under the 1909 Act).

2. Specially Commissioned Works

A work may also be a work made for hire if it meets the commissioned works standard. Because neither musical works nor sound recordings are explicitly enumerated in Section 101(2),[79] musical works and sound recordings would have to fall within one of the listed categories. It seems apparent that musical works are not encompassed within the enumerated categories, but sound recordings have generated enormous debate.

In 1999, Congress passed legislation which included a "technical amendment" that added sound recordings to Section 101(2).[80] This generated immediate controversy amongst authors;[81] technical amendments make minor formatting and grammatical changes,[82] and this insertion had substantive implications for copyright term duration and the applicability of Sections 203 and 304.[83] Congress rapidly repealed the amendment,[84] but avoided addressing whether sound recordings can ever qualify as works made for hire. Instead, Congress directed parties to act as if the enactment had never happened,[85] perhaps indicating that this question should be resolved by judicial interpretation of the preexisting list of specially commissioned works.

Parties now argue that sound recordings are encompassed within the preexisting list as contributions to a collective work because sound recordings are distributed on an album, an assembly of works.[86]

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79 *See supra* note 71 for the list of enumerated works eligible for Section 101(2) treatment.

80 Intellectual Property and Communications Omnibus Reform Act of 1999, § 1011(d), Pub. L. No. 106-113, 113 Stat. 1501 app. § 1948 (repealed 2000).

81 *See, e.g.*, Christman, *supra* note 2 (describing how the artist community "went ballistic" following the enactment of the technical amendment).

82 *Cf.* Henslee & Henslee, *supra* note 67, at 702 (noting that this edit was minor, located in the appendix to a 1000-page bill).

83 An individual-created copyrighted work is protected for the author's life plus seventy years, but works made for hire have a fixed term of ninety-five years from publication or 120 years from creation, whichever is shorter. 17 U.S.C. §§ 302(a), (c) (2012). This insertion affected Sections 203 and 304 because works made for hire are excluded from both of these provisions. *Id.* §§ 203(a), 304(c). For the impact on Section 203, see *supra* notes 63–67 and accompanying text.

84 Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, § 2, 114 Stat. 1444, 1444 (2000).

85 17 U.S.C. § 101(2) ("Neither the amendment . . . nor the deletion of the words added by that amendment . . . shall be considered or otherwise given any legal significance.").

86 PASSMAN, *supra* note 6, at 317. A collective work is "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101. Collective works are a type of compilation, a work "formed by the collection and assembling of preexisting materials . . . that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." *Id.*

Scholars have not found this argument to be particularly convincing.[87] Even if an album were a collective work, this would not foreclose applicability of Section 203 to sound recordings because individual sound recordings of an album are individually copyrightable.[88] Even if an album could not be terminated because it is a collective work, the author could submit termination notices for each individual sound recording on the album as a work-around. Distributing the sound recordings in a disc or playlist that includes all the same songs in the same order may infringe on the record label's copyright for the album, as it reproduces the record label's selection and arrangement of sound recordings. But perhaps the author could evade infringement by reorganizing the track-list (arranging the tracks in a different order) and adding or removing a few tracks (altering the selection). This argument is even more powerful given the fall of CDs and the rise of individual digital downloads and streaming, which establish the single as an individually marketed and consumed work.[89] The fact that sound recordings are distributed and consumed as individual singles contradicts the argument that they are works made for hire under Section 101(2), because individual sound recordings do not fall within any of the enumerated categories.

The applicability of the work made for hire doctrine to musical works and sound recordings remains unsettled.[90] Some have advo-

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Newspapers, magazines, and anthologies of poems and short stories are all examples of collective works.

[87] *See* LaFrance, *supra* note 73, at 388 (emphasizing the lack of discussion in the legislative history considering sound recordings through this lens); Vacca, *supra* note 65, at 241 n.339 (citing numerous sources which suggest that sound recordings should not qualify as collective works).

[88] The definition of "collective work" states that the individual contributions "constitut[e] separate and independent works in themselves." 17 U.S.C. § 101. Sound recordings are copyrightable under Section 102(a)(7), regardless of whether the work is fixed by itself or compiled alongside nine other sound recordings on an album.

[89] *See, e.g.*, Scott Berinato, *The iTunes Effect and the Future of Content*, HARV. BUS. REV. (Jan. 12, 2010), https://hbr.org/2010/01/the-itunes-effect-and-the-futu.html (discussing how more consumers are purchasing individual singles instead of albums); Ed Christman, *U.S. Music Industry Sees First Double Digit Growth in Almost 20 Years as Streaming Takes Over*, BILLBOARD (Mar. 30, 2017), https://www.billboard.com/articles/business/7744268/riaa-us-music-industry-2016-revenue-double-digit-growth (noting that revenue from streaming singles increased by 68.5% in 2016, while digital album sales declined by 21.3% and physical album sales fell 20.9%).

[90] *See, e.g.*, PASSMAN, *supra* note 6, at 320 (noting that this issue will "spawn some massive fights"); Henslee & Henslee, *supra* note 67, at 703 ("The critical issue of the status of the work made for hire definition in regard to sound recordings is now left squarely in the corner of the federal courts.").

cated for Congressional action,[91] particularly because parties are reluctant to litigate, fearing the establishment of harmful precedent.[92] Until a more decisive proclamation is made, Section 203 remains applicable to the music industry.

B. Derivative Work Exclusion

Section 203 also excludes derivative works, allowing transferees to continue using them after termination.[93] A derivative work is a work "based upon one or more preexisting works," and which may involve the original being "recast, transformed, or adapted."[94] This exception originated as an assurance to transferees that works produced during the thirty-five years of the transfer could remain in their possession after termination. Section 203 is inalienable, and so transferees risked losing authorization to exploit a derivative work that they produced because the derivative necessarily included elements of the original work that had been terminated. If the author of the terminated work did not reauthorize exploitation of the derivative work, its exploitation would have been copyright infringement.[95] There was concern in the movie industry that, after investing millions of dollars in creating a movie from a script, the movie would not be exploitable after the script's author terminated the script's transfer.[96]

The derivative works exception diminishes the utility of Section 203 for authors because courts have allowed transferees to continue receiving income from post-termination uses of works which were authorized by licenses entered into before termination.[97]

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[91] *See, e.g.*, LaFrance, *supra* note 73, at 404–15 (offering numerous proposals through which Congress could either make sound recordings eligible for work made for hire status or achieve the functional equivalent).

[92] *See, e.g.*, Brian L. Frye, *Scenes from the Copyright Office*, 32 Touro L. Rev. 83, 97 (2016) (stating that "the recording industry is split on the wisdom of litigating terminating notices"); Joseph Bogdan, *Ten Reasons Authors Aren't Retaking Their Copyrights: Guest Post*, Billboard (Dec. 11, 2015), http://www.billboard.com/articles/business/6805280/ten-reasons-authors-arent-retaking-their-copyrights-guest-post (explaining that no one wants to be the expensive, high-risk, high-profile, and tumultuous test case); Christman, *supra* note 2 (explaining that artists and labels have settled on a case-by-case basis because neither side wants to risk losing).

[93] 17 U.S.C. § 203(b)(1) (2012).

[94] *Id.* § 101.

[95] The right to control the production and use of derivative works is one of the express rights conferred to a copyright owner. *Id.* § 106(2).

[96] *See, e.g.*, H.R. Rep. No. 94-1476, at 5743 (1976) (stating that a film based on a play could "continue to be licensed for performance after the contract had been terminated").

[97] Mills Music, Inc. v. Snyder, 469 U.S. 153, 165–66 (1985). In *Mills Music*, the defendant transferred the copyright of the musical work to a music publisher. *Id.* at 157. The music publisher then licensed the use of the musical work to record companies who wanted to make sound recordings of the musical work, in exchange for royalty payments. *Id.* at 158. When defendant terminated the transfer under Section 304, a dispute arose as to

However, if the particular use is not covered by the pre-termination license, the transferee is not entitled to compensation.[98]

A transferee may not produce new derivative works after the effective date of the termination.[99] However, these legal rules may incentivize transferees to extensively license the work prior to the effective date of termination in order to secure a right to revenue for post-termination uses.[100] The development of new derivative works just before the effective date of termination harms the author's ability to independently grant post-termination licenses because the market will already be flooded with uses of the work. If licensing opportunities for the work have already been exhausted, invoking Section 203 will be less appealing for the author because the author will have diminished monetary returns after regaining ownership.

In the music industry, transferees can use the derivative works exception in various ways. Music publishers may license musical works for the creation of sound recordings so that they can obtain mechanical royalties generated from these licenses.[101] Any revenue generated from these licenses post-termination would be split between the music publisher and author, based upon the terms of their original agreement, rather than going entirely to the author. The author would continue to receive only a small fraction of the revenue, despite fully owning the work.[102]

Record labels may remaster sound recordings, transferring the recording from analog to digital format and making choices about various aural elements, such as compression and reverb.[103] It is not yet

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who should now receive the royalties paid under the record companies' license: the defendant (now the owner of the copyright) or the music publisher (who had owned the copyright at the time the license was created). *Id.* at 155–56. The court sided with the music publisher. *Id.* at 178.

98 *See* Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc., 958 F. Supp. 170, 174 (S.D.N.Y. 1997), *aff'd* 155 F.3d 17 (2d Cir. 1998). In *Fred Ahlert*, the revenue generated by the post-termination use of a sound recording went beyond the scope of the license that had been formed pre-termination. *Id.* The court held that the revenue belonged to the author, not the music publisher. *Id.*

99 17 U.S.C. § 203(b)(1).

100 Bently & Ginsburg, *supra* note 15, at 1579. Some might argue that any incentive to create more copyrighted works is a good thing, especially if one believes that the works are more efficiently managed in a transferee's hands than in the author's. This result, however, ignores Section 203's author-focused intent.

101 *E.g.*, *Mills Music*, 469 U.S. at 155.

102 *Cf.* J.H. Richman, *The Duration of Copyright and the Limits of Cultural Policy*, 14 CARDOZO ARTS & ENT. L.J. 625, 650 (1996) (criticizing the derivative works exception, because it does not allow the author and transferee to revisit the payment structure on equitable grounds).

103 Harrison Speck, *Everything Old Is New Again? Court Rules Remastering Resets Copyright*, FUTURE OF MUSIC COALITION (June 20, 2016, 2:56 PM), https://futureofmusic.org/blog/2016/06/20/everything-old-new-again-court-rules-remastering-resets-copyright.

clear whether remastered sound recordings constitute derivative works.[104] The Compendium of Copyright Office Practices states that remixes of preexisting sound recordings can be derivative works but that the creative contributions to remasters may be too mechanical or too minimal to qualify as derivative works.[105] In *ABS Entertainment, Inc. v. CBS Corp.*, the district court held that remastered sound recordings were derivative works[106] because they were sufficiently original and distinguishable from the original work.[107] The Ninth Circuit's decision on appeal is currently pending.[108]

Although *ABS Entertainment* does not involve termination, affirmance of the court's view could have significant effects on the post-termination market for the original work. Record labels must receive at least two years' advance notice of termination,[109] which would give them time to prepare remastered versions before the effective date of termination. Remastered works could devastate the post-termination market for the original work because they are direct replacements.[110] The record label has a greater capacity to distribute their version, and third parties will be uninterested in licensing the original work if one that sounds the same is already on the market.[111]

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104 *Compare* Jon Peritz, Note, *Closing a Loophole in Musicians' Rights: Why Digital Remasters of Analog Sound Recordings Are Not Derivative Works Protected by the Copyright Act*, 11 Cardozo Pub. L. Pol'y & Ethics J. 385 (2013) (arguing that remastered sound recordings are not derivative works and thus cannot be exploited by record labels after the author has terminated the original sound recording), *with* James J. Schneider, Note, *Defeating the Terminator: How Remastered Albums May Help Record Companies Avoid Copyright Termination*, 53 B.C. L. Rev. 1889 (2012) (concluding that sound recordings are derivative works and that record labels should be allowed to continue exploiting them after the author invokes Section 203).

105 U.S. Copyright Office, Compendium of U.S. Copyright Office Practices §§ 803.6(B)(2), 803.9(F)(3) (3d ed. 2017).

106 No. CV 15-6257 PA (AGRx), 2016 WL 4259846 (C.D. Cal. May 30, 2016).

107 *Id.* at *7–9, *11.

108 Docket at Entry No. BL-66, ABS Entm't, Inc. v. CBS Corp., No. 16-55917 (9th Cir. Nov. 9, 2017).

109 17 U.S.C. § 203(a)(4) (2012).

110 *See, e.g.*, Phillip Edward Page, *The Works: Distinguishing Derivative Creations Under Copyright*, 5 Cardozo Arts & Ent. L.J. 415, 426 (1986) ("[I]n some markets, particularly commercial music, a user might find a slightly modified derivative equal in value to the original work.").

111 Frisch & Fortnow, *supra* note 53, at 226. For example, the streaming service Spotify has blanket licenses of the major record labels' entire catalogs. *See, e.g.*, Hannah Karp, *Spotify and Warner Music Group Come to Terms on New Licensing Deal*, Billboard (Aug. 24, 2017), https://www.billboard.com/articles/business/7941889/spotify-and-warner-music-group-come-to-terms-on-new-licensing-deal (discussing Spotify's licensing deals with all three major record labels). If Spotify is a rational economic actor, it would prefer to use the remastered version already included in their blanket license than individually contract with each author for use of the original.

The derivative works exception could diminish Section 203's utility for authors because it incentivizes transferees to over-exploit a work before ownership reverts to the author, reaping any potential revenue prior to the termination and leaving the author with an exhausted good.

III
The Permanency of the Author and Transferee's Relationship

Even if a work escapes the work made for hire and derivative work exclusions, several factors impede Section 203 from effectively liberating authors from transferees. First, transferees may retain joint ownership in these works, restricting the author's freedom to distribute the work post-termination.[112] Second, Section 203 extends only to terminations in the United States, while music industry contracts grant worldwide rights, keeping the author tied to the transferee for international distribution.[113] Third, Section 203 affects the transfer of the copyrighted works but does not terminate the rest of the parties' contract. Many music industry contracts are broader than just the transfer of copyrighted works, keeping authors and transferees linked.[114]

A. Joint Ownership

Transferees may claim that they have continued joint ownership rights in the work, which would allow them to receive post-termination revenue and to obstruct future licensing efforts.[115] Joint ownership could be accomplished by establishing either that the transferee is a joint author, or that it has joint ownership through a joint author's lapsed termination rights.

1. Joint Ownership Through Independent Claim of Joint Authorship

A joint work is "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."[116] The authors must each

112 *See infra* Section III.A.
113 *See infra* Section III.B.
114 *See infra* Section III.C.
115 *See* 17 U.S.C. § 201 (2012) ("The authors of a joint work are coowners of the copyright in the work.").
116 *Id.* § 101.

intend to contribute to a joint work, and their contributions must be independently copyrightable.[117]

While the typical conception of joint authorship involves a songwriting collaboration or a band, a transferee could potentially establish joint authorship.[118] Many transferees serve creative roles, matching authors with collaborators and providing feedback on the works.[119] Mere direction or advice is not sufficient for joint authorship.[120] At least one court has found joint authorship for parties that provide equipment and talent for the production of a sound recording,[121] while others have rejected claims when the party's main contributions were funding and studio space.[122] Others emphasize the parties' intention to be joint authors.[123] Ultimately, whether transferees are joint authors is a highly specific, case-by-case determination, complicated by the difficulties in proving something thirty-five years after the fact.[124]

2. *Joint Ownership Through Lapsed Termination Rights*

Even if a transferee cannot establish joint authorship, it could retain partial control of works by multiple authors through one of the authors' lapsed termination rights. If joint authors originally transferred their rights to the transferee through separate grants, each author can independently choose whether to invoke Section 203.[125] If

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117 *E.g.*, Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1071–73 (7th Cir. 1994) (holding that plays were not joint works because they did not fulfill both of these requirements). At least one court has required evidence of intent to be joint authors as well. Aalmuhammed v. Lee, 202 F.3d 1227, 1234–35 (9th Cir. 2000).

118 *See, e.g.*, Frisch & Fortnow, *supra* note 53, at 226–28 (evaluating several ways that a transferee could claim joint authorship).

119 Passman, *supra* note 6, at 222 (describing the actions taken by "creative" music publishers).

120 *See, e.g.*, Gaylord v. United States, 595 F.3d 1364, 1377 (Fed. Cir. 2010) ("To be an author, one must supply more than mere direction or ideas." (quoting S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1087 (9th Cir. 1989))); Frisch & Fortnow, *supra* note 53, at 227 (noting that choosing a producer and back-up musicians are ideas, which are not copyrightable contributions).

121 Shaab v. Kleindienst, 345 F. Supp. 589, 590 (D.D.C. 1972).

122 *See, e.g.*, Forward v. Thorogood, 985 F.2d 604, 607 (1st Cir. 1993) (finding that the producer did not "serve as an engineer at the sessions or direct the manner in which the songs were played or sung"); Brown v. Flowers, 297 F. Supp. 2d 846, 852 (M.D.N.C. 2003) (finding that working as a recording engineer and producer was not enough to show a more than a de minimis original contribution).

123 *See* Ulloa v. Universal Music & Video Distrib. Corp., 303 F. Supp. 2d 409, 418 (S.D.N.Y. 2004) (holding that "merely intend[ing] to enter into a relationship that results in the creation of a copyrightable work" is not sufficient).

124 *See* LaFrance, *supra* note 73, at 397 (noting that authors are unlikely to document and retain evidence of the creative process for thirty-five years).

125 Scorpio Music S.A. v. Willis, No. 11cv1557 BTM(RBB), 2012 WL 1598043, at *2–5 (S.D. Cal. May 7, 2012). This is different from a situation where the joint authors originally

an author does not invoke Section 203 during the five-year termination window, the rights remain with the transferee for the rest of the copyright's term.[126] Imagine a situation where two authors collaborate, each transferring their ownership interest in the work to the same music publisher in separate grants. If the first author exercises his termination rights, but the second author never exercises her rights, the first author receives his share of the rights and the music publisher retains the second author's share.

The potential for this situation to arise is considerable. Most authors have individual contracts with music publishers, so they do not transfer copyright interests in the same transaction as their collaborators.[127] An additional complication is the industry practice of giving writing credits to parties who did not actually co-author the work.[128] "In name only" authors may be content to receive passive income from the transferee and may not be incentivized to exercise Section 203 rights, increasing the transferee's odds of retaining that ownership interest. The separate-grants situation could also arise in relation to producers of sound recordings, who may have a viable joint authorship claim.[129] Production agreements proclaim that the pro-

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transferred their rights to the transferee in a single grant. In that case, a majority of the authors must consent for termination to take effect. 17 U.S.C. § 203(a)(1) (2012). On the effective date of termination, the rights in the work revert to all of the authors, even if they did not consent to the termination notice. *Id.* In this situation, a transferee without a successful claim for an independent joint authorship interest would not retain any ownership rights after the effective date of termination. *Id.* § 203(b).

126 *Id.* § 203(b)(6).

127 Many authors of musical works collaborate with other authors in "one-offs," rather than as long-term collaborative teams. Thus, it is more efficient for each party's copyright interests to apply toward the author's delivery obligations under their individual contracts, rather than re-contracting with a publisher each time a collaboration occurs. *See generally* PASSMAN, *supra* note 6, at 292–96.

128 *See, e.g.*, Geoffrey P. Hull, *Termination Rights and the Real Songwriters*, 7 VAND. J. ENT. L. & PRAC. 301 (2005). A high-profile example is Robin Thicke's admission in a deposition that he did not write the 2013 hit, "Blurred Lines," even though he was credited as a co-writer. *See* Charlotte Alter, *Robin Thicke Admits He Didn't Really Write 'Blurred Lines,' Was High in the Studio*, TIME (Sept. 15, 2014), http://www.time.com/3378763/robin-thicke-blurred-lines-lawsuit-pharrell-drugs/. It is also common to give parties co-authorship credits after sampling that party's work or when settling copyright infringement disputes, even though those parties did not participate in the work's creation. *See, e.g.*, Melissa Locker, *Sam Smith to Pay Tom Petty Songwriting Royalties for 'Stay with Me*,*'* TIME (Jan. 26, 2015), http://time.com/3682314/sam-smith-stay-with-me-tom-petty-songwriting/ (explaining that Sam Smith agreed to pay Tom Petty a portion of the royalties generated by Smith's hit song because of the similarities between the two songs, even though Smith claimed that any similarities were coincidental).

129 *See, e.g.*, Sebastian Music Grp., Inc. v. Ayala-Rodríguez, 594 F. Supp. 2d 176, 180 (D.P.R. 2008) (suggesting that a producer may qualify as a co-author).

ducer's contributions are works made for hire,[130] but this contractual language is likely unenforceable,[131] and the *Reid* factors suggest independent contractor status for producers.[132] If an author exercises Section 203 but the producer does not, the author would share ownership of the sound recording with the record label, which would retain the producer's share of rights.

3. Post-Termination Implications of Joint Ownership

Joint ownership with a transferee would affect the author's ability to exploit the work. Joint owners may grant non-exclusive licenses without the consent of co-owners, but they are not permitted to grant exclusive licenses without consent.[133] An author may have invoked Section 203 with the intention of exclusively retransferring the work to another transferee in exchange for a higher royalty. However, a corporate joint-owner is unlikely to consent to an exclusive transfer to a competitor, even if they will receive a share of the revenue. Transferees use the revenue from one act to finance new acts,[134] and they compete for new talent based on the accolades of their existing catalog,[135] so a corporate joint-owner will not want to help a competitor's long-term interests.

An author with collaborators can avoid this situation if all collaborators exercise their termination rights within the statutory window. However, the cost and complexity of exercising Section 203, the fear of resulting litigation, or the lack of interest in reassuming control of the work may deter some of the authors from pursuing this route. A coordinated effort is likely necessary for multiple parties to successfully accomplish terminations within the allocated time window.

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130 *See, e.g.*, Steve Gordon, *Three Contracts Every Music Producer Should Know . . .* , Digital Music News (July 30, 2015), https://www.digitalmusicnews.com/2015/07/30/three-contracts-that-every-music-producer-should-know/ (noting that, while producers should avoid this contractual language, it may be non-negotiable).

131 *See supra* note 67–68 and accompanying text.

132 Daniel Gould, Note, *Time's Up: Copyright Termination, Work-for-Hire and the Recording Industry*, 31 Colum. J.L. & Arts 91, 112–14 (2007) ("[P]roducers are at least as likely as artists to be considered independent contractors rather than employees under *Reid*.").

133 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 6.10[A][2] (2018).

134 *See supra* note 53 and accompanying text.

135 *See, e.g.*, Mitchell Peters, *Liam Payne Announces Solo Deal with Capitol Records UK*, Billboard (July 21, 2016), http://www.billboard.com/articles/news/7446504/one-direction-liam-payne-announces-solo-deal-with-capitol-records-uk (sharing the author's statement that "Capitol Records has an amazing history stretching right back before even Frank Sinatra and I'm really looking forward to becoming part of their story").

B. Terminating U.S. Rights in an International World

Momentarily dispensing with the complications of joint authorship and joint ownership, imagine a simple scenario: A single author writes a musical work and records a sound recording of it, serving as his own producer. The music publisher and record label do not have joint authorship interests in the musical work or sound recording. Only two parties are implicated in each copyright transfer: author and music publisher for the musical work; author and record label for the sound recording. In theory, Section 203 is designed so that the author terminates the transfer, regains the rights to his work, and proceeds independently from the transferee.[136]

However, this clean severance of relationship is impossible, because the Copyright Act of 1976 applies only within the United States,[137] and Section 203 applies only to termination of transferred rights for the United States.[138] If demand for a work were limited to one country, or the transferee were only capable of distribution within a single jurisdiction, this may have been sufficient. But the marketplace is global,[139] and industry contracts cover a territory encompassing the world, or even the "universe."[140] Transferees have substantial international operations, with subsidiaries around the world and systems for collecting and distributing foreign revenue.[141]

1. Implications of the United States-International Distinction

Because Section 203 only terminates transfers for the United States, transferees retain the ability to exploit the work internationally under the preexisting contract.[142] An author invoking

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[136] 17 U.S.C. § 203(b) (2012).

[137] *See, e.g.*, Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc., 523 U.S. 135, 154 (1998) (Ginsburg, J., concurring) ("The rights granted by the United States Copyright Act extend no farther than the nation's borders." (quoting PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 16.0 (2d ed. 1998))); Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) ("[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . .").

[138] 17 U.S.C. § 203(b)(5). *See also* Siegel v. Warner Bros. Entm't Inc., 542 F. Supp. 2d 1098, 1140 (C.D. Cal. 2008) (holding that the comparable Section 304 right is limited to recapturing domestic rights), *rev'd on other grounds sub nom.* Larson v. Warner Bros. Entm't Inc., 504 F. App'x 586 (9th Cir. 2013).

[139] *See, e.g.*, Michael Landau, *Fitting United States Copyright Law into the International Scheme: Foreign and Domestic Challenges to Recent Legislation*, 23 GA. ST. U. L. REV. 847, 847 (2007) ("Information, knowledge, and entertainment know no borders.").

[140] PASSMAN, *supra* note 6, at 184–85.

[141] *See id.* at 262–65 (describing the major publishers' subsidiaries and smaller publishers' sub-publishing deals).

[142] 7 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 25:74 (2018). *Cf.* Marketa Trimble, *Advancing National Intellectual Property Policies in a Transnational Context*, 74 MD. L. REV. 203, 226 (2015) (noting that the Supreme Court has not located any indication in the

Section 203 must still deal with the transferee for the remainder of the copyright's duration or commercial viability. This has several practical effects on the author's options for the U.S. rights post-termination. It significantly complicates the work's licensing on global distribution platforms, makes the U.S. rights less attractive to potential third-party transferees, and provides the transferee leverage to regain control of the U.S. rights.[143]

The U.S.-international bifurcation can be problematic for U.S. authors but may be fatal for foreign authors, whose original contracts were with foreign transferees. For example, British group Duran Duran recently invoked Section 203 to terminate transfers of musical works originally made in England to Gloucester Place Music.[144] Gloucester Place Music then sued for breach of contract, arguing that rescinding the U.S. rights was a breach of their global transfer.[145] The court agreed, holding that although termination was valid under U.S. law, it breached the contract.[146] Duran Duran is thus liable for damages for Gloucester Place Music's lost revenue from exploitation in the United States.[147] These damages render the termination more costly than if there had been no termination at all. If Duran Duran self-administers the U.S. rights to the works, they must bear all marketing and transaction costs—expenses previously handled by Gloucester Place Music—and they still have to pay Gloucester Place Music its portion of the revenue as damages. If Duran Duran transfers the works to another transferee, they similarly must split any revenue with both Gloucester Place Music and the new transferee, narrowing their profit margin even more. Duran Duran's appeal is pending.[148] Although this decision was rendered in an English court, other parties have reacted in anticipation of the problems that an affirmance could cause in the United States.[149]

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legislative history that Congress considered cross-border transactions when drafting the Copyright Act of 1976).

143 *See infra* Part IV.

144 Gloucester Place Music Ltd. v. Le Bon & Ors [2016] EWHC (Ch) 3091, [1], [4].

145 *Id.* at [1].

146 *Id.* at [18], [45], [46].

147 Kenneth D. Freundlich & Michael J. Kaiser, *A View from Across the Pond: Duran Duran's Termination Rights Under the U.S. Copyright Act Come Undone by British High Court Ruling*, 33 Ent. & Sports Law., no. 2, Winter 2017, at 1, 41 ("The likely result of this perplexing decision . . . financially render[s] their termination rights a nullity.").

148 Letter Motion Requesting Pre-Motion Conference by Defendant at 1, McCartney v. Sony/ATV Music Publ'g LLC, No. 17-cv-00363 (S.D.N.Y. Mar. 13, 2017), ECF no. 30.

149 For example, Paul McCartney filed for a declaratory judgment against music publisher Sony/ATV, seeking affirmation that he would not breach his contract by terminating his U.S. rights. Complaint, McCartney v. Sony/ATV Music Publ'g LLC, No. 17-cv-00363, 2017 WL 194336 (S.D.N.Y. Jan. 18, 2017). The parties have since settled. Order, *McCartney*, 2017 WL 194336 (No. 17-cv-00363).

2. *Evaluating Avenues for Avoiding Bifurcation of Rights*

Can authors circumvent this jurisdictional bifurcation of rights? Technically, it is possible; practically, it would be so burdensome as to be prohibitive.

The easiest method to avoid bifurcation is to terminate the contract with the transferee, either by breach or by purchasing the transferee's international rights. Both alternatives would entail substantial expense. A breach could trigger litigation and large damages, considering the size and scope of the international market. Negotiating a buy-out of the international rights would require a significant payment to compensate the transferee for the lost revenue and would likely require superstar-level leverage.[150]

Another alternative would be to seek out comparable rights in foreign jurisdictions and invoke them. Although parties recognize the need for global protection of copyrighted works,[151] fluid international treatment of copyright is far from realized.[152] International copyright law dealing with ownership and exploitation rights consists of a patchwork of protections, with each country creating its own legislation.[153] Although most countries do not have an equivalent to Section 203, several foreign countries have author-protective laws governing economic rights.[154] Matters of substantive copyright follow *lex loci protec-*

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[150] *See* PASSMAN, *supra* note 6, at 299.

[151] *See, e.g.*, Richard A. Epstein, *Foreword: The International Evolution of Intellectual Property Rights*, 5 N.Y.U. J. INTELL. PROP. & ENT. L. 107, 107–08 (2015) ("[U]niformity of law facilitates the cross-border transactions that are the life-blood of international trade and cooperation. . . . The greater the variation in local laws, the harder it becomes to do business in multiple jurisdictions simultaneously.").

[152] The Berne Convention established baseline provisions of copyright protection, which it required members to adopt. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 1980 U.N.T.S. 31. Under the principle of national treatment, member countries must afford foreigners the same copyright protection as they give nationals. *Id.* art. 5(1)–(3). However, this only applies to the Berne Convention's minimum requirements, which do not include reversion rights. *See* Paul Edward Geller, *Conflicts of Laws in Copyright Cases: Infringement and Ownership Issues*, 51 J. COPYRIGHT SOC'Y U.S.A. 315, 328–30, 368–70 (2004).

[153] *See generally* Graeme W. Austin, *Social Policy Choices and Choice of Law for Copyright Infringement in Cyberspace*, 79 OR. L. REV. 575 (2000) (describing this patchwork and criticizing it as unsustainable for online distribution, which operates without borders).

[154] *See, e.g.*, Van Houweling, *supra* note 40, at 381–83 (discussing the "duty to exploit" as an author-protective tool). The German Copyright Act allows authors to revoke a transfer if the transferee does not exploit the work. Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights], Sept. 9, 1965, BUNDESGESETZBLATT, Teil I [BGBL I] at 1273, § 41 (Ger.). The Dutch Copyright Contract Act requires that authors receive fair compensation for transfers, and allows authors to dissolve a contract for failure to exploit. Wet auterscontractenrecht 30 juni 2015, Stb. 2015, 257, art. 25c–25h (Neth.). In France, an author may demand to revise the contract price if it becomes unfair, and the publisher

tionis, the law of the country for which protection is sought.[155] If an author could successfully invoke rights in jurisdictions where the work is exploited, the author would regain more of the work and get closer to severing the author-transferee relationship. While it would be difficult to invoke a parallel right in all territories where the work is exploited, regaining rights in key money-generating jurisdictions for U.S. music[156] could provide the author with enough leverage to negotiate a buy-out of the rights to the rest of the world. The transferee may not want the remaining international rights if those jurisdictions are unprofitable.[157]

The success of a piecemeal termination strategy would depend on both substantive and procedural considerations,[158] but it would be an uphill battle for the author. Some author-protective economic rights in other countries may not be available to U.S. authors or may require standards that are too burdensome for the author to establish. For example, several countries' rights are based on the transferees' failure to economically exploit the work.[159] It is unlikely that a transferee would fail to exploit a work in a major market, especially if there is continued demand for it. Non-exploitation is also less likely now that music consumption is primarily achieved through electronic means, governed by global licensing agreements.[160] These agreements likely cover a broad territory instead of discriminating country-by-country, so it is unlikely that a work would be available in all major European markets except for a single country.

must continuously exploit the work. CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] art. L131-5, L132-12 (Fr.).

155 INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES § 301 (AM. LAW INST. 2008).

156 *See* INT'L TRADE ADMIN., U.S. DEP'T OF COMMERCE, 2016 TOP MARKETS REPORT: MEDIA AND ENTERTAINMENT 10 (2016) (listing the U.K., China, Canada, India, Brazil, Mexico, and Germany as the top markets for U.S. entertainment exports).

157 The lack of profitability could be because U.S. music is not popular in these territories, because piracy is more common there, or because it is difficult to enforce the copyrights in these areas. *Cf. id.* at 16 (eliminating the Middle East/North African markets from the top markets analysis because these markets are small, present challenges to doing business, and demand for U.S. entertainment is smaller).

158 *See* Trimble, *supra* note 142, at 206 ("[I]t is the *interaction* of the territorial scope of substantive IP laws, conflict of laws rules, and a country's physical ability to enforce its laws that delineates the effective territorial scope of national IP laws.") (emphasis in original).

159 *See supra* note 154.

160 Streaming accounted for the bulk of music industry revenue for 2016. *See* Christman, *supra* note 89. Spotify, a leading interactive streaming service, operates through catalog licenses with record labels. *E.g.*, Karp, *supra* note 111 (noting that Spotify has recently renewed its licenses with the three major record labels).

Even if the right is substantively available, the author faces procedural hurdles, particularly as to whether a court (either at home or abroad) would recognize the U.S. author's right to invoke the foreign law. This depends upon whether the court classifies the dispute as a question of contract or copyright law.[161] If the court determines that it is a contract question, the governing law of the contract (U.S. law) would apply, and the author would not be able to invoke the foreign copyright provision.[162] If the court finds that it is a copyright issue, foreign courts have indicated a willingness to apply their nation's copyright provisions even when another country's law governs the contract dispute.[163] It is unclear how a U.S. court would treat a foreign reversion statute. The United States allows foreign authors to invoke Section 203 in their foreign contracts,[164] so a U.S. court may be willing to entertain a U.S. author invoking a similar right abroad.

Nonetheless, this strategy would be infeasible and uneconomical for most parties seeking to eliminate the U.S.-international bifurcation.[165] Realistically, authors must either accept that their terminations yield only U.S. rights and remain tied to the transferee for international distribution, or pay large sums to repurchase the international rights to these works.

This situation is unlikely to change in the near future. Because the Copyright Act of 1976 and thus Section 203 only apply to the

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161 *See, e.g.*, Geller, *supra* note 152, at 356–58, 370–74 (discussing the importance of this inquiry and the difficulty of determining the appropriate classification); Jane C. Ginsburg & Pierre Sirinelli, *Private International Law Aspects of Authors' Contracts: The Dutch and French Examples*, 39 COLUM. J.L. & ARTS 171, 178 (2015) (noting that the distinction varies by forum).

162 *Cf., e.g.*, Gloucester Place Music Ltd. v. Le Bon & Ors [2016] EWHC (Ch) 3091, [14], [18], [44], [45] (applying U.K. contract law to find that it was a breach of contract for the authors to enforce otherwise valid U.S. termination rights granted by Section 203); Helene M. Freeman, *Duran Duran Case Shouldn't Affect Paul McCartney Contracts*, LAW360 (Jan. 30, 2017), https://www.law360.com/articles/882786/duran-duran-case-shouldn-t-affect-paul-mccartney-contracts ("The error in the Duran Duran court's opinion is its assumption that the exercise of termination rights was a matter that was a proper subject of contracting rather than a limitation on the extent to which the copyrights were assignable.").

163 *See, e.g.*, Ginsburg & Sirinelli, *supra* note 161, at 183–84 (describing a case in which a French court applied a French copyright provision to a contract governed by New York law); Reto M. Hilty & Alexander Peukert, *"Equitable Remuneration" in Copyright Law: The Amended German Copyright Act as a Trap for the Entertainment Industry in the U.S.?*, 22 CARDOZO ARTS & ENT. L.J. 401, 405 (2004) (explaining that Section 32b of the German Copyright Act overrides the parties' choice of law).

164 *See, e.g.*, Corcovado Music Corp. v. Hollis Music, Inc., 981 F.2d 679 (2d Cir. 1993) (allowing a U.S. copyright renewal dispute relating to a Brazilian contract).

165 *See* Geller, *supra* note 152, at 375 (noting that the country-by-country copyright regime has "centrifugal effects on a contractual transfer of copyright worldwide, tending to pull the contract apart by applying as many sets of rules as there are national rights conveyed by the transfer").

United States,[166] creating an international termination right would require the coordinated efforts of many countries and possibly a new treaty.[167] This would be controversial given the interests of content aggregators and distributors worldwide.[168] A global legislative effort also raises questions of whether it is preferable for ownership and transfer decisions to be made by public bodies or by the parties' own contractual negotiations,[169] as well as whether solutions would be able to adequately account for changing technological and societal conditions.[170]

C. Surviving Contractual Provisions in Music Industry Contracts

A clean severance of the author-transferee relationship is also unreachable because termination applies only to the transfer of the copyright and not to the rest of the contract.[171] A typical music publishing or recording agreement is much broader than a transfer of copyright. For example, authors typically give record labels the exclusive right to use the author's likeness for marketing and distributing the works.[172] Because this right does not terminate with Section 203, the author could technically breach the contract by using his own likeness when marketing the terminated works. However, a court could be wary of enforcing the transferee's rights in this context, possibly on right of publicity grounds.[173]

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166 *See supra* notes 136–37 and accompanying text.

167 *See, e.g.*, Austin, *supra* note 153, at 579 (suggesting that a "[s]ingle governing law approach" could increase protection of authors' economic interests and create a more efficient global licensing market); Epstein, *supra* note 151, at 109–10 ("[T]here are only two ways in which uniformity can be achieved. The first is for different nations to adopt parallel rules independently. . . . The second, and cleaner way is to enter into a set of bilateral, or preferably multilateral agreements to set the standards for judging international transactions . . . ."); Trimble, *supra* note 142, at 210 ("A single-country perspective however has now become an unsuitable starting point for legislating; as globalization has intensified the flow of IP across national borders it has brought into doubt the premise that national policies can be sufficiently implemented through laws that are designed to address only single-country activities.").

168 *See, e.g.*, Jacques de Werra, *Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: In Search of a New Global Policy for Online Information Licensing Transactions*, 25 Colum. J.L. & Arts 239, 361–62 (2003) (calling a global legislative solution "wishful thinking" because of the "strongly diverging positions of countries and interested groups").

169 *See* Geller, *supra* note 152, at 391–93 (noting that countries may differ in their views).

170 *See* de Werra, *supra* note 168, at 361–62 (advocating for judicial solutions because of their flexibility and adaptability).

171 *See* Frisch & Fortnow, *supra* note 53, at 233.

172 *Id.*

173 *Id.*

A more problematic situation may occur in the future when contracts from the early-2000s become eligible for termination. In the early- to mid-2000s, record labels began making "360-degree deals,"[174] which entitle record labels to a percentage of the author's income from all entertainment activities, including touring, merchandise, fan clubs, acting, and promotional activities.[175] The record labels justify their entitlement to these revenues by arguing that their initial investment in the author's career catapulted the author to other income-producing opportunities.[176] Authors were not pleased with this shift in practices,[177] but the record labels' greater leverage has made this practice the industry norm.[178]

Terminations of transfers made in the early-2000s will likely generate litigation over the extent to which 360-degree, merchandising, and fan club operation provisions remain intact after the effective date of termination. Courts will undoubtedly have to address whether the copyright transfer is severable from the remainder of the contract and the potential illogic of enforcing the remaining contractual provisions (and thus giving the transferee a continued interest in the author's income) when the transferee is no longer active in promoting or distributing the author's works.

A court may resist tethering an author to a contract for a burdensome amount of time, but it may also consider allowing the record label to retain rights to ancillary revenue streams if the record label has not yet recouped its investment. This compromise could depend on the extent to which the author's account is recouped,[179] as well as the extent to which the label could recover the investment through international exploitation.[180]

The likelihood of joint authorship or joint ownership between author and transferee, the bifurcation of U.S. and international rights,

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174 *See, e.g.*, Jeff Leeds, *The New Deal: Band as Brand*, N.Y. Times (Nov. 11, 2007), http://www.nytimes.com/2007/11/11/arts/music/11leed.html.

175 *See* Passman, *supra* note 6, at 97–98 (noting that most companies receive 10–35% of the artist's net income from non-record sources); Leeds, *supra* note 174.

176 *See* Passman, *supra* note 6, at 97; Leeds, *supra* note 174.

177 *See* Leeds, *supra* note 174.

178 *See, e.g.*, Steve Gordon, *How to Avoid Getting Completely Screwed by a 360 Degree Deal*, Digital Music News (July 2, 2013), http://www.digitalmusicnews.com/2013/07/02/threesixty/.

179 If there is still a long way to go, it could be equitable to let the record label collect revenue to recoup its investment. If the account is nearly recouped or has reached the break-even point, there would be less harm in disallowing the record label from participating in 360-degree revenue post-termination.

180 A large international market for the work could weigh against the record label's retention of 360-degree revenue, as the deficit could instead be ameliorated through foreign income.

and the surviving provisions of the author-transferee contract after termination demonstrate that invoking Section 203 does not liberate the author from the transferee. Even after termination, the transferee will likely actively participate in administering the works alongside the author.

IV
What Can the Author Do?

If an author cannot definitively end their relationship with the original transferee after exercising Section 203, what are the author's options after the U.S. rights revert? This Note proposes three options: (1) choosing to self-administer the U.S. rights; (2) transferring these rights to a third party; or (3) retransferring the rights back to the original transferee. This Note evaluates the implications of each option and concludes that the only viable alternative is to retransfer the rights to the original transferee.

A. Self-Administering the U.S. Rights

Once the author has regained U.S. rights to the works, the author could retain these rights for the remaining duration of the copyright term, controlling their exploitation. Although most authors contract with transferees to distribute their works, authors have successfully distributed their works independently,[181] especially now that most distribution occurs through online streaming services[182] and various start-ups have emerged to facilitate distribution and track the use of authors' works.[183]

The advantages of self-administration are increased revenue and control. The author would retain all domestic revenue (rather than splitting it with a transferee) and would not depend on a third party to

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[181] A recent example is Chance the Rapper, who won three Grammys in 2016 without a record label or a physically-distributed album. *See, e.g.*, Ben Austen, *The New Pioneers: Chance the Rapper Is One of the Hottest Acts in Music, Has a Top 10 Album and His Own Festival — All Without a Label or Physical Release*, Billboard (Aug. 11, 2016, 8:59 AM), http://www.billboard.com/articles/news/magazine-feature/7468570/chance-the-rapper-coloring-book-labels-grammys; *Chancelor Bennett*, Grammy Awards, https://www.grammy.com/grammys/artists/chancelor-bennett (last visited June 30, 2018).

[182] *See* Christman, *supra* note 89.

[183] *See, e.g.*, *FAQs: About TuneSat*, TuneSat, http://www.tunesat.com/tunesatportal/home/faqs (last updated Mar. 12, 2014) (describing an audio monitoring service that tracks public performances); Ari Herstand, *Want to Know the Best Digital Music Distribution Company?*, Digital Music News (May 29, 2014), https://www.digitalmusicnews.com/2014/05/29/digital-distribution-company-review (reviewing various digital distribution companies that authors can use without having a record label or music publisher affiliation).

account to them.[184] The author would have complete creative control, deciding how the work should be distributed, and could agree to pursue or decline licenses based on whatever criteria they choose.[185]

Self-administration's significant disadvantage is the cost incurred in manufacturing, distributing, marketing, promoting, and seeking out revenue opportunities for the work. The author would have to solicit offers and negotiate each deal while also assuming the role of a policeman to enforce against domestic copyright infringement. Many authors are inherently creative and not necessarily business-minded, and it is unlikely that they would want to endure the administrative logistics of exploiting their works.[186] Wealthy authors could hire a team to perform these services, but it could be less expensive to transact with a company with expertise.[187] Authors could prefer the transferee model because the transferees bear nearly all the risk of the work not generating revenue.[188]

If many authors adopt a self-administration model, it could cause chaos in the music industry, particularly for distributors (e.g., Spotify and Apple) and performance rights organizations (PROs) such as the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). A distribution company like Spotify obtains the rights to host sound recordings on its platform through catalog licenses with the major record labels.[189] When a work is terminated, the distributor has a choice: either remove the sound recording from the U.S. platform to avoid infringement liability or obtain a license from the author. If a work is popular enough to warrant termination, the distributor will not want to remove it (e.g., Spotify would not want to lose all of Billy Joel's songs). Thus, distributors would have to contract with the authors who self-administer their U.S. rights. If many artists invoke Section 203, the number of contracts that the distributor must individually negotiate would increase dramatically. This would translate into higher licensing fees, causing the distributors' profit margin to narrow or inducing them to pass the costs onto their consumers in the form of higher prices.

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[184] *See generally, e.g.*, PASSMAN, *supra* note 6, at 165–66.

[185] This provides an opportunity for the author to experiment with new technological mediums or business models, which transferees may have been reluctant to embrace. *See, e.g.*, Loren, *supra* note 46, at 1349; Wu, *supra* note 39, at 353–54.

[186] *See, e.g.*, PASSMAN, *supra* note 6, at 11–12.

[187] *See id.* at 222 (suggesting the need to hire an administrator to handle transactions and creative staff who can provide marketing services).

[188] *Cf.* Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 88 (2013) (explaining that the transferee is best suited to handle risk because it has a more diverse portfolio).

[189] *See* Karp, *supra* note 111.

For musical works, distributors may not face the same problem of having to negotiate a significant number of new individual contracts because the right to publicly perform a musical work is administered through performance rights organizations, of which many authors and publishers are members.[190] PROs separately pay the author and the transferee their respective share of any royalties generated from the use of their musical work, so the only post-termination shift would be instructing the PROs to pay the entire U.S. public performance royalty to the author, rather than splitting it between the author and music publisher.[191]

However, this situation could change in coming years. In 2013, Sony/ATV and Universal Music Publishing Group withdrew their new media rights from ASCAP, hoping to negotiate directly with distributors.[192] The Second Circuit held that partial withdrawal violated ASCAP's judicially administered consent decree—in place due to concerns over its potential for monopoly power[193]—but, given the value of digital licensing, music publishers could find it economically worthwhile to withdraw from the PROs entirely and directly license their catalogs. This would create the situation that exists for sound recordings, placing a similar burden on distributors to negotiate with individual authors post-termination.

Invoking Section 203 and then self-administering the U.S. rights implicates not only the transferee but also many other parties, and it could spawn an expensive web of confusion.

B. Transferring Rights to a Third Party

Instead of self-administering, the author could transfer the rights to a third party, another transferee, which would hold several advantages. The author's notoriety could lead to a more favorable deal than before, and the author would save money and time by avoiding the administrative burdens of negotiating licenses. Because the new trans-

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190 *E.g.*, Passman, *supra* note 6, at 238. Performance rights organizations transact with authors and music publishers for the right to license the authors' and music publishers' public performance rights in their music works. *Id.* The PROs then license these rights to any party that seeks to publicly perform the works. For example, restaurants, malls, and sports arenas all must obtain public performance licenses before they play any music at their venues. *See, e.g.*, Paul Resnikoff, *A Comprehensive Comparison of Performance Rights Organizations (PROs) in the US*, Digital Music News (Feb. 20, 2018), https://www.digitalmusicnews.com/2018/02/20/performance-rights-pro-ascap-bmi-sesac-sound exchange/. This system is efficient because the PROs issue blanket licenses that cover all of the musical works that they represent. For a single fee, the licensee has permission to play the PROs' entire catalog. *E.g.*, Passman, *supra* note 6, at 239.

191 *E.g.*, Passman, *supra* note 6, at 23.

192 Pandora Media, Inc. v. ASCAP, 785 F.3d 73, 76 (2d Cir. 2015).

193 *Id.* at 75–77.

feree would presumably have catalog licensing deals with the distributors, the transferred works could be included under those licenses, avoiding the individual license issue.[194] Although the author and music publisher would have to alert the PROs of the new publisher for U.S. rights, the PROs already make payments to the major publishers.[195] Redirecting payments from one publisher to another that is already in the payment system is not a drastic change to implement.

Authors would have to share the work's revenue and forfeit complete creative control, but many authors regard these consequences as necessary for the convenience of having a professional party exploit the works. A more serious concern could be loss of revenue if others could not identify the work's new owners. Although authors must record their notice of termination,[196] there is no requirement to include the terminating party's contact information,[197] nor to record subsequent transfers.[198] Thus, a potential licensee could know that ownership has reverted to the author, but not that the work has since been transferred elsewhere. The search costs in determining the new owner could discourage parties from seeking the license; instead, they could choose to license another work with a clear chain of ownership.

The viability of transferring works to a third party would depend on whether the author shares joint ownership in the work, especially with the original transferee. A joint owner could refuse to consent to the transfer, frustrating the author's ability to form new agreements.[199]

Additionally, third party transferees may be less interested in obtaining only U.S. rights, when international distribution is the norm.[200] Because marketing and distribution occur primarily on the internet, a borderless medium, the old and new transferee would have to establish a cohesive plan; otherwise, each would risk overstepping the other's territory. The collaboration of players in an already oligopolistic market would seem to set the stage for collusion and could raise potential antitrust concerns, such as agreeing to certain global pricing or to shift release dates around other works that are being released by one of the transferees so as to not directly compete.

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194 *See supra* note 189 and accompanying text.

195 *See supra* notes 190–91 and accompanying text.

196 17 U.S.C. § 203(a)(4)(A) (2012).

197 *See* 17 U.S.C. § 203(a)(4)(B) (delegating to the Register of Copyrights the task of prescribing requirements for the termination notice's form and content); 37 C.F.R. § 201.10(b)(2)(i)–(vii) (2018) (listing the required components of a termination notice).

198 17 U.S.C. § 205(a) ("Any transfer of copyright ownership . . . *may* be recorded in the Copyright Office.") (emphasis added).

199 *See supra* Section III.A.3.

200 *See supra* notes 139–40 and accompanying text.

C. Retransferring Rights to the Original Transferee

The third alternative is for the author to retransfer the rights to the original transferee. Section 203 contemplates a retransfer by allowing parties to an initial transfer—but only those parties—to reach a new agreement for a "further grant" before the effective date of termination.[201] This gives the transferee an advantage against third parties, who must wait until the effective date of termination.

The principal advantage of retransferring to the original transferee is that it would avoid many of the problems linked to termination. It would prevent the onslaught of litigation stemming from work made for hire challenges,[202] the creation of derivative works that could bloat the market or even directly compete with the original,[203] and the intrusion of joint authorship, whereby the original transferee could block the subsequent transfer or license of the work.[204] It would avert the bifurcation of U.S. and international rights: The rights would remain with one entity, simplifying global licensing deals and avoiding the need to notify all contractual parties about dividing payments by region of exploitation.[205] Finally, it would avoid litigation regarding the surviving contract provisions.[206]

Retransferring to the original transferee could also prevent retaliatory behavior toward the author. Because the transferee retains control over the international rights, there is the risk that, if the author invokes Section 203 without the intent to retransfer, the transferee could express its discontent by underexploiting the international rights, sabotaging the author in the marketplace, or engaging in questionable accounting practices that diminish the amount of income that the author would receive from exploitations of the works.[207] These

[201] 17 U.S.C. § 203(b)(4).

[202] *See generally supra* Section II.A. This was the motivation for Warner Music Group (WMG) and Prince's 2014 deal, which gave Prince "ownership" of the U.S. rights, but allowed WMG to administer them for the remainder of the copyright. Ed Christman, *Prince's Estate Weighs Deals with Publishers, PROs for Artist's Lucrative Catalog*, BILLBOARD (Aug. 26, 2016), https://www.billboard.com/biz/articles/news/legal-and-management/7487793/princes-estate-weighs-deals-with-publishers-pros-for.

[203] *See generally supra* Section II.B.

[204] *See supra* Section III.A.3.

[205] *See generally supra* Sections III.B, IV.A, IV.B.

[206] *See generally supra* Section III.C.

[207] This could be done without repercussions because there is no duty to exploit in U.S. copyright law. Van Houweling, *supra* note 40, at 382. Not exploiting the work likely would not breach the author-transferee contract because the contract would typically give the transferee sole decision-making authority regarding exploitation, subject only to an "implied duty of good faith and fair dealing." *See id.* Inaccurate accounting is undoubtedly problematic, but it is only detected by audits, which are limited both by contract and their expense. PASSMAN, *supra* note 6, at 165–66, 280. Parties typically settle if a discrepancy is detected, but by then, the transferee will have accomplished its purpose.

actions could also occur with works that are not yet eligible for termination and thus still under the transferee's control. Because industry contracts are relatively long-term (often covering five to six albums), the first album may be eligible for termination, while the subsequent four remain under the original transferee's control.[208] If termination of the first album results in contentious litigation, the transferee could seek to harm the market for the other albums to pressure the author into yielding to the transferee's position.

One could argue that a rational economic actor would not engage in this behavior; underexploiting or sabotaging these works would be cutting off one's nose to spite one's face, as the transferee would also lose revenue by not exploiting the works. However, the author's work is only one of thousands that a large transferee controls,[209] so the effect would not be as devastating to the transferee as it could be for the author. The momentary cost of punishing an author could be lower than the benefits to the transferee from securing a favorable retransfer.[210]

The preceding paragraphs emphasize that the original transferee holds enormous leverage over the author post-termination, suggesting that retransfer is the only rational post-termination alternative and raising suspicions of how much of a price increase the author can extract.[211] Some authors could believe that even a marginal increase in their royalty rate is worthwhile, whereas others could factor in the costs of termination and resulting disputes to conclude that the reward is not worth the hassle.

Conclusion

Section 203 was meant to provide authors with a "second bite of the apple," an opportunity to regain what was previously theirs on their own terms.[212] It has been framed by commentators as a gift to authors and a threat to transferees, whose business models could suffer from the loss of their most valuable works.[213] This Note argues

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[208] Passman, *supra* note 6, at 104–05.

[209] *See supra* Section I.D (describing the transferees' business strategy of obtaining the copyrights of many authors' works).

[210] *See, e.g.*, Rub, *supra* note 188, at 111–12.

[211] This appears to be the case so far. There are no publicly known cases of successful authors using Section 203 and *not* retransferring the rights back to the original transferee. Transferees have acknowledged that the retransfer is their primary strategy. *See, e.g.*, Christman, *supra* note 14.

[212] *See supra* Section I.A (noting Congress's intent to "safeguard[ ] authors" due to their "unequal bargaining position").

[213] Christman, *supra* note 2 (describing advocates who believe that Section 203 will be "cataclysmic" for the music industry).

that Section 203 is not a game-changer in restructuring the relationship between authors and transferees. Even if sound recordings and musical works escape Section 203's statutory exceptions and are not works made for hire or derivative works, copyright doctrine and the contractual reality of the global marketplace ensure that the author cannot completely sever the author-transferee relationship. Joint ownership, Section 203's jurisdictional limitation to the United States, and surviving contract provisions cause the author-transferee relationship to endure. This inevitable, permanent intertwining of interests allows transferees to exert pressure on authors to retransfer their rights back, as opposed to self-administering or transferring to a third party. The author is left without a meaningful choice: terminate and suffer the consequences of being tethered to a transferee that actively thwarts any attempts at author autonomy; terminate and settle for a marginally better deal than before (but expend great sums and/or litigate in the meantime); or never exercise the right at all. Section 203 fails to empower authors and perpetuates the status quo, keeping the core relationship between authors and transferees intact.

The unfortunate reality is that authors will likely have to deal with (or reject) Section 203 as it is. The prediction that the record labels and music publishers will become irrelevant and that power will shift to authors may one day become true, but Section 203 is not going to be the mechanism for this change. Instead, authors would be wise to attempt self-administration of their careers from the start through online distribution and streamlined global licensing regimes. By changing the nature of their relationships with transferees from the beginning of their careers (or avoiding these relationships entirely), authors would no longer need Section 203 to liberate them from oppressive contracts and redistribute compensation more equitably. Despite its lofty intentions and long-awaited implementation, Section 203's termination of transfers will not fundamentally change the power dynamics between authors and transferees in the music industry.