

2014

They Could be Back: The Possibility of Termination Rights for Session Musicians

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El-Bayeh, Alexandra. "They Could be Back: The Possibility of Termination Rights for Session Musicians." *American University Law Review* 64, no.2 (2014): 285-336.

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They Could be Back: The Possibility of Termination Rights for Session Musicians

Keywords

Works for hire (Copyright); Legal rights; United States. Copyrights (1976); Musicians -- United States -- Legal status, laws, etc.; Copyright of music -- United States -- Law & legislation; Authorship collaboration -- Law & legislation; Sound recordings -- United States -- Law & legislation; Copyright -- United States

COMMENTS

THEY COULD BE BACK: THE POSSIBILITY OF TERMINATION RIGHTS FOR SESSION MUSICIANS

ALEXANDRA EL-BAYEH*

Beginning in 2013, many musicians became eligible to regain rights they assigned to recording companies thirty-five years ago. Through a provision of the Copyright Act, artists can “terminate” these rights and regain control of their work as long as the work was not a “work for hire.” This Comment focuses on session musicians’ ability to claim termination rights in their creative contributions to sound recordings. Session musicians have been the focus of increased attention because many of them signed away their rights for little payment and control and without knowing the future possible uses of their works, particularly in digital sampling.

This Comment first considers whether these session musicians qualify as employees for hire under the statutory definition and subsequent work-for-hire doctrine. After determining that these musicians are not always employees for hire, this Comment examines the types of authorship claims they have at their disposal. Most session musicians will not be able to claim joint authorship under the current doctrine, but they may have the ability to claim copyright in independently contributed material. Due to these authorship claims, the session musicians will be able to exercise termination in certain circumstances.

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INTRODUCTION

Victor Willis was one of the lead singers of the Village People, but he has been unable to control the use of his biggest hit, “Y.M.C.A.,” for over thirty-five years.¹ Willis, like many artists, assigned the rights in the song to the record company; as a result, the record company maintained sole control over the song’s use and licensing.² Now,

1. Larry Rohter, *A Copyright Victory, 35 Years Later*, N.Y. TIMES (Sept. 10, 2013), <http://www.nytimes.com/2013/09/11/arts/music/a-copyright-victory-35-years-later.html>.

2. *Id.*

thirty-five years later, Willis has regained the rights to his famous song due to a provision in the 1976 Copyright Act that allows artists to terminate rights previously assigned to the recording company.³ This “termination right” allows artists like Willis, who quickly signed away their rights in the glory of the moment, to come back and bargain with large record companies on more equal footing.⁴

Now imagine you are an artist who has performed on countless chart-topping hits, but unlike Mr. Willis, you were not a group’s lead singer. Imagine further that your records are “classics” and as prolific as the “Y.M.C.A.” but that you are not a household name. Unlike Willis, you received no royalties for your creative contributions over the past thirty-five years but, rather, a mere one-time payment under the umbrella of “work for hire.” Then imagine that your creative contributions were used to supplement other artists’ hits, but you received neither compensation nor credit on the record. Welcome to the life of a session musician.

Session musicians are artists who support lead artists’ work and provide background vocals or instrumental accompaniment.⁵ Session musicians are highly skilled, and many of them are treasured by the music industry for their contributions to numerous successful tracks.⁶ Many of the most famous songs become what they are due to the

3. *Id.*; see also 17 U.S.C. § 203 (2012) (outlining the statutory termination right for transfers and licenses granted by authors).

4. Rohter, *supra* note 1.

5. For the purposes of this Comment, I will focus on certain types of session musicians. The term “session musicians” could possibly encompass members of a band that support the featured artist or members of a band that work in one particular studio on a regular basis. However, artists in both of those situations most likely fall into the work-for-hire exception of termination. Considering that session musicians may likely fall into a spectrum of employment relationships, I will focus on those who are hired at will by the studios when they are needed and not for extended periods. These musicians are the most likely to fall outside of the work-for-hire exception. A more fact-specific analysis will follow in the second half of this Comment. See *infra* Part II.A.

6. See Evan Andrews, *Top Ten Session Musicians and Studio Bands*, TOPTENZ (July 1, 2011), <http://www.toptenz.net/top-10-session-musicians-and-studio-bands.php> (listing several top session musicians and their contributions to various artists’ works). For example, Thomas Lang is a prolific drummer who has worked with the likes of Peter Gabriel and Kelly Clarkson. *Id.* Recent documentaries have also featured and focused on session musicians’ lives. For example, *20 Feet from Stardom*, which discusses the untold glory of several background singers during the 1970s and 1980s, won an Academy Award for Best Picture. See generally *20 FEET FROM STARDOM*, <http://twentyfeetfromstardom.com> (last visited Dec. 21, 2014).

talents of musicians who are paid a marginal lump sum fee.⁷ Session musicians are underappreciated and often overlooked. As some involved in the music industry have suggested, “[y]ou might not have heard their names, but you’ve definitely heard their music.”⁸

Typically, a recording studio hires session musicians to play background for a lead artist on a particular track.⁹ Many artists, particularly those who are new to the music business, are quick to sign paperwork assigning all of their rights to the record company.¹⁰ These contracts typically include a work-for-hire agreement¹¹—and therein lies the problem. If a sound recording is legally considered a work for hire, then the artist cannot terminate that right because the employer—in this case the studio—is the sole owner of the copyright.¹² However, session musicians often add real creative contributions to the work.¹³

It remains possible that these employment contracts are not sufficient to create a work for hire in all cases or that not all session musicians signed such contracts. If the actual nature of the employment relationship does not satisfy certain criteria, then the

7. See Andrews, *supra* note 6 (providing examples of well-known artists who have been supported by very talented session musicians).

8. *Id.*

9. See *Life as a Studio Musician*, RECORDING CONNECTION, <http://www.recordingconnection.com/reference-library/recording-entrepreneurs/life-as-a-studio-musician-0411> (last visited Dec. 21, 2014) (detailing the typical work that a session musician will encounter in today’s world).

10. There are generally two kinds of copyrights in music: the musical composition and the sound recording. 17 U.S.C. § 102(a)(2), (7) (2012). The musical composition is the underlying arrangement of a piece and is typically captured in the notes on a page or on a sound recording. See U.S. COPYRIGHT OFFICE, COPYRIGHT CIRCULAR 56A, COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND RECORDINGS 1 (2012), available at <http://copyright.gov/circs/circ56a.pdf>; see also H.R. REP. NO. 94-1476, at 53 (1976) (finding that “musical composition” did not need a statutory definition because it had a “fairly settled” meaning). The sound recording, by comparison, is the audible product of the musicians’ work within the session on that particular performance. 17 U.S.C. § 101. Though session musicians probably do not author underlying musical compositions, they do contribute to sound recordings.

11. E.g., *Musician/Vocalist Work for Hire Agreement*, SUPER DEMOS, <http://superdemos.com/images/Super%20Demos%20Work%20For%20Hire%20Agreement.pdf> (last visited Dec. 21, 2014).

12. 17 U.S.C. § 203(a) (eliminating work for hires from termination rights).

13. See, e.g., Ron Zabrocki, *Session Guitar: A Week in the Life of a Busy Session Guitarist*, GUITAR WORLD (Oct. 6, 2011, 11:51 AM), <http://www.guitarworld.com/session-guitar-week-life-busy-session-guitarist> (detailing the typical work of a guitar session musician who is often sent tracks that “are basically a beat, some bass and some chords,” which he then supplements with original work).

contract will likely be deemed an assignment.¹⁴ If there was an assignment, then the creator has a right to terminate.¹⁵ The termination right allows those who assigned their rights to get another chance to reconsider the terms of these agreements.¹⁶

Once the right of termination is established, one must consider the relevant musician's actual authorship claims. Because many session musicians are likely to contribute significantly to a piece, it would seem possible that some session musicians could be joint owners of the copyright. In order to be joint owners, two or more people must intend to contribute to the same work.¹⁷ Though on its face joint ownership would appear to apply to session musicians, a string of cases has limited potential joint authors' ability to bring such claims.¹⁸ Even if such joint authorship claims fail, courts could alter the interpretation of the § 101 definition of joint authorship to support these types of contributors.¹⁹ Alternatively, it may be possible for session musicians to claim independently copyright content depending in part on the outcome of a case in the Ninth Circuit.

Record companies fear termination for many reasons, including, most obviously, the loss of future profits from sales of the recording,²⁰ but there are several clear inequities that effect session musicians in the current industry structure. One issue that particularly highlights

14. When artists assign their rights, they lose all control over the future use of the work. This includes all of the rights outlined in the Copyright Act, such as reproduction, distribution, and public performance rights. 17 U.S.C. § 106. Since the recording company controls these rights, depending on the terms of the contract, the artist does not choose how or when his or her works are used, the sale price, or future licensing agreements. Oftentimes, these rights are very important to the artist, and therefore termination can play a large role in helping an artist to regain control over a recording.

15. *Id.* § 203 (detailing the conditions and effect of termination).

16. *Id.* § 203(b).

17. *Id.* § 101.

18. *See infra* Part II.B (explaining that joint authorship does not qualify many session musicians for authorship).

19. *See infra* Parts I.F, II.C (discussing the expanding scope of judicial joint authorship doctrines and using individual copyrightable content as a broader means of termination).

20. *See, e.g.,* Daniel Gould, *Time's Up: Copyright Termination, Work-for-Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91, 93–94 (2007) (listing recording companies' possible fears for termination, such as (1) due to the Internet, the value of old works is not restricted by shelf-space, (2) older records can return a higher profit since they are already established, and (3) labels are valued based on the worth of their catalogs and predictability of intellectual property).

this inequity is the new practice of digital sampling.²¹ Though the law in the sampling arena is somewhat complex, it requires that an artist typically pay to license the sample if the artist uses more than a very minor part of the original work.²²

Session musicians who now have the ability to exercise termination rights for recordings from thirty-five years ago did not consider this technology when and if they signed work-for-hire agreements. Many of the samples used are of a session musician's guitar riff, vocal harmony, or other creative contribution, yet the session musicians will receive little to no payment for licensing because they signed away all of their rights to the work.²³ Termination rights could help to overcome this injustice because even if artists elected to reassign their copyrights in their works, they could at least renegotiate new deals with the recording companies, keeping in mind both possible new revenue streams and the potential to exercise increased artistic control over their work.

This Comment argues that session musicians should be able to exercise termination rights in their works because their works are not works for hire and because session musicians have authorship claims in their contributions to sound recordings. Even if certain session musicians cannot be considered joint authors, they should at least be able to claim copyright protection in the part of the piece that they individually contributed. Part I of this Comment provides background information on music industry practices with regard to session musicians and digital sampling as well as a summary of work-for-hire and other authorship doctrines. Part II analyzes session musicians' ability to overcome work-for-hire obstacles despite their weak claims to joint authorship in works and recommends courts marginally change their interpretation of the Copyright Act. Part II then analyzes an alternative form of authorship that could help session musicians retain copyrights. Part III recommends interpreting the law in favor of session musicians and considers

21. Samplers use parts of sound recordings to mix in new songs. Tracy L. Reilly, *Debunking the Top Three Myths of Digital Sampling: An Endorsement of the Bridgeport Music Court's Attempt to Afford "Sound" Copyright Protection to Sound Recordings*, 31 COLUM. J.L. & ARTS 355, 356 (2008).

22. *See id.* at 364 (finding that most risk averse artists will seek licenses to sample music).

23. *See* David S. Bloch, "Give the Drummer Some!": *On the Need for Enhanced Protection of Drum Beats*, 14 U. MIAMI ENT. & SPORTS L. REV. 187, 196-97 (1997) (indicating that original artists rarely receive attribution or payment for samples of drum beats in rap music).

alternative means to aid session musicians that fall outside of this legal framework. Finally, Part III focuses on the future of session musicians and their contributions to the music industry and concludes that termination is a viable means of gaining rights for session musicians that are significant contributors.

I. BACKGROUND

A. *The Recording Industry*

1. *Business logistics for session musicians*

Session musicians have been used throughout the modern music era and have contributed to many recordings.²⁴ Session musicians are very skilled players who act as backup to the main act on a record. These musicians can often sight-read²⁵ a piece with little to no rehearsal time, though it is not unheard of for a session musician to not read music at all during a session.²⁶ Many of these musicians, particularly in musical genres that value improvisation, are given a very basic sheet with chord progressions or a basic recording and are told to improvise over a line.²⁷

Session musicians are necessary to the creation of the record, and some have gained such a special prominence in their role that main artists will wait to record until a specific musician with the right sound and technique for the record is available.²⁸ Session players have to not only read the parts but also interpret them and improvise when

24. See *supra* note 9 (discussing the current use of session musicians in musical works).

25. Sight-reading is the act of playing music without ever having seen or read the sheet music beforehand.

26. See JENNIFER EMBER PIERCE, *PLAYIN' AROUND: THE LIVES AND CAREERS OF FAMOUS SESSION MUSICIANS* xvii (1998) ("I have never seen anyone read from sheet music during a recording session; however, many session musicians have learned to read music."); see also *A Personal View of Session Programmers, Part 1: Musicians*, SOUND ON SOUND (Oct. 1998), <https://www.soundonsound.com/sos/oct98/articles/sessionmusic.html> (stating that the ability to sight-read is essential and finding that some session musicians cannot even read music); 20 FEET FROM STARDOM (Gil Friesen 2013) (stating that certain background vocalists were almost encouraged to improvise instead of strictly adhering to the sheet music).

27. See *A DAY IN THE LIFE OF A NASHVILLE SESSION MUSICIAN* (Artists House Music interview Dec. 2007), available at <http://www.artistshousemusic.org/videos/a+day+in+the+life+of+a+nashville+session+musician> (interviewing Dan Needham, a session drummer, about typical recording sessions and the amount of guidance session musicians receive from producers); Zabrocki, *supra*, note 13 (detailing a session guitarist's busy routine and the typical lack of pronounced music detail required).

28. PIERCE, *supra* note 26, at xvi.

needed.²⁹ Steve Lukather was a prominent session musician in the 1970's and 1980's who participated in thousands of recordings before going on to found his own band with other legendary session musicians.³⁰ He has noted the importance of the session musician in creating actual content for the lead artists who often give little initial direction.³¹ The key to excelling as a session musician, therefore, often requires making significant creative contributions as well as having the ability to follow direction.³² David Lasley—a prominent background singer for the likes of James Taylor and Aretha Franklin—once stated, “[As] a background singer they would like you to come in, make the thing sound great, take very little credit, and leave quickly.”³³

Certain musicians are well known and respected as session musicians and can make a decent living and maintain relative security in their employment.³⁴ Session musicians are paid by the job.³⁵ Salary rates are often established through unions or the industry and may appear generous on their face.³⁶ However, considering the

29. David Konow, *First Call: The Top Studio Guitarists of the '70's and '80's Look Back*, GUITAR INT'L, <http://guitarinternational.com/2010/09/30/first-call-the-top-studio-guitarists-of-the-%E2%80%9870%E2%80%99s-and-%E2%80%9880%E2%80%99s-look-back> (last visited Dec. 21, 2014).

30. *Id.*

31. *Id.* (“Somebody would give you like 85 bars of E written on a piece of paper, and all of [a] sudden all the guys in the band would rewrite this song for these people.” (internal quotation marks omitted)).

32. Jimmy Page was a session musician before he founded Led Zeppelin, but he is well known for his guitar work on many prominent recordings as well. Michael Gallucci, *Top 10 Pre-Led Zeppelin Jimmy Page Songs*, ULTIMATE CLASSIC ROCK, <http://ultimateclassicrock.com/pre-led-zeppelin-jimmy-page-songs> (last visited Dec. 21, 2014). Modern successful background singers were also unlikely to focus on the music on the page itself as much as the “feeling” that the artist wanted to provoke. See 20 FEET FROM STARDOM, *supra* note 26.

33. 20 FEET FROM STARDOM, *supra* note 26.

34. See PIERCE, *supra* note 26, at xvi (admitting that some artists only record when the best session musicians are available); see also Andrews, *supra* note 6 (listing top session musicians and groups they have supported).

35. Some studios will maintain in-house bands, but this Comment will focus on musicians that are hired by the job.

36. Zach O'Malley Greenburg, *How to Make a Living in the Modern Music Business: 12 Music Jobs that Can Pay Six Figures*, FORBES (Jan. 23, 2013, 1:05 PM), <http://www.forbes.com/sites/zackomalleygreenburg/2013/01/23/how-to-make-a-living-in-the-modern-music-business>. See generally AM. FED'N MUSICIANS SOUND RECORDING, AMERICAN FEDERATION OF MUSICIANS SOUND RECORDING SCALES (NON-SYMPHONIC) (2014), available at [http://www.afm.org/uploads/file/SRLA%20-%20Non-Symphonic%20Scales_Rev_%20031314\(final\).pdf](http://www.afm.org/uploads/file/SRLA%20-%20Non-Symphonic%20Scales_Rev_%20031314(final).pdf) (detailing pay grades for different types of sessions).

possible future revenue that session musicians forsake when they sign work-for-hire contracts, the salary is not as generous as it may first appear. Under the current union regulations for a three-hour session, a session musician will be paid \$397.36, but the lead musician will be paid \$794.72 and may have the opportunity for royalties and termination.³⁷ The union contracts also require that session musicians receive health insurance and pensions.³⁸ Non-union musicians may not receive such benefits and are not restricted to minimum rate standards.

The payments session musicians receive depend on whether they are members of unions, the performers' relative skills, and the types of uses for their work. The American Federation of Musicians ("AFM") and the Screen Actors Guild and the American Federation of Television and Radio Artists ("SAG-AFTRA") provide very strict pay and employment rates for various types of musicians in different jobs.³⁹ The union contracts have strict hiring policies and rates per hour for session musicians.⁴⁰ For sound recordings under AFM, the session musician will typically make about half of what the lead artist makes for the session and will not receive royalty payments.⁴¹

Record companies often ask session musicians to sign a contract indicating that their recordings are works for hire. Typically, boilerplate language in these contracts states that the musician's "performances shall be considered as works made for hire."⁴² This language would, at first blush, appear to give away all future rights to a work by making the musician an employee for hire because under the law a work for hire cannot be terminated. The recording companies are therefore trying to preempt a session musician's termination right, but courts would look beyond the mere contract

37. AM. FED'N MUSICIANS SOUND RECORDING, *supra* note 36, at 1.

38. *Id.*

39. See *Sound Recordings*, AM. FED'N MUSICIANS, <http://www.afm.org/departments/electronic-media-services-division/sound-recordings> (last visited Dec. 21, 2014) (providing sample labor agreements and protections given to artists in the recording studio); *Sound Recordings*, SAG-AFTRA, <http://www.sagaftra.org/soundrecordings> (last visited Dec. 21, 2014) (showing rates for music royalties in the television and film industry).

40. See generally AM. FED'N MUSICIANS SOUND RECORDING, *supra* note 36 (listing the pay scales for side and lead musicians, which differ based on the length and type of session in question).

41. *Id.*

42. See *Musician/Vocalist Work for Hire Agreement*, SUPER DEMOS, <http://superdemos.com/images/Super%20Demos%20Work%20For%20Hire%20Agreement.pdf> (last visited Dec. 21, 2014).

language to the actual relationship between the session artist and recording studio or lead musician in order to determine whether it truly is a work for hire.⁴³ Session musicians who might not have the legal savvy or the standing in the industry to negotiate the terms often sign such contracts.

Sound recordings have different types of rights attached compared to other copyrighted works, thus leading to an often complicated royalty breakdown for the artists involved. Owners of sound recording copyrights do not have a “right of performance”⁴⁴—a right that enables radio stations to license only the musical rights without paying extra for the recording rights.⁴⁵ On the other hand, digital performance rights are protected under another provision of the Copyright Act so that digital audio services like Pandora have to pay an extra licensing fee to use them.⁴⁶ Though this may appear like a bizarre distinction in itself, Congress made the change to support artists to some extent when radio stations play the artists’ recordings even though the change did not alter the use of the recordings on terrestrial radio.⁴⁷ Consequently, because the royalty disbursement for digital royalties is statutorily required, SoundExchange must distribute a portion of the royalties to session musicians.⁴⁸ The session musicians receive five percent of the royalties, the lead artist

43. See *infra* Part II.A (arguing that session musicians should not generally be considered workers for hire).

44. 17 U.S.C. § 114(a) (2012).

45. *Id.* § 114(d)(1).

46. *Id.* § 114(d)(2). See generally *About Pandora*, PANDORA, <http://www.pandora.com/about> (last visited Dec. 21, 2014) (describing how Pandora uses an algorithm enabling subscribers to explore new artists and musical genres based on individual preferences).

47. See *Digital Performance Right in Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the Subcomm. on Courts & Intellectual Prop. of the Comm. on the Judiciary*, 104th Cong. 187 (1995) (prepared statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services, Library of Congress) (testifying to the U.S. Copyright Office’s conclusions regarding proposed changes to copyright legislation, including that sound recordings “fully warrant” a performance right so that artists can share in “at least some share” of their works’ commercial uses (internal quotation marks omitted)).

48. Cf. *About Digital Royalties*, SOUNDEXCHANGE, <http://www.soundexchange.com/artist-copyright-owner/digital-royalties> (last visited Dec. 21, 2014) (defining “digital royalties” as “fees that digital radio services, such as Pandora, . . . are required by law to pay for streaming music” that must be “allocate[d] . . . [to] the featured artist(s) and copyright owners of those recordings”). SoundExchange is “the independent nonprofit performance rights organization that collects and distributes digital performance royalties to featured artists and copyright holders.” *About*, SOUNDEXCHANGE, <http://www.soundexchange.com/about> (last visited Dec. 21, 2014).

receives forty-five percent, and the owner of the “master” of the sound recording receives fifty percent.⁴⁹

Session musicians also receive marginal revenue when their work is used for another purpose outside of the original contracted purpose. In these cases, session musicians are entitled to residual payments, or “mailbox money.”⁵⁰ An example would be a sound recording used for a hit television show’s opening credits.⁵¹ However, residual payments are uncommon, and session musicians have little say in whether they receive residual payments because they have no say in the future use of their work.⁵²

Session musicians not only play an important role in the recording industry, but they also often play a significant role in the particular recordings they are hired to support. While recent changes in union contracts have attempted to lend further support to session musicians, a wide disparity between musicians’ compensation—either in contractual or monetary terms—and their potential contributions continues to exist.

2. *The law regarding digital music sampling*

Music sampling is another relatively new discovery in music industry terms. Sampling is the art of mixing music by borrowing small snippets of sound from other recordings.⁵³ Sampling as we know it has now been popular for over a decade, but it began its ascent in the late 1970’s and gained widespread popularity in the 1980’s and 1990’s.⁵⁴ Sampling has become a powerful and prevalent means of creating music in the modern era.⁵⁵ Not only is the equipment, such as the mixing software, relatively inexpensive and easy to obtain, but there is also a widespread culture of sampling, leading to its growing acceptance, and various licensing schemes that exist.⁵⁶ Though the union contracts do provide small residual

49. 17 U.S.C. § 114(g)(2)(C).

50. See BACKGROUND VOCALIST, FUTURE OF MUSIC COAL. 15 (2014), available at <http://money.futureofmusic.org/wordpress/wp-content/uploads/2014/03/ARScasestudyAY.pdf> (providing a detailed account of the various uses and reuses that allow artists to claim residual payments).

51. See, e.g., *Residuals FAQ*, SAG-AFTRA, <http://www.sagaftra.org/content/residuals-faq> (last visited Dec. 21, 2014) (explaining who is entitled to receive residual payments and when they are entitled to receive them).

52. BACKGROUND VOCALIST, *supra* note 50, at 15–16.

53. Reilly, *supra* note 21, at 356.

54. See generally *id.* at 358–61 (detailing the history of digital sampling).

55. *Id.* at 361.

56. *Id.*

compensation for use of samples, the fee is marginal at best compared to the profit margin for the recording companies.⁵⁷ Also, these residual payment agreements were not written into the AFM recording agreements until 1995, after sampling was already long underway.⁵⁸ Subsequently, this left many musicians whose songs were sampled before 1995 without any reimbursement.⁵⁹ Moreover, the ease and proliferation of sampling actually replaces musicians.⁶⁰ Because the sampler can have a guitar riff without a guitar, sampling actually hurts session musicians in more ways than one.

Sampling has led to many legal questions that are likely to affect session musicians. The legal fight regarding sampling has been fraught with many disagreements about the legal and moral implications of digital sampling. One of the leading cases on digital sampling begins, “[T]hou shalt not steal.”⁶¹ Though courts have

57. Under the current AFM Sound Recording Labor Agreement, the licensing record company must pay a one-time \$400 fee to a “Sound Recording Special Payments Fund” regardless of how many times the sample is used on a new song. AM. FED’N MUSICIANS, SOUND RECORDING LABOR AGREEMENT WITH THE SOUND RECORDING SPECIAL PAYMENTS FUND AGREEMENT (SPF) AND SOUND RECORDING TRUST AGREEMENT (MPTF), FEBRUARY 1, 2002–JANUARY 31, 2005 ex. A I.A.(9)(b)(i). The fund must also include two percent of the gross revenue received by the company for any use that exceeds \$25,000. *Id.* ex. A I.A.(9)(b)(ii). However, the fund that the company pays into will compensate all “Covered Musicians” who performed on the track equally. *Id.* ex. A I.A.(9)(g). A “Covered Musician” does not include royalty-earning musicians or symphonic musicians. *Id.* ex. A I.A.(a)(1). Any remixes of the songs that use the sample will not require further payments into the fund. Therefore, these union agreements do little to compensate the actual performer of the sampled piece since the company splits the marginal payment between all musicians on the recording. *Id.* ex. A I.A.(9)(a)(5). Much like other residual payments, the licensing itself is not at the will of the musician, but is left to the recording company to decide. Between the small amount, the lack of personalization to the particular musician, and the lack of control, these payments do not compensate for the need for increased direct control by musicians.

58. See Christopher D. Abramson, Note, *Digital Sampling and the Recording Musician: A Proposal for Legislative Protection*, 74 N.Y.U. L. REV. 1660, 1674 (1999) (noting that even though the union discussed addressing sampling as early as 1987, the actual first agreement to do so was not released until 1995).

59. See generally 20 FEET FROM STARDOM, *supra* note 26 (discussing early session singers and their lack of compensation or credit); COPYRIGHT CRIMINALS (Copyright Criminals, LLC 2009) (describing the realities faced by early session musicians like Clyde Stubblefield).

60. Abramson, *supra* note 58, at 1667–68 (adding that producers can “save money (by not hiring a musician) without sacrificing the sound and phrasing of a live musician in the song”).

61. Grand Upright Music Ltd. v. Warner Bros. Records, Inc., 780 F. Supp. 182, 183 (S.D.N.Y. 1991) (internal quotation marks omitted).

disagreed about how much of a sample may be taken without permission, based on existing case law, it likely would be much safer for a recording artist to request a license from the owner of the sampled work before using that work in a recording intended for mass distribution.⁶² Courts have found copyright infringement⁶³ even

62. See, e.g., *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 272, 275, 278 (6th Cir. 2009) (affirming the district court's finding that the defendant's use of the word "dog" in a low voice, the rhythmic panting, and the Bow Wow reference ("bow wow wow, yippie yo, yippie yea") infringed the plaintiff's tracks). In *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, the U.S. Court of Appeals for the Sixth Circuit approved the district court's use of the "fragmented literal similarity" standard where the jury was asked to look solely at the particular use of the work when it determined infringement rather than at the work as a whole. *Id.* at 275 (internal quotation marks omitted). The relative importance of the portion of the sampled song is key to determining infringement under this standard. *Id.* at 275–76. Under this standard, it is also likely that most samples would be infringing. Samplers admit that they will use a sound recording as a form of musical allusion to evoke the popularity of a particular piece; therefore, it is likely that the part of the piece they use is a crucial component. See COPYRIGHT CRIMINALS, *supra* note 59 (discussing the reason for session musicians' trade and the use of popular beats as an illustration). There is, however, room for possible fair use claims, but the courts have not fully explored that avenue yet, and the recording industry operates on a presumption of licensing fees. See DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 28–29 (2013), available at <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf> (discussing the controversial use of fair use as applied to remix culture). Fair use acts as a defense to an infringement of a copyrighted work by balancing four factors: "(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used . . . ; and (4) the effect of the use on the potential market for or value . . ." 17 U.S.C. § 107 (2012). In recent cases, the "transformative" purpose of the work as it relates to the first factor has come to the forefront of the factor analysis, but the doctrine itself continues to expand. See generally PETER JASZI, HEARING ON THE "THE SCOPE OF FAIR USE" HOUSE JUDICIARY COMMITTEE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET 4 (2014), available at http://judiciary.house.gov/_cache/files/496f0a48-1c95-4f88-aabf-9a98b0b22aa7/012814-testimony-jaszi.pdf.

63. For a prima facie copyright infringement claim, a plaintiff must demonstrate that (1) he owned a valid copyright, (2) the defendant copied the work, and (3) there was an improper appropriation. See 17 U.S.C. § 501(b); see also CRAIG JOYCE ET AL., COPYRIGHT LAW 636–37 (9th ed. 2013) (indicating that while courts generally agree on the elements of a prima facie copyright case, they do not agree on how to define the standard for infringement). Defendants can argue under the "improper appropriation" element that even if they copied the plaintiff's work, they only relied on a lawful amount (also called a *de minimis* use) or a part of the work that is not copyrightable. JOYCE ET AL., *supra*, at 637; see also *Feist Publ'ns, Inc., v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) ("Not all copying . . . is copyright infringement.").

in cases where very small snippets of music are used, causing samplers to license materials to avoid risking infringement.⁶⁴

B. A Brief Introduction to Musical Copyright Law

American copyright law and American intellectual property law generally find their beginnings in the Constitution's Intellectual Property Clause, which states that Congress has the power to enact laws to "promote the progress of science and useful arts, by securing for limited times to author and inventors the exclusive right to their respective writings and discoveries."⁶⁵ Unsurprisingly, as culture and technology changed, so too have the contours of federal copyright law. The Copyright Act⁶⁶ was heavily revised in 1976 ("1976 Act" or "the Act"),⁶⁷ and the 1976 Act remains the law today, with some more recent additions at the turn of the century.⁶⁸ A copyright exists the moment a work is "fixed in any tangible medium of expression" so that others can perceive it.⁶⁹ Fixation occurs when a work has maintained a sense of permanence for longer than a "transitory

64. Some courts, like the Sixth Circuit, have taken the de minimis defense to infringement off the table. *See, e.g.,* *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 801–02 (6th Cir. 2005) ("Get a license or do not sample. . . . When you sample a sound recording you know you are taking another's work product. . . . It is a physical taking rather than an intellectual one."). A musician could easily mimic the sounds of these small snippets of music and not be an infringer; however, since the Sixth Circuit determined the act of digital sampling was a "physical taking," the court refused to permit even small uses of a sound recording. *Id.* at 802. On the other hand, the U.S. Court of Appeals for the Ninth Circuit found the sampling of a three-note flute solo was not an infringement because it was a de minimis use. *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004). Because the circuits have split on the likely outcome of sampling cases, the law does not provide much guidance to samplers on whether their use will constitute an infringement. Commentators have criticized this strict approach regarding the finding of infringement in sampling. *See, e.g.,* Reilly, *supra* note 21, at 375 (analyzing the top arguments for and against sampling).

65. U.S. CONST. art. I, § 8, cl. 8.

66. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (codified as amended in scattered sections of 17 U.S.C.).

67. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

68. *See Copyright Timeline: A History of Copyright in the United States*, ASS'N RES. LIBR., <http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline#.VEr4QPnF9u0> (last visited Dec. 21, 2014) (providing a brief history of U.S. copyright law and key statutory amendments).

69. 17 U.S.C. § 102 (2012). Under the 1976 Act, a copyright does not have to be registered, though registration provides certain advantages if done in a timely fashion. Further, a copyright holder cannot sue for certain remedies for infringement unless the work has been registered. *Id.* § 412.

duration.”⁷⁰ Therefore, any sound recording, once it is created, will be copyrightable. However, it is well within any copyright owner’s prerogative to assign these rights, as long as he does so in writing.⁷¹

When it comes to sound recordings, two copyrights are present: one in the underlying musical work and a second in the particular recording.⁷² The 1976 Act did not define “musical compositions” because the term already had such a well-understood meaning.⁷³ Musical composition copyrights include the sheet music and underlying melodic material of the work as it is first fixed.⁷⁴ The sound recording copyright, on the other hand, protects only the particular performance of the work fixed in the sound recording.⁷⁵ The Copyright Act defines sound recordings as “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”⁷⁶ Protection for sound recordings was a much-needed addition to the realm of copyright,⁷⁷ but there was little mention of authorship in the legislative history.⁷⁸

The copyright in a sound recording is subject to a lesser version of copyright than other works. A copyright owner typically holds the right to reproduce the work, to prepare derivative works, to publicly distribute the work, to publicly perform the work, and to publicly display the work.⁷⁹ Sound recording copyrights, however, carry a

70. *Id.* § 101.

71. *Id.* § 204(a).

72. *Id.* § 102(a).

73. *See* H.R. REP. NO. 94-1476, at 53 (1976) (noting that it was not necessary to create a musical composition definition).

74. 17 U.S.C. § 102(a)(2). Although sheet music is the traditional way that the underlying music is fixed, any other method of fixation, including a recording, will do.

75. *Id.* § 101.

76. *Id.*

77. Sound recordings earned copyright protection beginning with the 1971 Act. Several years before Congress enacted the 1976 Act, the Senate Judiciary Committee estimated the cost of piracy of phonorecords at \$100 million per year. S. REP. NO. 92-72, at 3-4 (1971). In a report, the committee expressed concern that piracy negatively affected the recording industry as well as musicians. *Id.* at 4.

78. *Id.* at 5 (“As in the case of motion pictures, the bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.”).

79. 17 U.S.C. § 106. These rights are the same for all copyright owners, but their scope often becomes the subject of debate and controversy. Reproduction is the creation of copies of a work that will be fixed in a “tangible medium of

limited performance right, so the copyright owner has the right to performance only “by means of digital audio transmission.”⁸⁰ Even though owners of sound recordings have a limited set of rights, the person or entity that holds the copyright retains all possible profit and control of the work.⁸¹

C. *Work-for-Hire Clauses: The Recording Companies’ Attempts at Control*

Understanding the work-for-hire doctrine is key to determining whether an artist can exercise his or her termination rights. The termination provision for post-1978 works is codified at 17 U.S.C. § 203 and states that a work for hire cannot be terminated, whereas an “agreement to the contrary,” or assignment of any rights, can always be terminated.⁸² It is likely that many artists were induced to sign contracts that explicitly stated the work was “work for hire.”⁸³

expression . . . sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.* § 101. Derivative works are “based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted.” *Id.* Public distribution is typically a transfer of ownership, either “by sale or other transfer of ownership, or by rental, lease, or lending,” *id.* § 106, but there is some confusion over whether merely making a work publicly available qualifies as distribution, *see* *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (creating a making available right in the library context). There is also a limitation on the distribution right, called the first sale doctrine, which allows the purchaser of a copyrighted good to dispose of that particular copy as he sees fit. 17 U.S.C. § 109(a). A public display or performance occurs “at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered” or where it is communicated remotely to the public in a similar manner. *Id.* § 101.

80. 17 U.S.C. § 106(6). The specific sound recording rights are outlined in 17 U.S.C. § 114 and include statutory licensing of certain types of transmissions.

81. *See id.* § 114 (explaining that limitations upon the rights of duplication do not impair the rights of the owner of the original sound recording).

82. *Id.* § 203(a); *see also infra* Part I.D (discussing the termination right).

83. *See United States Copyright Office and Sound Recordings as Work Made for Hire: Hearing Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 106th Cong. 17 (2000) [hereinafter *Hearing: Sound Recordings as Work Made for Hire*] (prepared statement of Rep. Mary Bono, Member, H. Comm. on the Judiciary) (“These young artists who are desperate to sign a contract to a record company are the backbone of the recording industry. Any major artist had to make his or her start at the bottom as an unknown. The negotiation power the record company has over the music artist is staggering. The artist is so desperate to sign a contract for an album that the artists’ concern for his future financial well-being and possible royalty

Although, facially, this would appear to defeat any defense, that is not necessarily the case. The Supreme Court has accepted the Restatement of Agency interpretation of work for hire, which looks not only at the terms of a contract but also at the actual nature of an agreement to determine if it was an assignment or an actual work for hire.⁸⁴

The Nimmer Treatise—the quintessential copyright treatise written by Melville Nimmer and subsequently updated by his son David Nimmer—outlines the established interpretation of work for hire. Nimmer has found that an agreement alone should not constitute a per se judgment that a work is a work for hire.⁸⁵ He admits that an agreement will typically impose a much higher burden on the hired party⁸⁶ but that the words “work for hire” themselves should control only if the relationship is not “within the scope of employment” under the factor test adopted by the Supreme Court.⁸⁷

One case demonstrates that an ex post facto written agreement did not create a work for hire if the relationship did not actually fall within that scope. In *Marvel Characters, Inc. v. Simon*,⁸⁸ the U.S. Court of Appeals for the Second Circuit considered the bounds of termination when faced with a subsequent agreement to assign. The court found that a settlement agreement, which the parties entered into long after the creation of a comic book and which stated that the book was a “work for hire,” did not bar termination.⁸⁹ The court noted that the agreement was created after the work had already been done, but in concluding that the agreement did not make the work a “work for hire” for purposes of termination, the court relied heavily on the legislative intent behind § 304(c), the pre-1978 termination provision.⁹⁰ The court was concerned that allowing the

rights are minimal. The current inclusion of sound recordings in the [w]orks-made-for-hire provision would have a detrimental effect on these struggling artists.”).

84. See *infra* note 95 and accompanying text.

85. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.03[B][1][b][ii] (2014).

86. *Id.* § 5.03[B][1][b][ii] n.98.1.

87. *Id.* § 5.03[B][1][b][ii]. However, Nimmer appears primarily concerned with agreements in a typical employer-employee relationship when the employee is working outside of the scope of his employment and states that such agreements should be considered assignments rather than works for hire for the purposes of termination. *Id.*

88. 310 F.3d 280 (2d Cir. 2002).

89. *Id.* at 292.

90. See *id.* at 290 (construing the legislative history of the provision after concluding its plain language was ambiguous). Section 304 of the Copyright Act is being used here because it is the termination provision for pre-1978 works. Section 304 has language concerning work for hire and “any agreement to the contrary” that

plaintiff to bring a claim in this case would compromise the essence of the legislation because the provision was meant to protect authors from their initial poor bargaining power.⁹¹ The court stated:

If an agreement between an author and publisher that a work was created for hire [was] outside the purview of § 304(c)(5), the termination provision would be rendered a nullity; litigation-savvy publishers would be able to utilize their superior bargaining position to compel authors to agree that a work was created for hire in order to get their works published. . . . We conclude that Congress included the “notwithstanding any agreement to the contrary” language in the termination provision precisely to avoid such a result.⁹²

The Second Circuit also used the Nimmer Treatise to support its conclusions, thus further demonstrating the acceptance of Nimmer’s test.⁹³ Even though the court relied in part on the fact that the settlement agreement was signed years later—which if anything would demonstrate a better capability of the parties to bargain equally—the court held that the agreement should not foreclose termination.⁹⁴

Commentators and the courts therefore agree that “the actual relationship between the parties, rather than the language of the contract,” will establish work for hire.⁹⁵ Industry contracts or standards should not be controlling when interpreting the copyright law, especially when certain interests are clearly marginalized.⁹⁶

is identical to § 203, which applies to post-1978 works and is the provision most relevant to this Comment.

91. *Id.* at 290–91.

92. *Id.* (internal quotation marks omitted).

93. *Id.* at 291 (citing NIMMER & NIMMER, *supra* note 85, § 11.02[A][2]).

94. *Id.* at 290–91.

95. Emily Burrows, Note, *Termination of Sound Recording Copyrights & the Potential Unconscionability of Work for Hire Clauses*, 30 REV. LITIG. 101, 120 (2010) (examining work-for-hire clauses in recording contracts).

96. Nimmer has also considered the possible ramifications of termination rights on the recording industry and has found that there are many problems with few solutions. See NIMMER & NIMMER, *supra* note 85, § 5.03[B][2][a][ii][IV] (“For if such agreements can prevent background artists from terminating, then why are the featured artists allowed to ignore their own contracts with the record industry, which likewise bar such terminations?”).

D. *Termination Rights: What They Are and How to Use Them*

Congress passed the 1971 sound recording amendment to fight piracy of sound recordings;⁹⁷ however, the industry quickly became vexed by the prospect of termination rights. Termination rights, as mentioned previously, are the ability of the author to recapture rights that were assigned away years prior.⁹⁸ Because it would be incredibly difficult to overcome the pre-1978 work-for-hire doctrine,⁹⁹ the focus of this Comment will be on the relevant termination provision that applies only to post-1978 works: § 203.¹⁰⁰

Beginning thirty-five years after the execution of the grant,¹⁰¹ and within five years of the thirty-five year mark, an author can assert his or her termination rights by written notice to an assignee.¹⁰² The notice must state the date of termination, which will fall within the same five-year period.¹⁰³ The termination will grant all rights that had been given away back to the author but allow the assignee the continued use of any derivative works already in existence.¹⁰⁴

Work for hire is a statutory exception to the termination right.¹⁰⁵ However, “[t]ermination of the grant may be [a]ffected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”¹⁰⁶ The language “any agreement to the contrary” has been interpreted, in pre-1978 works, to include any general assignment of the rights even

97. See Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (adding protections for sound recordings to the Copyright Act); *supra* note 77 and accompanying text (explaining the purpose of the 1971 amendments).

98. 17 U.S.C. § 203 (2012).

99. Act of Oct. 15, 1971 § 1.

100. 17 U.S.C. § 203; *cf. id.* § 304(c) (outlining termination rights for pre-1978 works). Even though federal protection for sound recordings began in 1972, this Comment focuses on the implications of termination after 1978 since it is far less likely that session musicians would qualify for copyright under the pre-1978 work-for-hire doctrine. See *infra* note 211 (explaining the particulars of the 1909 Act work-for-hire doctrine).

101. Authors can grant their rights to a third party in “any means of conveyance or by operation of law,” and they can assign either all or part of the § 106 bundle of rights. 17 U.S.C. § 201(d). Transfers of copyright must be done by written agreement. *Id.* § 204(a).

102. *Id.* § 203(a)(3)–(4).

103. *Id.* § 203(a)(4).

104. *Id.* § 203(b)(1)–(2).

105. *Id.* § 203(a).

106. *Id.* § 203(a)(5).

if the assignee tried to resist the right of termination.¹⁰⁷ Therefore, even if the contract stated that all rights were assigned, the copyright would still be subject to termination, and this is likely true using the same clause in the post-1978 termination provision. The key to determining whether termination applies is whether the contract is an assignment or a work for hire.

In recent years, many authors or their heirs have come forward to exercise this statutory right.¹⁰⁸ Typically, termination will result in a new negotiation and may not actually result in termination.¹⁰⁹ The key aspect of the termination right is that authors are able to return to the negotiating table to generate a more appropriate deal for the future of the copyright based on any change that occurred over the past thirty-five years.¹¹⁰

E. *The Current Work-for-Hire Doctrine*

There are two ways that a work can be a “work for hire” under the 1976 Act’s definition. The first requires that the work be within the scope of employment.¹¹¹ The second requires that the work fall into a pre-determined list of nine types of commissioned works and that an express agreement in writing by the parties designates the work as a work for hire.¹¹² Notably, sound recordings are not included on the

107. *Cf. supra* note 92 and accompanying text (providing the Second Circuit’s interpretation of “any agreement to the contrary” in § 304(c)).

108. *See, e.g., Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1037–38 (9th Cir. 2005) (indicating that *Winnie-the-Pooh* children’s book author A.A. Milne’s heirs asserted termination rights to his works after his death); *Siegel v. Warner Bros. Entm’t Inc.*, 542 F. Supp. 2d 1098, 1114 (C.D. Cal. 2008) (concerning an action by the widow and daughter of one of the creators of the *Superman* comics asserting termination rights in the comics).

109. *See Milne*, 430 F.3d at 1037–38 (finding that a renegotiation of rights at the prior renewal term created a new assignment). Some contracts and payment schemes specifically account for termination after thirty-five years.

110. The 1976 Act eliminated the renewal right in copyright, but the termination provision was a compromise for authors since it provided them with a similar means to regain rights in their works after a certain number of years. H.R. REP. NO. 94-1476, at 124 (1976) (finding the need for such a provision due to the “unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited”).

111. 17 U.S.C. § 101.

112. *Id.* (listing the types of works as those “for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire”).

list; however, this was not always the case. After Congress passed the Digital Millennium Copyright Act in 1998,¹¹³ there was a quick and powerful move by certain lobbyists in the music industry to pass a “technical amendment” that included sound recordings in the list of commissioned works.¹¹⁴ Artists and unions reacted swiftly to oppose this amendment.¹¹⁵ Many people viewed this amendment as a severe change to the statute, and it was almost immediately repealed.¹¹⁶ At hearings following the technical amendment concerning whether the change was in fact a technical amendment and its effects on the current law, some industry and copyright leaders supported termination rights for lead or featured musicians but were wary of broadening that definition to session musicians in particular.¹¹⁷ Some considered restricting the language of a new proposed amendment to only the “major contributors” on a sound recording,¹¹⁸

113. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

114. See Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, app. I, 113 Stat. 1501, 1501A-521 (2000) (amending the Copyright Act with the Intellectual Property and Communications Omnibus Reform Act of 1999); see also H.R. REP. NO. 106-464, at 105–06 (1999) (Conf. Rep.) (“Sound recordings have been registered in the Copyright Office as works made for hire since being protected in their own right. This clarifying amendment shall not be deemed to imply that any sound recording or any other work would not otherwise qualify as a work made for hire in the absence of the amendment made by this subsection.”); David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC’Y USA 387, 391–92 (2002) (describing the results of the recording industry’s lobbying efforts and recording artists’ consequential uproar to the “lobbyists’ backroom handiwork”).

115. Nimmer & Menell, *supra* note 114, at 391–92.

116. See Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444 (repealing the addition of sound recordings to the work-for-hire commissioned works definition).

117. See, e.g., *Hearing: Sound Recordings as Work Made for Hire*, *supra* note 83, at 72 (prepared statement of Sheryl Crow) (refuting arguments that the work-for-hire amendment was “necessary to clarify who is the author of the sound recording” since “[t]here is no confusion in the record industry” that featured artists and not hired musicians, producers, or others create sound recordings).

118. See *id.* at 21 (prepared statement of Marybeth Peters, Register of Copyright, Copyright Office of the United States, Library of Congress) (arguing that “an unfettered termination right” that was available to every person who performed on a recording would be “unworkable” and that there is a need for “a carefully calibrated termination right” specific to featured artists); see also *id.* at 76 (statement of Michael Green, President and CEO of Recording Academy, National Academy of Recording Arts & Sciences, Inc.) (testifying that performers besides the featured artist have “a contractual understanding through industry standard agreements” that they have no claim to authorship in the sound recording and “[t]his has been the standard

but the proposed amendment ultimately did not pass. Even though the statute now states that the repeal of the technical amendment should not affect courts in their interpretations one way or another,¹¹⁹ it is difficult to see how that will be the case. At the very least, the repeal demonstrated a move away from easily finding sound recordings to be works for hire under § 101.¹²⁰

The first portion of the work-for-hire definition, that the work must be within the scope of employment, leaves much more room for interpretation than the subsequent portion. Indeed, when the 1976 Act first came into effect, the circuits were split over the proper interpretation of this clause.¹²¹ Under the pre-1978 work-for-hire doctrine, the main inquiry was the amount of control, as demonstrated by several pre-1978 cases as well as a very recent case that applied the 1909 Act doctrine to comic book characters.¹²² The “instance and expense” test asked solely whether the employer had the right to control the work and whether it had taken the financial risk of the project.¹²³ The work-for-hire doctrine was completely revamped in the 1978 Act, which confined commissioned works to those enumerated in the § 101 definition, while all other

practice forever”). *But see id.* at 66 (statement of Marci Hamilton, The Thomas H. Lee Chair in Public Law, Cardozo School of Law) (suggesting that recording companies can “certainly handle” the transaction costs of having to renegotiate the termination of a particularly lucrative work and that “the equities are pretty clear”).

119. 17 U.S.C. § 101 (2012) (stating that the brief reform and removal “shall [not] be considered or otherwise given any legal significance”).

120. Sound recordings were commissioned works and likely considered works for hire for the limited time they were covered under the technical amendment. *See Hearing: Sound Recordings as Work Made for Hire, supra* note 83, at 111 (quoting Marybeth Peters, Register of Copyrights, as stating that sound recordings made after November 29th and before the repeal of the amendment were “a problem”).

121. *See, e.g., Dumas v. Gommerman*, 865 F.2d 1093, 1102 (9th Cir. 1989) (holding that only formal salaried employees qualify under § 101’s scope of employment circumstance); *Easter Seal Soc’y for Crippled Children & Adults of La., Inc. v. Playboy Enters.*, 815 F.2d 323, 334–35 (5th Cir. 1987) (holding that the term “employee” should be interpreted literally and consistently with law of agency principles); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 552–53 (2d Cir. 1984) (applying a standard that looked at whether the employer had wielded control over the contractor).

122. *See Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 139 (2d Cir. 2013) (finding that a work is created at an employer’s “instance and expense when the employer induces the creation of the work and has the right to direct and supervise the manner in which the work is carried out” (internal quotation marks omitted)), *cert. dismissed*, 135 S. Ct. 42 (2014). The instance and expense test creates a strong presumption favoring the employer. *Id.* at 140.

123. *Id.* at 139.

employment relationships focused on whether the work was done in the “scope of employment.”¹²⁴

Eventually, the Supreme Court in *Community for Creative Non-Violence v. Reid*¹²⁵ decided that agency law would be the governing standard for deciding whether an employee is working in the scope of employment.¹²⁶ The Community for Creative Non-Violence (“CCNV”), a non-profit organization specializing in homelessness awareness, sued Reid, the sculptor it had hired to produce a sculpture depicting a homeless family.¹²⁷ After Reid created the sculpture, he rejected the CCNV’s proposal to take it on tour because the material was so fragile.¹²⁸ The parties did not have a written agreement, and the CCNV asserted copyright ownership over the work.¹²⁹ The CCNV argued that Reid had created the sculpture as a work for hire.¹³⁰ The Court adopted the agency model of employee from the Restatement (Second) of Agency¹³¹ and outlined several factors that courts should consider when they assess whether a hired party is working within the scope of their employment—in addition to “the hiring party’s right to control the manner and means by which the product is accomplished”—including:

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the

124. 17 U.S.C. § 101. Some scholars have considered whether a sound recording could qualify as “collective works” or “compilations” under § 101. *E.g.*, Randy S. Frisch & Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 COLUM. J.L. & ARTS 211, 221–24 (1993) (providing arguments for and against sound recordings as § 101 specially commissioned works). Considering the severe backlash from including sound recordings as a technical amendment, it is unlikely that sound recordings automatically warrant work-for-hire status. *See Hearing: Sound Recordings as Work Made for Hire*, *supra* note 83, at 34 (prepared statement of Marybeth Peters, Register of Copyright, Copyright Office of the United States, Library of Congress) (stating that adding sound recordings to the commissioned works outlined in the second part of the work-for-hire definition was “a substantive amendment to the law, not a technical amendment as some have claimed”).

125. 490 U.S. 730 (1989).

126. *Id.* at 743.

127. *Id.* at 732–33.

128. *Id.* at 735.

129. *Id.*

130. *Id.* at 738–39.

131. *Id.* at 751–52. The Third Restatement of Agency, published after the Supreme Court decided *Reid*, does not include factors in its description of when an employee acts in the scope of his employment. Restatement (Third) of Agency § 7.07 (2006). Courts have not addressed whether the copyright doctrine should be changed due to this revision.

parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.¹³²

The Court asserted, however, that “[n]o one of these factors is determinative.”¹³³ The Court determined that CCNV was not an employee under the agency test because merely having control over the details of the project was not enough.¹³⁴ Reid was a skilled sculptor, provided his own tools, worked from home without daily supervision, and only had one short assignment.¹³⁵ The project was also completed outside the scope of the non-profit's regular business, and Reid was not on the employee payroll and did not receive employee benefits.¹³⁶

The federal circuits readily adopted the Supreme Court's factor test, but they have implemented it in a variety of ways. The Second Circuit interpreted the proper use of the test in *Aymes v. Bonelli*.¹³⁷ In *Aymes*, the defendant was a computer programmer who appealed a finding that the program he made for the plaintiff was a work for hire.¹³⁸ Here again, the parties did not have a written agreement that assigned ownership rights.¹³⁹ When analyzing the factors, the court noted that while the Supreme Court stated that none of the factors is dispositive, the Court provided no guidance on how courts should weigh them.¹⁴⁰ The Second Circuit found that some factors will have little to no relevance and some will be significant in nearly every situation.¹⁴¹ It explicitly noted the following five factors as almost always being key to the interpretation: “(1) the hiring party's right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign

132. *Reid*, 490 U.S. at 751–52 (footnotes omitted).

133. *Id.* at 752.

134. *Id.* at 752–53 (finding instead that the employee was an independent contractor).

135. *Id.*

136. *Id.* at 753.

137. 980 F.2d 857 (2d Cir. 1992).

138. *Id.* at 858.

139. *Id.* at 860.

140. *Id.* at 861.

141. *Id.*

additional projects to the hired party.”¹⁴² The Second Circuit found that other courts have adopted a similar approach by weighing only the relevant factors in the individual case.¹⁴³ In *Aymes*, the court found that the plaintiff’s work was not a work for hire because even though the employer had a right to control his work product, the other factors weighed against the employer, particularly the factors that emphasized the plaintiff’s payment and tax treatment.¹⁴⁴

The U.S. Court of Appeals for the Ninth Circuit in *JustMed, Inc. v. Byce*¹⁴⁵ was more hesitant than the Second Circuit to focus on the employment arrangement between a software engineer and a start-up software company.¹⁴⁶ The Ninth Circuit found that the software engineer was an employee and not an independent contractor even though he was not given direction and did not receive employee benefits.¹⁴⁷ The court noted that the nature of a start-up company could make these factors less indicative of an employment relationship.¹⁴⁸ However, the Ninth Circuit explicitly rejected the Second Circuit’s approach, which heavily emphasizes the employee benefits factor.¹⁴⁹ The Ninth Circuit instead largely relied on the amount of control exhibited by the employer.¹⁵⁰ The court reasoned that although it would generally be “unfair[.]” for the employer to treat a worker as an employee in one context and an independent

142. *Id.*

143. *Id.* At least one other circuit has adopted the Second Circuit’s approach from *Aymes*. See *Kirk v. Harter*, 188 F.3d 1005, 1009 (8th Cir. 1999) (determining that a computer programmer was an independent contractor rather than an employee after considering the programmer’s tax treatment, benefits, skill level, ability to hire a subcontractor, and ability to consult other outside companies).

144. See *Aymes*, 980 F.2d at 862–63 (“[T]he importance of these [employee benefits and tax treatment] factors is underscored by the fact that every case since *Reid* that has applied the test has found the hired party to be an independent contractor where the hiring party failed to extend benefits or pay social security taxes.”).

145. 600 F.3d 1118 (9th Cir. 2010).

146. *Id.* at 1128 (finding the defendant’s “strongest argument” was based on his tax status and fact that he did not receive employee benefits from the company).

147. *Id.*

148. See *id.* (speculating that the employer did not exert very much control because it was a new startup company).

149. *Id.* (“There is a danger, however, in relying on them too heavily, because they do not bear directly on the substance of the employment relationship—the right to control. In this case, the factors do not decisively favor [the software engineer], especially when one considers [the technology startup company’s] business model.”).

150. *Id.*

contractor in another, that concern was irrelevant in the instant case due to the startup nature of the business.¹⁵¹

The weight of each factor is up to some dispute in the circuits. The two most influential circuits for copyright and the entertainment industry in particular—the Second and Ninth—favor relatively different interpretations. There will be an analysis of these factors in regards to session musicians below.¹⁵²

F. The Current Judicial Joint Authorship Doctrines: The Ever Expanding Scope

Once the artist overcomes the work-for-hire hurdle, he will still have to claim some type of ownership in the copyright in order to assert his right to terminate. This becomes particularly complicated when a work has many contributors with varying degrees of contribution, such as in a sound recording. This section will consider the statutory language and outline how various circuit courts interpret the definition of joint authorship. Primarily, it will consider the circuit courts' views on both the requirements of intent and the amount of copyrightable material necessary to establish joint ownership.

To claim joint authorship, the artist's work must fall into the § 101 definition of joint work, which states that the work must be "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."¹⁵³ Though this may appear to be a simple enough standard at first glance, there are contradictory opinions on the necessary intent and the contributions needed by each party.

*Childress v. Taylor*¹⁵⁴ established the most widely accepted test for a joint work, called the *Childress* test, which requires that each author's contribution be copyrightable on its own.¹⁵⁵ In *Childress*, the defendant did most of the background research and urged the plaintiff to write a play about the comedienne "Moms" Mabley.¹⁵⁶ The court concluded the defendant was not a joint author because research is not copyrightable in itself.¹⁵⁷ The court in *Childress* also

151. *Id.*

152. *See infra* Part II.A.2.

153. 17 U.S.C. § 101 (2012).

154. 945 F.2d 500 (2d Cir. 1991).

155. *Id.* at 508–09.

156. *Id.* at 502.

157. *Id.* at 509 (accepting, without analysis, the trial judge's determination that research is not copyrightable).

discussed how the parties lacked the intent to be joint authors.¹⁵⁸ The court set a relatively high bar for intent, requiring that the joint authors not only intend for their work to be comingled but also that they intend to be joint authors.¹⁵⁹ Prior cases had only regarded the intent “to become part of a unitary work,”¹⁶⁰ but several courts have subsequently adopted and expanded this higher standard for intent.

The Ninth Circuit applied the *Childress* test in *Aalmuhammed v. Lee*¹⁶¹ and also created a three-pronged approach to determine the intent portion of joint authorship.¹⁶² In this case, Aalmuhammed was the cultural aid for the movie, *Malcolm X*.¹⁶³ Aalmuhammed helped direct and write the movie and provided guidance to ensure cultural accuracy in certain scenes.¹⁶⁴ The court found that the case turned on the director’s intent to regard Aalmuhammed as a co-author.¹⁶⁵ The court interpreted a much stricter rule for joint authorship, which considered (1) whether the author exercised control over the work, (2) whether the purported co-authors objectively showed intent to be joint authors, and (3) whether the audience’s “appeal of the work turn[ed] on both contributions” such that each person’s share in the success was indistinguishable from the other’s share.¹⁶⁶ The court was persuaded by the implications that a broad interpretation of co-authorship could have on the movie industry.¹⁶⁷

Nimmer believes that joint authorship requires only that a contribution have more than de minimis contribution of authorship

158. *Id.* at 508 (requiring “some distinguishing characteristic of the relationship” be understood by the parties in order to have the necessary intent for joint authorship).

159. *Id.* at 509 (“That equal sharing of rights should be reserved for relationships in which all participants fully intend to be joint authors.”).

160. *Weissmann v. Freeman*, 868 F.2d 1313, 1319 (2d Cir. 1989); *see also* *Eckert v. Hurley Chi. Co.*, 638 F. Supp. 699, 702 (N.D. Ill. 1986) (“The narrower and better view is that each author when making his or her contribution must intend it to constitute a part of a total work to which another shall make (or has already made) a contribution.”).

161. 202 F.3d 1227 (9th Cir. 2000).

162. *Id.* at 1233–34 & n.24.

163. *Id.* at 1229.

164. *Id.*

165. *Id.* at 1235–36.

166. *Id.* at 1234.

167. *See id.* at 1233 (“Everyone from the producer and director to casting director, costumer, hairstylist, and ‘best boy’ gets listed in the movie credits because all of their creative contributions really do matter. . . . A creative contribution does not suffice to establish authorship of the movie.”).

that does not need to be separately copyrightable.¹⁶⁸ Nimmer essentially follows the plain language of the Copyright Act.¹⁶⁹ Generally, other scholars and the courts have disfavored the Nimmer test.¹⁷⁰ Nimmer argues that there is nothing in the plain language of the statute that requires the parts to be separately copyrightable.¹⁷¹ A recent case vindicated the Nimmer test in part, which may lead other courts to also use the test as the standard for copyrightability.¹⁷² For example, the U.S. Court of Appeals for the Seventh Circuit in *Gaiman v. McFarlane*¹⁷³ considered whether the defendant could claim joint authorship in the comic book character he had created and in the greater work to which he had contributed.¹⁷⁴ The court stated:

The decisions that say, rightly in the generality of cases, that each contributor to a joint work must make a contribution that if it stood alone would be copyrightable weren't thinking of the case in which it *couldn't* stand alone because of the nature of the particular creative process that had produced it.¹⁷⁵

To illustrate the point, the court used the example of two professors—one who has great ideas but cannot write and one who has mediocre ideas but can write.¹⁷⁶ In that situation, the Seventh Circuit asserted that it would be proper for the authors to be considered joint authors even though one author contributed only uncopyrightable material.¹⁷⁷ *Gaiman* remains somewhat of an outlier in the line of cases that continue to apply the *Childress* test, but because the case was decided relatively recently and there has not been subsequent case law to determine if this is part of a trend, it may demonstrate a move toward a less stringent interpretation of joint authorship.

168. NIMMER & NIMMER, *supra* note 85, § 6.07.

169. See 17 U.S.C. § 101 (2012) (“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.”).

170. NIMMER & NIMMER, *supra* note 85, § 6.07[A][3][b] (discussing the resistance to Nimmer’s interpretation of the proper test).

171. *Id.* § 6.07[A][3][a].

172. See *id.* § 6.07[A][3][c] (discussing the “vindication” of the Nimmer test through a recent case that did not require both joint authors to contribute independently copyrightable content).

173. 360 F.3d 644 (7th Cir. 2004).

174. *Id.* at 648.

175. *Id.* at 659.

176. *Id.*

177. See *id.* (suggesting that these hypothetical individuals’ “intent” to be joint authors “would be plain”).

Another notable copyright scholar, William Patry, is split between the two tests. Patry states that *Childress* has been misconstrued as requiring both parties to contribute independently copyrightable material.¹⁷⁸ He suggests that *Childress* required only that an individual contribute some kind of expression but that the expression need not stand alone as a separately copyrightable material to be regarded as joint authorship.¹⁷⁹ Therefore, he believes that only a minimal amount of expression is required. However, he does favor the requirement that both parties demonstrate mutual intent in order to be regarded as joint authors.¹⁸⁰ Unlike the Ninth Circuit's decision in *Aalmuhammed*, Patry argues that intent should not rely heavily on the dominance of one party over another because “[h]ard-and-fast rules can never answer the many nuanced fact situations sure to be presented by collaborative, creative efforts.”¹⁸¹ Patry contends that “the parties must have an intent to be joint authors in the lay sense, i.e., colleagues striving together in a creative process.”¹⁸² This interpretation would possibly include other contributors, but Patry notes how evidence of one-time fees to contributors could demonstrate a lack of mutual intent to be joint authors.¹⁸³

Joint authorship is no longer used as a means for smaller players in a group work to claim authorship because of the various circuits' interpretations limiting who can claim to be a joint author. The courts will likely consider both the intent of the parties as well as the type of work they contribute. Though *Gaiman* moves away from the requirement that each author contribute stand-alone copyrightable content, smaller contributors will likely still have difficulty proving their intent to be joint authors.

G. Independently Copyrightable Material: Support for the Supporting Players

Beyond joint authorship, there is still a possibility that a copyright owner could claim some type of authorship in the work that it contributed to the whole. This section will consider the possibility that an author could claim such rights independently of joint authorship. It outlines the recent case law that supports such a

178. 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 5:16 (2014) (suggesting that *Childress* “did not endorse the ‘independently copyrightable’ language”).

179. *Id.*

180. *Id.* § 5:18.

181. *Id.* § 5:23.

182. *Id.* § 5:21.

183. *See id.* § 5:24 (suggesting the provision of minimal fees “is fairly strong evidence that the dominant author viewed the contributor as a volunteer”).

proposition and concludes that in certain instances, authors probably can claim copyright in independently contributed material.

In *Thomson v. Larson*,¹⁸⁴ the Second Circuit applied the majority *Childress* test but also left a small gap for copyright owners to possibly recover for the use of their copyrightable material outside of joint authorship.¹⁸⁵ In the case, Thomson had been helping Larson write the musical *Rent*.¹⁸⁶ Larson was the main author, but Thomson had also made substantial contributions to the play as a dramaturge.¹⁸⁷ The court found that Thomson lost her claim for joint authorship on intent rather than contribution.¹⁸⁸ The more interesting part of the case is what the court left open—that Thomson might have had a copyright interest in the work that she contributed separately and could have potentially brought an infringement claim against Larson’s estate for unlawful use of her particular contributions.¹⁸⁹ The court refused to hear the issue because Thomson first presented it on appeal.¹⁹⁰

A recent copyright case in the Ninth Circuit has more explicitly opened the door to this type of authorship claim. An initial ruling awarded the plaintiff, an actress, a preliminary injunction based on her minor performance in a film.¹⁹¹ The actress had a minor role in an amateur film that was never produced, but her scene was used in a subsequent film called the “Innocence of Muslims.”¹⁹² She was dubbed in the film so that it appeared she was asking if Mohammed was a child molester.¹⁹³ She soon became subject to death threats from extremists on YouTube and attempted to take down the video on YouTube through copyright notice and takedown procedure.¹⁹⁴

184. 147 F.3d 195 (2d Cir. 1998).

185. *See id.* at 206 (noting that the Second Circuit has not had the opportunity to consider whether a person “mak[ing] a non-de minimis copyrightable contribution but cannot meet the mutual intent requirement of co-authorship[] retains . . . any rights and interests in his or her own contribution” (emphasis omitted)).

186. *Id.* at 197.

187. *Id.* at 197–98.

188. *See id.* at 202, 206–07 (applying *Childress* and finding that even if a putative author makes a quantitatively large contribution to a work, the author will lack co-ownership of the work if the parties lacked mutual intent for joint ownership).

189. *Id.* at 206.

190. *Id.*

191. *Garcia v. Google, Inc.*, 743 F.3d 1258, 1269 (9th Cir.), *amended by* 766 F.3d 929 (9th Cir.), *reh’g en banc granted*, 771 F.3d 647 (9th Cir. 2014).

192. *Id.* at 1261.

193. *Id.*

194. *Id.* at 1262.

The plaintiff did not claim joint authorship but instead claimed that she had contributed independently copyrightable material to the film.¹⁹⁵ The Ninth Circuit found sufficient evidence to support the plaintiff's claim for independent copyrightable material and reversed the district court's decision to grant summary judgment to the filmmaker.¹⁹⁶ This opinion sparked a fierce outcry and opposition from various parties.¹⁹⁷ The court had amended the opinion but retained the basic premise of the argument while, at the same time, noting that it is possible the district court will find that the actress does not in fact have a copyrightable interest on remand.¹⁹⁸ However, this opinion has since been vacated by a pending en banc review.

In his dissenting opinion to the original order, Judge Smith was less convinced, reasoning that the Ninth Circuit in *Aalmuhammed* had rejected a claim for authorship in one's individual performance in a film.¹⁹⁹ Judge Smith noted that because the actress did not exercise creative control over the project and her role was not separately copyrightable as a "motion picture," she should not be able to claim ownership.²⁰⁰ However, the majority clearly recognized the possibility of a third type of authorship: a contribution to a copyrighted work.²⁰¹ Though this opinion is no longer good law, it demonstrates varying opinions among judges on the panel.

On November 12, 2014, the Ninth Circuit agreed to rehear this case en banc and the oral arguments occurred December 15, 2014.²⁰²

195. *Id.*

196. *See id.* at 1263, 1269 (finding that a small acting role in a film could constitute independently copyrightable content).

197. *See, e.g.,* Corynne McSherry, *Ninth Circuit Doubles Down in Garcia v. Google*, ELECTRONIC FRONTIER FOUND. (July 11, 2014), <https://www.eff.org/deeplinks/2014/07/ninth-circuit-doubles-down-in-garcia-v-google> (detailing the opposition to the ruling because it "amounts to a prior restraint of speech, something that should never happen where the underlying claim is 'doubtful'").

198. *Garcia v. Google, Inc.*, 766 F.3d 929, 935 (9th Cir.) ("Nothing we say today precludes the district court from concluding that Garcia doesn't have a copyrightable interest, or that Google prevails on any of its defenses."), *reh'g en banc granted*, 771 F.3d 647 (9th Cir. 2014).

199. *Garcia*, 743 F.3d at 1272–73 (Smith, J., dissenting) (arguing that *Aalmuhammed* "forecloses" the court's decision because the actress had a "minimal" role in the film).

200. *Id.* at 1271–72.

201. *Id.* at 1264–65 (majority opinion) (stating that an actor can claim a copyright interest in his own contribution but not in pre-existing material, such as the content of the script).

202. *Garcia v. Google, Inc.*, 771 F.3d 647 (9th Cir. 2014). A live webcast of the oral arguments is available on YouTube.com. *Pasadena CRS 3:30 PM Monday*

It is difficult to speculate what the outcome of this case will be. There are multiple ways that the case could turn out, each of which have possible repercussions for this Comment.

Though an authorship claim for independently contributed material has not been presented in much case law, the possible holding in a Ninth Circuit case and the dicta in the Second Circuit's decision in *Larson* demonstrate that such claims may gain favor with the courts. Therefore, even without joint authorship, this avenue could give authors another means to claim authorship in their smaller contributions to a larger work.

II. ANALYSIS

A session musician's ability to terminate his rights in sound recordings requires overcoming multiple hurdles due to authorship concerns. The termination right was intended to support the original authors of works.²⁰³ Session musicians have been undervalued and undercompensated for works that remain considerably popular and prominent for years after their creation. The addition of digital sampling to the music scene also created new avenues for recording companies to profit from the works of session musicians who receive little compensation from sampling and usually no other forms of royalties.²⁰⁴ Termination rights are a means for these musicians to get a piece of the future earning of their works as the works continue to enjoy success both in traditional and new mediums.

Session musicians have a unique purpose in the music industry and have different experiences depending on their level of skill and the type of work they do.²⁰⁵ This Part argues that session musicians who contribute more than a de minimis amount of work to a sound recording should be able to terminate their rights.

A. *Session Musicians Are Generally Not Employees for Hire*

When applying the work-for-hire doctrine to session musicians, courts must consider the actual relationship between the parties in addition to the documents that were signed. The answer to whether

12/15/14, YOUTUBE (Dec. 15, 2014) <https://www.youtube.com/watch?v=EMTaBkOBR2Q> [hereinafter *Garcia Oral Arguments*].

203. See *supra* note 110 (explaining that termination rights were so important to the 1976 Act because the 1976 Act eliminated the renewal right).

204. See *supra* Part I.A.2 (detailing laws pertaining to digital sampling).

205. See *supra* Part I.A.1 (describing the recording industry and session musicians' place therein).

a musician is an employee for hire is very fact dependent, but general rules can be extracted from the thicket of factors.

1. *Recording contracts do not present substantial obstacles to termination*

The first presumption against the session musician occurs when the artist signs the papers, which may occur at the time or before the sound recording is first made. These contracts typically include a work-for-hire clause, but the clause should not condemn the artist to work-for-hire status.²⁰⁶ As David Nimmer has stated, “[I]t is the relationship that actually exists between the parties, not their description of that relationship, that is determinative.”²⁰⁷ As demonstrated in *Marvel Characters, Inc. v. Simon*, the existence of an agreement will likely not in itself create a work for hire.²⁰⁸ Therefore, an agreement must portray the actual working relationship. In the case of musicians who contribute substantially to the sound recording beyond what is directly prescribed by sheet music, it is difficult to say in all circumstances that they were employees for hire.

2. *Reid and Aymes suggest that session musicians are not employees for hire*

The *Reid* factors are tantamount to understanding whether a session musician will qualify for termination rights. The *Reid* analysis is very fact-specific; however, many session musicians encounter similar situations regarding many of the factors beyond the “manner and means by which the product is accomplished.”²⁰⁹

As *Aymes* has become one of the most well recognized interpretations of the work-for-hire doctrine in the Second Circuit, it may control in subsequent interpretations because many circuits emulate the Second Circuit in copyright decisions.²¹⁰ Even though

206. See *supra* note 11 and accompanying text.

207. See NIMMER & NIMMER, *supra* note 85, § 11.02[A][2].

208. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 290 (2d Cir. 2002).

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

210. See, e.g., *Kirk v. Harter*, 188 F.3d 1005, 1009 (8th Cir. 1999) (finding the Second Circuit’s approach in *Aymes* was “persuasive”). But see *JustMed, Inc. v. Byce*, 600 F.3d 1118, 1128 (9th Cir. 2010) (arguing that “[t]here is a danger . . . in relying on [the *Aymes* factors] too heavily”); NIMMER & NIMMER, *supra* note 85, § 5.03[B][1][a][iv] (noting that while some courts have followed *Aymes*, “the categorical gloss of *Aymes v. Bonelli* should be considered suspect . . . [and] a better approach emerges from authority outside the Second Circuit” (footnotes omitted)); PATRY, *supra* note 178, § 5:68 (stating that some courts have followed the *Aymes* court’s emphasis on financial factors but “other courts . . . have correctly examined and emphasized other factors as well as the totality of the parties’ relationship, which is the true test”).

the Ninth Circuit is more reluctant to weigh the employee financial factors as heavily as the Second Circuit, its focus on control is more reminiscent of the 1909 Act²¹¹ and thus does not appear to follow the heart of the Supreme Court's analysis in *Reid*.²¹² Also, the Ninth Circuit was particularly concerned with the start-up nature of the employer,²¹³ and that is not the case here with a far more established and sophisticated recording industry.

The *Reid* factors focus the inquiry on whether the parties had a typical employment relationship. An independent contractor should not qualify under *Reid* as an employee, and most session musicians are independent contractors. The potential employer's right to control the work product is important but not dispositive.²¹⁴ In the case of session musicians, this is the one factor in a work-for-hire inquiry that will vary most widely.²¹⁵

a. The control factor varies widely among session musicians.

The first issue to consider is whose control matters. Session musicians are hired either under contractual arrangements with recording studios or under less formal arrangements with featured artists.²¹⁶ If a featured artist hired the session musician, the session musician would have a simpler time asserting that the recording studio did not have a strong case for control.²¹⁷ On the other hand, if

211. Act of Mar. 4, 1909, Pub. L. No. 60-349, § 62, 35 Stat. 1075, 1087-88 (“[T]he word ‘author’ shall include an employer in the case of works made for hire.”).

212. Compare *Reid*, 490 U.S. at 752 (concluding that control is one factor of the analysis but that control “is not dispositive”), with *JustMed, Inc.*, 600 F.3d at 1128 (finding control to be a far more relevant factor in the context of a small start-up company than the *Aymes* court’s interpretation).

213. *JustMed, Inc.*, 600 F.3d 1118 at 1128.

214. See *Reid*, 490 U.S. at 751 (listing the “right to control” as the first of many factors in consideration).

215. Control depends on a wide variety of fact-specific factors whereas other factors such as payment and source of instrumentalities are likely more standard industry-wide or at least have fewer variations.

216. KEMBLEW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 291 n.10 (2011).

217. *Reid* cited a case that asked whether bandleaders of a Hilton Hotel band were employees or independent contractors. See *Reid*, 490 U.S. at 752. In *Hilton International Co. v. NLRB*, the Second Circuit held that “steadily-engaged hotel musicians are not hotel employees, but rather, employees of their band leaders.” 690 F.2d 318, 321 (2d Cir. 1982). The court reasoned that Hilton did not exercise control over the “manner” of the performances since the bandleaders hired the members of their bands directly. *Id.* Selection of the “repertoire, instruments used, style, tempo, and other standards of performance” were left to the bandleader, and the contract with the Hilton was for the band as a whole—not for the individual

the recording company hired the session musician directly, then that relationship will be most important to a work-for-hire analysis. Also, if the recording company uses a studio it does not own or allows the featured artists to use their own studios, an even more tenuous link of control would exist between the recording company and the session musician. The recording company would need to control the process as directly as possible for the musician to be a worker for hire. Some industry players have tried to argue that a featured artist is an employee of the record company when a featured artist creates a sound recording.²¹⁸ However, even though session musicians may generally exhibit less control over recordings than featured artists, they still control their particular performances.²¹⁹

Once a direct link to the record company is defined, control of a sound recording is best considered by (1) genre and (2) the artistic control asserted on the session musician by those in the studio. Certain musical genres create a greater opportunity for creative expression by the particular artists in the recordings than others. Creative control is therefore strongly influenced by the nature of the creative process.²²⁰ Musicians that work in classical or pop music genres likely have minimal control over their creative

players. *Id.* Therefore, at least under the Second Circuit's analysis, a session musician that is hired solely by the featured artist has a strong claim for control. It is difficult to say how often that was the case since many of these sessions occurred and relationships were formed so many years ago.

218. See sources cited *supra* note 118 (providing testimony of several industry experts, including some who believed that the change to include sound recordings in the definition of "work for hire" was a technical amendment). *But see* Jessica Johnson, Comment, *Application of the Copyright Termination Provision to the Music Industry: Sound Recordings Should Constitute Works Made for Hire*, 67 U. MIAMI L. REV. 661, 664 (2013) (arguing that sound recordings should qualify as works for hire). What is most interesting about the featured artist becoming an employee for hire is that a featured artist often has far more contractual restrictions and requirements than a session musician. See M. WILLIAM KRASILOVSKY & SIDNEY SHEL, THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 186 (Robert Nirkind & Sylvia Warren eds., 10th ed. 2007). Record companies can often assign other projects or will require a certain amount of touring or music releases under the contract. *Id.* Featured artists may be more like employees for hire than session musicians because of the long nature of featured artists' contractual relationships with recording companies. *Id.*

219. See, e.g., *supra* notes 25–27 (detailing a variety of typical session musicians' contributions to recordings').

220. See PATRY, *supra* note 178, § 5:23 (acknowledging the "many nuanced fact situations" that arise in creative endeavors, particularly with regard to joint authorship claims).

contributions.²²¹ Typically, the music in these genres is thoroughly planned, and the performers have strict guidelines concerning what to play. In classical music, for example, session musicians must perform faithfully what is written on the page. Diversion from the composer's original intent would not only produce harmonic chaos, but it would also misrepresent the composer's original intellectual work. On the other hand, jazz and funk recordings require far less stringent direction because the styles are based in part on improvisation. Many times, the musicians will be part of the creative contribution because they are given a chord progression on which to improvise their part.²²² The creation of music in these genres is far more fluid than in others.²²³ Rock and country songs may have certain parts that require creative ingenuity (e.g., guitar riffs,²²⁴ drum solos,²²⁵ and vocal harmonies²²⁶), and in those cases, session musicians could create those parts with the guidance of the other musicians in the session.²²⁷

221. See, e.g., Zoe Chace, *How Much Does It Cost to Make a Hit Song?*, NPR (June 30, 2011, 3:58 PM), <http://www.npr.org/blogs/money/2011/07/05/137530847/how-much-does-it-cost-to-make-a-hit-song> (outlining the creation of a hit pop song and the producer's managing of the singers in the studio); Bill Stensrud, *Classical Music After the CD*, BUS. CLASSICAL MUSIC BLOG (Dec. 9, 2008, 2:19 PM), <http://businessofclassicalmusic.blogspot.com/2008/12/classical-music-after-cd.html> (describing existing classical music recordings as "homogenized perfection" while suggesting that major music labels will soon stop making new classical recordings).

222. Cf. *supra* notes 29–31 and accompanying text (demonstrating the means by which session musicians contribute to the creative content of recordings).

223. In England, a key case on a similar issue helped determine the authorship of the song "A Whiter Shade of Pale." In the case, an expert musicologist testified that the band, which created the song, worked with the songwriter in the group to arrange the particular recording so that each musician contributed substantial material, including hooks, countermelodies, and intros. *Fisher v. Brooker*, [2006] EWHC (Ch) 3239, [45] (Eng.). Even though they were members of a band, the same idea holds true for certain session musicians.

224. Cf. Zabrocki, *supra* note 13 ("Ninety-five percent of the time they require easy, if creative, guitar playing.").

225. See Bloch, *supra* note 23, at 188, 195 (arguing for the copyrightability and possible protection of drumbeats in light of digital sampling because drum beats can "influence countless musicians").

226. See 20 FEET FROM STARDOM, *supra* note 26 (indicating that certain prolific background singers were given "free reign" to contribute to the recording in whatever means necessary).

227. A session musician will get charts that map out the structure of the piece, and the length and depth of these charts can vary widely in the realm of country; thus, a session musician's independent contributions to a country song often vary. See A DAY IN THE LIFE OF A NASHVILLE SESSION MUSICIAN, *supra* note 27 (detailing a typical session for a country session musician). The same is true for background vocalists on

The other important consideration for control is the specific artistic control the lead musician or recording company has over the session musician. Musicians typically bring personal technique and style to their work, therefore making it difficult to determine to what extent a third party can control a musician's artistic output. Even where the lead musician gives direction and ideas about the sound and parts, each contributing musician's sound is unique.²²⁸ Many recording studios or lead musicians choose certain session musicians for their unique sound and timbre.²²⁹ Even though style contributions are not copyrightable,²³⁰ they are contributions nonetheless and are solely the creation of the musician. It may also take little direction at all for many skilled musicians to "get it right," and the absence of clear control in such situations could work in their favor because of the control factor in a work-for-hire analysis.²³¹

On the other hand, recording studios and featured artists often state that they have complete control over the end product and have the right to reject any parts that are not satisfactory.²³² However, this general control does not necessarily overlap with the specific control over the content. These arguments would be far more persuasive under the 1909 Act,²³³ but the 1976 Act requires more than just bare control.²³⁴

many of the most important rock recordings of the 1980s and 1990s. *See generally* 20 FEET FROM STARDOM, *supra* note 26.

228. Musicians are often treasured for their "own particular sound or their mastery of one particular skill or style." Big George Webley, *A Personal View of Session Programmers, Part I: Musicians*, SOUND ON SOUND (Oct. 1998), <https://www.soundonsound.com/sos/oct98/articles/sessionmusic.html>. Others have cautioned musicians from taking jobs that they are not a fit for because it might waste others' time and the musician's reputation. Gaetano, Comment to *Tips for Becoming a Recording Studio Session Musician*, MUSIC THINK TANK, (Oct. 18, 2012), <http://www.musicthinktank.com/blog/tips-for-become-a-recording-studio-session-musician.html>.

229. *See supra* notes 28–33 and accompanying text (detailing the work of various session musicians and their ability to contribute copyrightable content).

230. 17 U.S.C. § 106 (2012) (omitting style contributions from a list of copyrightable items).

231. *See* PIERCE, *supra* note 26, at xiv–xv (stating that producers will often not give session musicians a lot of direction during a recording session, particularly if a producer has worked with a musician before).

232. *See id.* at xv–xvi (noting that producers and the artist decide what instruments, musicians, studio, and engineers to use and many other various details of a session).

233. *See supra* notes 122–23 and accompanying text (detailing the strict "instance and expense" test used under the 1909 Act).

234. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989) (explaining that control is only one factor in the analysis).

In the end, the question is to what extent should the courts get involved in determining the hierarchy and control exhibited in a recording studio thirty-five years ago. Often there will be evidentiary issues with determining the record company's control because of the time gap between the recording's creation and termination as well as the lack of records supporting either side.²³⁵

b. The other Reid factors suggest session musicians are independent contractors rather than employees for hire.

All of the remaining *Reid* factors are relatively similar in application for most session musicians. The first factor is the skill required. This factor weighs in favor of all session musicians because they must be very skilled on their chosen instruments to remain competitive in the industry.²³⁶ The best session musicians are contacted often and are so popular that producers and artists will wait for them to become available before recording.²³⁷

The second factor is the source of the instrumentalities.²³⁸ Considering that session musicians are very skilled professionals and often have strong attachments to their instruments, they more than likely provide their own instruments. This is particularly true for vocalists. Using their own instruments weighs in session musicians' favor. However, the instrumentalities to create the recording, such as the studio and recording gear, will be provided by the producer or the record company.²³⁹ Both the recording company and the musician contribute vital portions of the instrumentality, so at the very least the factor weighs equally for both parties.

The duration of the relationship also likely weighs in the favor of the musicians.²⁴⁰ Musicians are typically only hired for one session or

235. See, e.g., *In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1098 (N.D. Cal. 2002) (noting that Napster argued that the "absence of any evidence of an employment relationship . . . precludes plaintiffs' claim of authorship" and that the plaintiffs admitted they could not produce "contracts with artists to demonstrate an employment relationship").

236. PIERCE, *supra* note 26, at xvi; *Life as a Studio Musician*, *supra* note 9 (stating that session musicians "have to be really fantastic on [their] chosen instrument").

237. PIERCE, *supra* note 26, at xv-xvi.

238. *Reid*, 490 U.S. at 751; see *Aymes v. Bonelli*, 980 F.2d 857, 864 (2d Cir. 1992) (weighing the instrumentality factor "negligibl[y]" because the computer programmer was required to use the hiring party's computers).

239. KRASILOVSKY & SHEMEL, *supra* note 218, at 186.

240. See *Reid*, 490 U.S. at 751 (listing the duration of the parties' relationship as a relevant factor).

on a per session basis.²⁴¹ There are strict union guidelines about the length of sessions and frequency of sessions.²⁴² Because the typical session is only composed of hired hands, these musicians essentially act as independent contractors for that session.²⁴³ The hiring party will probably not have the right to assign additional projects because of union agreements.²⁴⁴ Even though a session musician may be hired again, it is likely that this will be a part of a separate work and agreement; therefore, this factor also weighs in session musicians' favor.²⁴⁵ For non-union musicians, it is possible that they will be hired with less stringent guidelines. This could weigh against them depending on whether the agreement requires a certain number of sessions or restricts the time of the particular job.

The hiring party likely has discretion over when and how long the session musician will work,²⁴⁶ however, labor laws can play a large role in regulating the contracts. Due to the restrictive nature of recording contracts for union musicians,²⁴⁷ recording companies do not have full discretion over the time the musicians work. Though the recording company does determine when the recording will take place, this factor will likely balance due to contractual restrictions concerning the time a musician can spend on any particular recording.²⁴⁸

Sound recording is the recording studio's business, and hiring a musician is within a studio's normal course of business.²⁴⁹ This factor

241. See *supra* text accompanying note 35 (noting session musicians are paid by the job).

242. See *supra* text accompanying notes 36–41 (outlining union-specific requirements for recording contracts).

243. See *Aymes*, 980 F.2d at 864 (finding that even though *Aymes* worked for a long period for Island, he worked for others at the same time and this factor should not necessarily weigh heavily against him).

244. See *Reid*, 490 U.S. at 751 (indicating that a hiring party's "right to assign additional projects to the hired party" is a factor relevant to whether the hiring party has control over the hired party); *supra* note 57 and accompanying text (detailing the explicit union contracts that are necessary for each job if a session musician is part of a union).

245. See *Aymes*, 980 F.2d at 864 (finding that gaps in employment suggest that *Aymes* was not a full-time employee).

246. See *Reid*, 490 U.S. at 751 (including discretion over the duration of work as a relevant factor).

247. See *supra* notes 36–38 and accompanying text (outlining several union contract requirements).

248. See *Aymes*, 980 F.2d at 862, 864 (finding that Island had significant control of and gave significant input into the creation of the software and yet this was not entirely determinative of the outcome).

249. See *Reid*, 490 U.S. at 752 (listing "whether the work is part of the regular business of the hiring party" as a factor).

likely weighs against the musician. However, the recording company does not play or create music itself. Rather, it records music, so this factor depends on the narrowness of a court's interpretation of "regular business." The business of the recording company in general terms is to sell music and choose the songs to sell. Since hiring musicians is a part of this process, it is likely that this factor inevitably weighs against the session musicians.²⁵⁰

Session musicians are paid at a set rate determined by the union or purely by contractual agreements concerning the hours worked.²⁵¹ This lump sum payment likely weighs in the session musicians' favor.²⁵² Even though some session musicians do receive special payments for uses of their work outside of the original agreement,²⁵³ these payments depend on statutory requirements and should not weigh against the musicians. Payment for the recording is a one-time, non-royalty payment. This type of payment weighs in favor of the session musician.

The location of the work weighs against the session musicians.²⁵⁴ Although many hours of practice went into honing the musician's skills, the location of the work is technically a recording studio.²⁵⁵ Because the work will be produced at the studio, this factor depends on who owns that studio. Oftentimes, the record company will provide the featured artist with a budget, and the featured artist will choose where to record, such as in his or her own studio.²⁵⁶ The featured artist will usually have these costs later deducted from future profits. Thus, in a way, it is the featured artist, not the recording studio, who provides the location.²⁵⁷ Therefore, the location of the

250. *Id.*; see *Aymes*, 980 F.2d at 863 (finding the "regular business" factor weighed in favor of *Aymes* because his work was not a regular part of *Island's* business, and yet this factor was not weighed heavily and was considered "generally . . . of little use" in determining a claim of work for hire (internal quotation marks omitted)).

251. See *Reid*, 490 U.S. at 751 (stating "the extent of the hired party's discretion over when and how long to work" is a factor relevant to control); *supra* notes 37-41 and accompanying text (describing the contractual rate structure and comparing rates for lead and session musicians).

252. See *Aymes*, 980 F.2d at 863 (suggesting that payment of a salary wage tends to indicate the recipient is an employee).

253. See *supra* text accompanying notes 50-52 (detailing the small possibility that musicians can receive residual payments for work used in different mediums).

254. See *Reid*, 490 U.S. at 751 (including "the location of the work" as a factor).

255. See *Aymes*, 980 F.2d at 864 (finding that since *Aymes* had to complete his work at *Island's* office, that factor should not weigh heavily against him due to the necessity created by the hiring situation).

256. Frisch & Fortnow, *supra* note 124, at 220.

257. *Id.*

work may weigh in favor of the session musician because even though the session musician does not have freedom to choose the location, the record company does not always specifically provide the location either. However, if the recording company itself does not choose the location, it is likely that the company's agent will and that would work against the session musician for location purposes.

Session musicians are not typically allowed to hire other parties and so this factor will weigh against them. However, in *Aymes*, the court found this factor to be “virtually meaningless” when the other party did not require an assistant.²⁵⁸ Because the session musician is meant to play a supporting role to the featured artist, it does not make sense to hold this factor strongly against him. A session musician would probably not require an assistant even if he had that right.

Some courts have considered employee benefits and tax treatment to be two of the most important factors.²⁵⁹ These factors largely depend on the session musician's membership in a union. According to union contracts, session musicians receive a partial pension and must file W-4s for employee tax purposes.²⁶⁰ It would seem against good judgment to have a union contract weigh against the musicians in this circumstance, and yet it may be the case. Though the benefits provided under the union contracts may create a serious concern for session musicians, this factor can likely still be weighed in the session musician's favor when determining if the session musician is an employee for hire. These benefits are still minimal by comparison to the benefits received by the recording company's regular employees.²⁶¹ The main concern for the court in *Aymes* was that an employer should not be able to rely on the benefits of having a contractor over an employee without also obtaining the burdens that it imposes.²⁶² Therefore, even the union contracts likely will not cause substantial harm to a session musician's claim.

Outside of the unions, session musicians are not typically given employee benefits because they are paid solely for that recording; they are therefore less likely to have filed W-4s as in a typical

258. *Aymes*, 980 F.2d at 864.

259. *E.g., id.* at 862. *But see* *JustMed, Inc. v. Byce*, 600 F.3d 1118, 1128 (9th Cir. 2010) (urging against “relying . . . too heavily” on the employee benefits and tax treatment factors “because they do not bear directly on the substance of the employment relationship—the right to control”).

260. *See* AM. FED'N MUSICIANS SOUND RECORDING, *supra* note 36, at 1 (detailing the benefits bestowed by these union contracts).

261. *Frisch & Fortnow*, *supra* note 124, at 219.

262. *Aymes*, 980 F.2d at 862.

employment relationship.²⁶³ The musician is merely a contracted party for a particular recording. Therefore, this factor will more easily weigh in favor of a non-unionized session musician. Though this seems contrary to sound policy, the union-contracted workers likely receive greater security in their employment because of the fixed rates in the contracts.²⁶⁴ Both union and non-union musicians have a case on this point, but their respective arguments are slightly different. Any session musician who attempts to make an argument that he is not a worker for hire must consider these different arguments.

Most of the factors weigh against finding that session musicians are employees and in favor of finding them as independent contractors. The *Aymes* court relied heavily on the employee benefits and tax treatment as an indication of employment.²⁶⁵ Even though these factors are complicated by the union involvement, they will likely weigh in favor of most non-union musicians and many union ones as well. The employment relationship is restrained by union documents in order to keep the relationship fair so that whatever union musicians may lose in terms of the tax and benefit factors, they likely gain in other factors such as the location, time, and payment of the work. Therefore in either case, it is likely that many session musicians will not be deemed workers for hire. As the Supreme Court stated in *Reid*, “Congress meant to refer to a hired party in a conventional employment relationship,”²⁶⁶ which is generally not the case with session musicians.

B. Joint Authorship Does Not Qualify Many Session Musicians for Authorship, but It Can Likely Provide Some Coverage and Should Provide More

Session musicians will likely fare differently under the various tests that have been judicially created for joint authorship. This section outlines the various joint authorship approaches from different circuits as they apply to session musicians. After comparing the tests

263. *Cf. id.* (compiling cases that found “architects, photographers, graphic artists, [and] drafters . . . to be highly-skilled independent contractors,” workers who are generally not offered normal benefits).

264. *See generally* AM. FED’N MUSICIANS SOUND RECORDING, *supra* note 36 (providing pay rates by type of musician and type of session).

265. *Aymes*, 980 F.2d at 862.

266. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989); PATRY, *supra* note 178, § 5:68 (“Doubts should be resolved in favor of the hired party because work-made-for-hire status represents a significant exception to the general statutory rule of individual authorship.”).

and how they apply to session musicians, it argues that the Nimmer test, which the Seventh Circuit recently employed in *Gaiman v. McFarlane*, best supports the plain language of the statutory joint authorship definition.

The “joint work” definition requires that a work be “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”²⁶⁷ The *Childress* test is the most widely accepted, and the Ninth Circuit’s subsequent interpretation of the necessary intent to become a joint author is particularly difficult for many session musicians to overcome.

Under the *Childress* test, the analysis will be slightly more challenging but feasible for some of the most engaged session musicians. The *Childress* test requires (1) that each author manifested intent to share authorship with the other and (2) that both authors contributed copyrightable content.²⁶⁸ This test is far more demanding for a potential joint author than Nimmer’s test.²⁶⁹ The intent prong is particularly difficult to reconcile with the nature of the session musician’s relationship with a lead artist or a record company.²⁷⁰ Record companies generally draft contracts to assign rights away from session musicians. Therefore, a session musician will have difficulty proving both parties’ subjective or objective intent to be joint authors.²⁷¹ If there is a special situation where the session musician will receive credit for his work on the record or if he will be named specifically, it is possible that he will be able to prove this intent. However, for the many session musicians with a lesser role in the recording, such intent will be difficult to prove.

The Ninth Circuit makes it particularly difficult for smaller contributors to establish the requisite intent for joint authorship. The factors laid out in *Aalmuhammed* show the Ninth Circuit’s rather strict approach to intent. The Ninth Circuit requires the following

267. 17 U.S.C. § 101 (2012).

268. *Childress v. Taylor*, 945 F.2d 500, 508–09 (2d. Cir. 1991).

269. See *infra* text accompanying notes 286–89 (suggesting session musicians are more likely to be able to prove joint authorship under the Nimmer test than under other formulae).

270. See *supra* Part I.A.1 (summarizing how a record company or lead artist contracts with a session musician).

271. See, e.g., *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409, 411, 418 (S.D.N.Y. 2004) (finding that a guest in the studio who contributed a vocal harmony to a Jay Z song could not claim joint authorship because she offered no evidence that Jay Z intended to share authorship with her).

criteria to show intent in the absence of a contract: (1) the author must exercise control over the work; (2) the putative authors must show objective intent to be joint authors; and (3) the appeal to the audience must turn on both of the putative authors' contributions such that their individual contributions to the success of the work cannot be distinguished from one another.²⁷² The session musician may not have creative control over an entire work but may have such control over a particular portion of the work to which he adds significant improvisation.²⁷³ Concerning the second element, session musicians will likely have difficulty providing evidence that they and a lead artist or recording studio mutually intended to be joint authors given the provisions of typical music recording contracts. Though these contracts' copyright clauses should not always be valid in work-for-hire contexts,²⁷⁴ they will likely prove a lack of objective intent.²⁷⁵ The third criterion will weigh in favor of a session musician, especially if his contributions are particularly important to a song's overall creative impression, such as one of Clyde Stubblefield's drum beats that has been profusely sampled or a small snippet of the heart of a popular song that is intended to allude to the past.²⁷⁶ This element will rely heavily on the amount of the contribution and also the appeal of that part.²⁷⁷ Such appeal could be demonstrated by how often the particular part is sampled—a potentially difficult factual and quantitative inquiry. However, some guitar riffs or vocal lines in particular are well known and play a major role in a piece. Such contributions might reach the requisite appeal for the third element.²⁷⁸

The second prong of the *Childress* test requires copyrightability of each contribution, and some session musicians may satisfy this prong, though that will not necessarily qualify them as joint authors. The minimum requirement for copyrightability is an "original work[]" of

272. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000).

273. See *supra* notes 27–29 and accompanying text (suggesting that session musicians' improvisational playing contributes creative value to music).

274. See *supra* note 11 and accompanying text.

275. See PATRY, *supra* note 178, § 5:26 (indicating that the absence of an explicit reference to intent must be weighed against other components of the contract to determine whether the parties had intent).

276. See COPYRIGHT CRIMINALS, *supra* note 59 (providing examples of uses for digital samples).

277. *Aalmuhammed*, 202 F.3d at 1234.

278. Cf. Pauline France, *Top 10 Instantly Recognizable Guitar Riffs*, FENDER (Feb. 12, 2013, 12:51 PM), <http://www.fender.com/news/top-10-instantly-recognizable-guitar-riffs> (listing top guitar riffs that are not necessarily by session musicians but that demonstrate the notability of instrumental breaks).

authorship fixed in any tangible medium of expression.”²⁷⁹ The Supreme Court has determined that originality is a very low bar.²⁸⁰ Typically, a session musician who contributes a longer portion of a piece that could possibly stand on its own as a copyrighted work will satisfy this requirement. Though courts are wary of copyrighting very small musical motifs,²⁸¹ anything beyond a de minimis contribution can probably at least reach the level of copyrightable content.²⁸²

Patry and several courts have argued that *Childress* “did not endorse the ‘independently copyrightable’ language.”²⁸³ Specifically, Patry argues that a mere contribution of copyrightable content, whether or not it can stand on its own, is all that is required.²⁸⁴ This sets a slightly lower bar for joint authorship that is more likely to support a greater number of session musicians. Because their contributions are of musical material that is the type of work copyright law protects, session musicians likely satisfy this element. However, Patry does support considering the joint authors’ intent. His view of intent is less encompassing than the *Aalmuhammed* court’s and therefore likely more in line with the statute.²⁸⁵ Musicians probably have a higher likelihood of contributing copyrightable material than an actor in a play or editor of a novel.

Session musicians will more likely qualify as joint authors under the Nimmer test because it does not require separate copyrightability. This test requires (1) more than a de minimis contribution (2) of

279. 17 U.S.C. § 102(a) (2012).

280. See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”).

281. E.g., *Newton v. Diamond*, 388 F.3d 1189, 1196 (9th Cir. 2004) (finding that a three-note opening line was not sufficient to sustain an infringement claim).

282. Copyrightability is a very low bar and only requires a very small amount of creativity. See *supra* note 280.

283. PATRY, *supra* note 178, § 5:16.

284. *Id.* § 5:21; see *Swirsky v. Carey*, 376 F.3d 841, 851 (9th Cir. 2004) (“Although it is true that a single musical note would be too small a unit to attract copyright protection (one would not want to give the first author a monopoly over the note of B-flat for example), an arrangement of a limited number of notes can garner copyright protection.”); cf. *Ulloa v. Universal Music & Video Distrib. Corp.*, 303 F. Supp. 2d 409, 411, 413 (S.D.N.Y. 2004) (stating that “this Court declines to find that a countermelody is unoriginal as a matter of law” but rejecting a request for partial summary judgment concerning the originality of that countermelody because disputed issues of fact existed).

285. PATRY, *supra* note 178, § 5:20 (stating that joint authors must have “intended that their contributions be merged into a joint work”).

authorship (3) that does not need to be separately copyrightable.²⁸⁶ The de minimis contribution will be easily met in most cases of musical contribution because a solo, riff, or established harmony is likely to qualify as more than de minimis.²⁸⁷ The authorship requirement is also met easily because it merely requires creative contribution beyond a minimal level.²⁸⁸ The session musician should also qualify under the third prong because the contribution need not even be separately copyrightable.²⁸⁹ Even artists who contribute smaller amounts or elements like style or timbre—which are not copyrightable on their own—may be able to qualify under this prong of the test. Because the contribution need not be separately copyrightable, potentially very little would be necessary to become a joint author.

The Nimmer test is far more akin to the actual language of the Copyright Act. The statutory definition of 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.”²⁹⁰ The plain language of the statute does not indicate that it either requires both authors to intend to be joint authors or for both to contribute copyrightable content.

The intent factors extrapolated by the Ninth Circuit are equally difficult to reconcile with the plain language of the statute.²⁹¹ The court seemed more concerned with industry ramifications than with interpreting the plain language of the statute.²⁹² There is no reason to expand the statute’s meaning in such a way without the consent of Congress. That said, most of the circuits have been very keen on accepting the *Childress* test as the judicial interpretation of the statute. Though *Gaiman* may demonstrate a shift in the circuits toward the

286. NIMMER & NIMMER, *supra* note 85, § 6.07[A].

287. Especially in the realm of sound recordings, de minimis use is far simpler to prove. See *supra* note 64 and accompanying text. For example, a specific musician’s input will be determined by his part on the recording though the extent of his control over that part might be an issue.

288. See NIMMER & NIMMER, *supra* note 85, § 6.07[A][2] (finding that there must be a creative contribution rather than just “physical labor” to qualify as an author of a work).

289. *Id.* § 6.07[A][3][a].

290. 17 U.S.C. § 101 (2012).

291. The Ninth Circuit may be rethinking its joint authorship standard and, in particular, its holding in *Aalmuhammed* based on several judges’ comments during the *Garcia* oral arguments. See *Garcia Oral Arguments*, *supra* note 202.

292. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 2000) (stating that the enumerated “factors . . . cannot be reduced to a rigid formula, because the creative relationships to which they apply vary too much”).

adoption of the Nimmer test,²⁹³ as the general body of law stands now, it is difficult for many session musicians to qualify as joint authors.

The intent prong that has been read into the statute merely perpetuates social norms at the expense of real contributors to a work. Under the current model, any contributor that is not clearly in the eyes of the industry worthy of joint authorship cannot claim such intent. This creates an uphill battle for an already underprivileged group or person. A much better interpretation of the statute merely requires intent to contribute to a unitary whole.²⁹⁴ This Comment argues that the current interpretation of the statute has veered away from the proper statutory interpretation and should be modified to allow those without intent to be “joint authors” to still be able to claim joint authorship as long as they intended their work to be merged as part of a “unitary whole.”

Session musicians would benefit most from the Nimmer test for joint authorship regarding copyrightability and prior case law regarding intent. *Gaiman* in particular has made this interpretation more possible.²⁹⁵ Though the *Childress* test remains the most prominent interpretation, the Ninth Circuit adopted *Childress* but also created a wider scope for the intent prong of joint authorship in *Aalmuhammed*.²⁹⁶ The required intent does not need to be this strict, as demonstrated by the statutory language and court interpretations. More courts should support a lesser intent requirement by following earlier case law so that artists that make substantial but limited contributions to a work, like session musicians, would be more likely to claim joint authorship in their recordings.

C. Individual Copyrightable Content as a Broader Means of Termination

In the case of session musicians who may not meet the strict requirements for joint authorship, particularly under *Childress*, the Second Circuit’s decision in *Thomson v. Larson* left open a possible

293. See *supra* notes 172–77 (summarizing the Seventh Circuit’s finding of joint ownership where a plaintiff’s contribution was not separately copyrightable).

294. See *Weissmann v. Freeman*, 868 F.2d 1313, 1319 (2d Cir. 1989) (stating a “finding of joint authorship requires that each author intend his or her contribution, at the time that it is created, to become part of a unitary work to which another will make or already has made a contribution”).

295. See *Gaiman v. McFarlane*, 360 F.3d 644, 658–59 (7th Cir. 2004) (recognizing that joint authorship based on more than a de minimis contribution in copyrightable “joint labors” requires “originality and creativity”).

296. See *Aalmuhammed*, 202 F.3d at 1234 (describing the three-prong test for intent).

means of claiming authorship.²⁹⁷ The Ninth Circuit then solidified this approach in *Garcia v. Google, Inc.*; however, the Ninth Circuit has now agreed to rehear the case en banc.²⁹⁸ The Second and Ninth Circuits, in prior holdings, found that if a musician has a particular contribution that is above the *de minimis* requirements for copyrightability, he may possibly terminate that portion of the piece.²⁹⁹ This section applies *Thomson* and the *Garcia* holding, prior to its rehearing en banc, to session musicians and concludes that a session musician likely has a strong claim of independent authorship in any contribution surpassing a minimal threshold. This section will also discuss possible outcomes of the Ninth Circuit's en banc decision in *Garcia* and their implications for session musicians.

If we assume that the Ninth Circuit upholds *Garcia*, *Thomson* raised, and *Garcia* confirmed, the possibility that an artist may claim copyright in his or her work outside of full ownership or joint authorship.³⁰⁰ This concept that authorship can occur in a part of a whole work is relatively new and could have vast repercussions for copyright law.³⁰¹ The now overturned *Garcia* holding specifically established an actress's right to claim copyright in her individual performance in a film and demonstrated that it is entirely possible for a court to rule that a particular part within a creative work like a film

297. See *Thomson v. Larson*, 147 F.3d 195, 206 (2d Cir. 1998) (indicating that since the Second Circuit has not had an opportunity to determine “whether a person who makes a non-*de minimis* copyrightable contribution but cannot meet the mutual intent requirement . . . retains . . . rights” in the absence of a work-for-hire agreement).

298. *Garcia v. Google, Inc.*, 743 F.3d 1258, 1263 (9th Cir.) (stating that joint authorship is not the only means of proving authorship in a film), *amended by* 766 F.3d 929 (9th Cir.), *reh'g en banc granted*, 771 F.3d 647 (9th Cir. 2014).

299. Cf. Bloch, *supra* note 23, at 202–03 (arguing that drum beats should be copyrightable and that a piece of music can hold multiple copyrights, but finding this will not affect past works since drummers are likely works for hire).

300. *Garcia*, 743 F.3d at 1263–64 (allowing an actress to assert copyright in her own performance in a film because “nothing in the Copyright Act suggests that a copyright interest in a creative contribution to a work simply disappears because the contributor does not qualify as a joint author of the entire work”); *Thomson*, 147 F.3d at 206 (finding the court had no occasion to decide whether a contributor had any rights or interests short of co-authorship in the full work).

301. See Corynne McSherry, *Bad Facts, Really Bad Law: Court Orders Google to Censor Controversial Video Based on Spurious Copyright Claim*, ELECTRONIC FRONTIER FOUND. (Feb. 26, 2014), <https://www.eff.org/deeplinks/2014/02/bad-facts-really-bad-law-court-orders-google-censor-controversial-video-based> (forecasting the possible legal repercussions of *Garcia*, especially for the entertainment business and the Internet).

or sound recording can claim copyright.³⁰² As the dissent in *Garcia* pointed out, there was an issue with the plaintiff's case because she did not actually claim a work separate from the film: she claimed that her performance in the film itself was copyrightable.³⁰³ However, a particular musical performance could be copyrightable in a sound recording, and therefore a session musician's claim may be even stronger than Garcia's claim. The Ninth Circuit also found that *Aalmuhammed* did not dictate its decision. *Aalmuhammed* centered on the requirements for joint ownership in an entire work but also "plainly contemplate[d]" this level of authorship over a portion of a film, or for this Comment's purposes, a sound recording.³⁰⁴ Even if the district court were to find on remand that this particular case, with its extreme facts, did not demonstrate an independently copyrightable contribution,³⁰⁵ that would not necessarily bar a session musician's claim, which would likely be stronger in many respects than Garcia's.

A sound recording is a fixation of a particular performance. Each part of the performance would qualify as copyrightable content if recorded separately because it would qualify as an "original work[]" of authorship fixed in any tangible medium of expression."³⁰⁶ Take a recorded guitar riff for example. If longer than a few bars or notes, it would likely qualify for at least thin copyright protection.³⁰⁷ The work is both original and a work of the type copyright protects because it is a sound recording.³⁰⁸ The work would be "fixed" within the recording.³⁰⁹ If the Ninth Circuit upholds the finding in *Garcia*, such a claim is far more likely to prevail.

302. *Garcia*, 743 F.3d at 1264. *But see* McSherry, *supra* note 301 (stating that the facts in *Garcia* did not warrant such an authorship claim but admitting there might be other instances that would).

303. *See Garcia*, 743 F.3d at 1270 (Smith, J., dissenting) ("While Congress distinguishes the performance from the work itself, the majority blurs this line.").

304. *Id.* at 1263–64 (majority opinion) (reasoning that "*Aalmuhammed* only discusses what is required for a contributor to a work to assert joint ownership over the *entire* work").

305. *See Garcia v. Google, Inc.*, 766 F.3d 929, 935 (9th Cir.) ("Nothing we say today precludes the district court from concluding that Garcia doesn't have a copyrightable interest, or that Google prevails on any of its defenses."), *reh'g en banc granted*, 771 F.3d 647 (9th Cir. 2014).

306. 17 U.S.C. § 102(a) (2012).

307. *See supra* note 284 and accompanying text (detailing the possibilities of copyright protection in small portions of a musical work).

308. 17 U.S.C. §§ 101–02.

309. *Id.* § 102(a).

If the Ninth Circuit reverses the particular finding in *Garcia* but upholds the concept of independent copyrightable content, then session musicians likely still have a claim. Session musicians have a much stronger claim than *Garcia* because their contributions likely rise to the level of independent copyright, especially for those with substantial contributions to recordings.³¹⁰ *Garcia*, by contrast, was an actress working off a script, so even if she made artistic style choices, those aspects of her performance are not subject to copyright.³¹¹

If the Ninth Circuit's en banc decision completely rejects the notion of independent copyrightable content, it would be very difficult for session musicians to make these claims in the Ninth Circuit unless the Supreme Court were to get involved. Though the idea was first suggested in the Second Circuit, no other courts have considered this concept, and so it would be severely weakened as an avenue for session musicians.

Though this Comment argues that a session musician who contributes a larger part to a work should be able to claim copyright in the particular part to which he has contributed, this argument may be severely weakened by the Ninth Circuit's rehearing en banc decision in *Garcia*. Assuming the Ninth Circuit completely rejects this argument, session musicians would have to rely more heavily on joint authorship claims. As discussed above, these claims are difficult using the current case law, but small changes in interpretation to better align with the plain wording of the Copyright Act could provide session musicians with much better claims. Therefore, even without *Garcia*, there are other ways to better serve session musicians within the framework of the Copyright Act.

III. RECOMMENDATIONS

Session musicians who make less than a de minimis contribution to a work should be able to earn more for works that remain popular or are sampled years later.³¹² As mentioned above, there is still a right in

310. See *supra* text accompanying notes 61–63 (discussing small musical contributions as rising to the level of copyrightable content in infringement suits).

311. See 17 U.S.C. § 102(b) (stating copyright does not “extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery”).

312. See Gabriel Jacob Fleet, Note, *What's in a Song? Copyright's Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235, 1236–40 (2008) (summarizing the joint authorship issues session musicians face today, conceding that many session musicians will not establish joint authorship in their contributions, and recommending a revised copyright statute that does not differentiate between types of contributions such as melody, lyrics, a guitar riff, and rhythmic foundation).

digital sound recordings that will compensate session musicians at a small rate when their work is used on platforms such as Pandora.³¹³ There should be a means for session musicians to retain certain royalties in the future licensing and sale of their work beyond what little the unions have been able to negotiate since 1995.³¹⁴

The United States could emulate England and that country's recent changes to its copyright terms. In England, sound recording rights have been extended from fifty to seventy years after the owner's death.³¹⁵ However, as a means of compensating the other artists on the recording, a separate provision pays session musicians twenty percent of sales from publication of recordings in which they participate.³¹⁶ England has therefore acknowledged the importance of session musicians and their contributions.

It is time for the United States to acknowledge that session musicians deserve more monetary compensation and credit for their immense creative contributions.³¹⁷ These musicians have significantly impacted the music industry and they deserve to be recognized and compensated, especially when other artists digitally sample their works. The above considerations could present a way for these musicians to be compensated better for their work on profitable recordings beyond termination.

CONCLUSION

There are multiple ways to compensate and provide attribution to session musicians for their performances on sound recordings. Most session musicians are not employees for hire and sign contracts that only temporarily assigned away their rights. Therefore, many session musicians who contribute more than a de minimis amount to a recording likely qualify for termination rights. Lesser contributors

313. See *About Digital Royalties*, *supra* note 48 (defining digital royalties and explaining how and to whom they are distributed).

314. See *supra* note 57 and accompanying text (providing some of the elements of the current American Federation of Musicians recording agreement).

315. Press Release, Gov't of the U.K., Musicians Benefit from Extended Copyright Term for Sound Recording (Nov. 1, 2013), available at <https://www.gov.uk/government/news/musicians-benefit-from-extended-copyright-term-for-sound-recordings>.

316. *Id.*

317. But see David M. Liston, Note, *Songwriter, Side Musician, or Sucker?: The Challenge of Distinguishing Composers from Contributors Under U.S. Copyright Law and the Lessons from a Famous British Case*, 65 RUTGERS L. REV. 891, 917–21 (2013) (arguing that the United States should not follow the British precedent in recognizing session musician contributions and that the joint authorship test should be even more restrictive).

who cannot rely on joint authorship might be able to terminate the particular copyright in the specific portion that they contributed. And even the Ninth Circuit rejects the concept of independent copyrightable content in *Garcia* on rehearing en banc, courts should interpret joint authorship claims more in line with the plain language of the Copyright Act to allow session musicians to make viable authorship claims and to exercise termination.

Those session musicians who may contribute even less and cannot make any authorship claims should still be compensated for what they have contributed. The ramifications of these changes, or termination rights, might be difficult for the music industry. However, there should be a way for musicians to reap the rewards of their creative labor. After thirty-five years, termination is less of a burden on the industry and would create greater equality for session musicians who were left out of the financial and overall control of these famous recordings.

Many session musicians could qualify for termination; however it is likely that musicians either will not terminate, or if they do bring a claim, will have companies buy them out or renegotiate their contract terms. Congress established termination rights to help the original owners of a copyrighted work gain power in future bargaining and get a second bite at the apple. Considering the amount of time that has passed and the fact that musicians did not know about the power of sampling at the time many of these recordings were created, termination would be an equitable way for them to gain back rights that they lost. Many of these artists have been silently contributing to some of the most loved hits of the last several decades,³¹⁸ and they deserve to be properly recognized and compensated for their contributions.

318. See Andrews, *supra* note 6 (providing examples of session musicians' well-known contributions).