NOTES

DARKNESS ON THE EDGE OF TOWN: HOW ENTITLEMENTS THEORY CAN SHINE A LIGHT ON TERMINATION OF TRANSFERS IN SOUND RECORDINGS*

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I. INTRODUCTION: NIGHTFALL

> I'll be there on time and I'll pay the cost
> For wanting things that can only be found
> In the darkness on the edge of town.[1]

The darkness draws ever closer.

When Congress overhauled the Copyright Act in 1976,[2] it created the device of termination of transfers[3] to protect authors of copyrighted works from "unremunerative transfers."[4] On its face, the scheme is straightforward: a certain number of years after an author transfers her rights in a work, she may terminate the transfer and recapture those rights, and no agreement to the contrary can divest her of the power to do so.[5] But to paraphrase the proverb: Congress plans, and God laughs. Complications were bound to arise, and few have provoked as much confusion as terminations of transfers in sound recordings.

In 1976, any questions about sound recordings' terminability were little more than shadows of uncertainty not worth dealing with at the time.[6] Indeed, in the years since, technological advances have created a recording industry unimaginable to the drafters of the 1976 Act.[7] But while the industry has changed, the termination-of-transfers doctrine has not, and the shadows of uncertainty in the law have become a creeping darkness, growing larger as musical artists' termination dates near.

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[1] BRUCE SPRINGSTEEN, *Darkness on the Edge of Town*, *on* DARKNESS ON THE EDGE OF TOWN (Columbia Records 1978).

[2] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101 to 801 (2006)).

[3] 17 U.S.C. §§ 203, 304(c).

[4] H.R. REP. NO. 94-1476, at 124 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5740.

[5] 17 U.S.C. §§ 203(a), 304(c) (2006).

[6] *See* David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y U.S.A. 387, 412 (2001) ("In effect, Congress enacted a scheme in 1976 whose effective date lay so far in the future that no one needed to work out the practical implications.").

[7] *See* Jeff Carter, Comment, *Strictly Business: A Historical Narrative and Commentary on Rock and Roll Business Practices*, 78 TENN. L. REV. 213, 255 (2010) (noting that "[t]he digital revolution has played an undeniable role in changing the recording industry").

And now the darkness is here.[8] Very soon, artists will attempt to terminate their transfers to record labels, and the labels, unwilling just to hand over valuable property,[9] are prepared to argue that artists' sound recordings are works made for hire[10] not subject to termination.[11] Whether or not sound recordings qualify as works made for hire is a matter of considerable uncertainty, complicated by congressional indecision.[12] No court has yet resolved the question,[13] nor is it clear under the Copyright Act, but on such a resolution is what the status of most sound-recording terminations will turn.[14] Unless Congress steps in, the task will inevitably fall upon the courts.[15]

Some commentators addressing the question have responded to the advancing darkness with a throwing up of hands, concluding that the issue is too muddled to be resolved without congressional action.[16] In the absence of such action, it seems, the darkness will remain.[17]

This Note seeks to shine some light on the darkness. To be sure, significant complications may arise in applying the

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[8] *See* Larry Rohter, *Record Industry Braces for Artists' Battles over Song Rights*, N.Y. TIMES, Aug. 16, 2011, at C1 (reporting on anticipated disputes over sound-recording terminations).

[9] *See id.* at C5 (noting that the four major record companies "will not relinquish recordings they consider their property without a fight"). Albums that may be subject to termination in 2013 include best-selling works like Bruce Springsteen's *Darkness on the Edge of Town*, Billy Joel's *52nd Street*, and Van Halen's *Van Halen*. *Id.*

[10] *Id.*; *see also* 17 U.S.C. § 101 (defining "work made for hire").

[11] 17 U.S.C. § 203(a). This language is a bit imprecise, as of course the work itself is not what is terminated, but the grant of any rights in that work. But it is a convenient imprecision, and one on which other commentators have relied. *See, e.g.*, Nimmer & Menell, *supra* note 6, at 412 (acknowledging questions over "who can terminate their contributions to sound recordings").

[12] *See infra* notes 122–34 and accompanying text.

[13] Nimmer & Menell, *supra* note 6, at 397.

[14] *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) (noting that "[c]lassifying a work as 'made for hire' determines . . . the owners' . . . termination rights").

[15] Brian Day, *In Defense of Copyright: Record Labels, Creativity, and the Future of Music*, 21 SETON HALL J. SPORTS & ENT. L. 61, 71 (2011).

[16] *See, e.g.*, Nimmer & Menell, *supra* note 6, at 387 ("After analyzing the issue in depth, the conclusion reached below is a resounding *maybe*.").

[17] *See* Stephen W. Tropp, *It Had To Be Murder or Will Be Soon – 17 U.S.C. § 203 Termination of Transfers: A Call for Legislative Reform*, 51 J. COPYRIGHT SOC'Y U.S.A. 797, 799 (2004) (asserting "the need for some [c]ongressional action").

termination-of-transfers doctrine to sound recordings, and it may well be that the ideal solution is legislative.[18] But the interests of artists and labels depend on those complications being resolved[19] regardless of whether Congress saves the day with at-the-buzzer legislation. Uncertainty is no reason to abdicate guidance to legislative heroism; indeed, a primary responsibility of courts is to answer questions when Congress has failed to do so.[20]

This Note argues that substantial guidance can be found in entitlements theory.[21] Congress created the doctrine of termination of transfers with an eye toward bargaining between authors and assignees,[22] the goal being to give authors a chance to renegotiate the transfer once the value of their work is established.[23] It is therefore productive to view termination of sound recordings as altering artists' and labels' bargaining positions in ways that implicate economic efficiency and the normative goals of copyright. This Note argues that by analyzing the impact potential outcomes will have on bargaining, reaching a conclusion as to what the outcome should be is possible.[24] It thus proposes a framework of use to both courts and legislators faced

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[18] *Cf.* Daniel Gould, *Time's Up: Copyright Termination, Work-for-Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91, 137 (2007) (acknowledging that work-made-for-hire doctrine is not easily applicable to sound recordings and arguing that the ideal outcome is statutory revision or reinterpretation).

[19] *See generally* Randy S. Frisch & Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 COLUM.-VLA J.L. & ARTS 211 (1993) (observing problems record labels face if artists exercise termination rights).

[20] *See* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 918 (2003) (noting most cases arise "where lawmakers have been unable to produce rules that lead to determinate answers").

[21] *See generally, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[22] *See* H.R. REP. NO. 94-1476, at 124 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5740 ("A provision of this sort is needed because of the unequal bargaining position of authors . . . .").

[23] *See* Stewart v. Abend, 495 U.S 207, 229 (1990) ("When an author produces a work which later commands a higher price in the market than the original bargain provided, the copyright statute is designed to provide the author the power to negotiate for the realized value of the work.").

[24] *See* discussion *infra* Part III.B.

with the question whether musical artists may terminate their transfers.

First, this Note sets forth the theoretical foundations of copyright, Coasean bargaining, and Calabresi and Melamed's property-rule/liability-rule dichotomy. It also reviews termination of transfers, the work-made-for-hire doctrine, and recording industry business practices. This Note then surveys the arguments over whether sound recordings are subject to termination and analyzes the answers based on their impact on bargaining. This Note argues that in the majority of cases, courts and legislators should err toward finding that sound recordings are not works made for hire and are therefore subject to termination. It further argues that in close cases, uncertainty over whether a work is terminable may be more desirable than perfect clarity. Finally, this Note considers the complication of joint authorship in sound recordings and offers a few tentative suggestions.

II. BACKGROUND: SURVEYING THE SHADOWS

A. COPYRIGHT

The Constitution empowers Congress to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[25] From this language, the Copyright Act derives.[26] In the United States, the rationale for copyright protection is primarily economic;[27] copyright is not principally designed to reward authors for their labor,[28] but rather to "advance public welfare"[29] by encouraging production of new

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[25] U.S. CONST. art. I, § 8, cl. 8.

[26] Eldred v. Ashcroft, 537 U.S. 186, 192–93 (2003).

[27] *See id.* at 254 (Breyer, J., dissenting) (noting "copyright's traditional economic rationale"); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 291 (1970) (rejecting moral arguments and concluding copyright can be justified only on economic grounds).

[28] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991).

[29] Mazer v. Stein, 347 U.S. 201, 219 (1954).

works.[30] Because creative works are nonrival, nonexcludable,[31] and cheap to copy, they can be reproduced widely without generating revenue equal to demand or sufficient to encourage creation.[32] Copyright seeks to protect the incentive to create and disseminate[33] so that the public can access and build upon an author's ideas.[34] Copyright protection thus balances public access and private incentives,[35] but its intended benefit has historically been public in nature.[36]

B. BARGAINING AND ENTITLEMENTS

1. Frictionless Bargaining and the Coase Theorem. From an economic perspective, the basic goal of any bargain is efficiency—that is, to effect an exchange where the benefits outweigh the costs.[37] In such an exchange, the entitlement is transferred to the party who values it most, with the selling party receiving payment at least minimally above her own valuation.[38]

Coase theorized that in the absence of transaction costs[39] or externalities, an entitlement will end up with its highest-valuing user no matter where the law initially vests ownership.[40] Imagine, as Coase does, a farmer and a cattleman operating on adjacent

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[30] Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30, 36 (1939).

[31] That is, they possess the qualities of public goods. Robert P. Merges, Comment, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2661 (1994).

[32] *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) (concluding that "the creator's total revenues may not be sufficient to cover the cost of creating the work").

[33] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

[34] *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (noting that "private motivation must ultimately serve the cause of promoting broad public availability" of creative works).

[35] Landes & Posner, *supra* note 32, at 326.

[36] Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1108 (1990).

[37] Calabresi & Melamed, *supra* note 21, at 1093–94.

[38] *Id.* (describing Pareto optimality).

[39] Understood broadly, a transaction cost is any cost that could impede negotiations, including, for example, freeloader and holdout problems, strategic bargaining, and imperfect knowledge. *Id.* at 1094–95.

[40] *Id.* at 1094 n.12.

tracts of land.[41] The cattleman desires to add to his herd, but straying cattle will damage the farmer's crops; the farmer wishes to enjoin the cattleman from adding to his herd, but that will reduce the cattleman's output.[42] Legally, either the farmer will have the right to enjoin the cattleman or the cattleman will have the right to trample the farmer's crops; and either way, one party will suffer to the benefit of the other.[43] The problem, then, is not one of wrongdoers and victims but of competing uses, and the optimal solution is that which allows the highest-value use to continue.[44]

Coase's insight was that if exchanges are "frictionless" (i.e., without transaction costs),[45] parties will bargain until resources are allocated in a maximally efficient way regardless of who has the initial entitlement.[46] If the farmer has the entitlement, and if the harm to the cattleman caused by a smaller herd is greater than the harm to the farmer from trampled crops, the cattleman will pay for the right to trample; if the harm to the farmer is greater than the harm to the cattleman, no bargain will occur.[47] The converse is true if the cattleman has the entitlement, but the efficient outcome results either way.[48]

Of course, outside of economists' thought experiments, there are no frictionless transactions,[49] and transaction costs can prevent many desirable bargains.[50] Thus, in allocating entitlements, we

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[41] Coase, *supra* note 21, at 2.

[42] *Id.*

[43] *See id.* ("The nature of the choice is clear: meat or crops.").

[44] *See id.* ("The real question . . . is: should A be allowed to harm B, or should B be allowed to harm A? The problem is to avoid the more serious harm.").

[45] Calabresi & Melamed, *supra* note 21, at 1095.

[46] Coase, *supra* note 21, at 15.

[47] *Id.* at 6.

[48] *Id.* at 7. The Coase Theorem has nothing to say about the distribution of wealth between parties, which may change based on who has the entitlement and which can affect the optimal allocation. Calabresi & Melamed, *supra* note 21, at 1095–96.

[49] Calabresi & Melamed, *supra* note 21, at 1096.

[50] Coase, *supra* note 21, at 15.

should account for transaction costs.[51] To do so, we must make a trip to the Cathedral.[52]

2. Property Rules and Liability Rules: Who Is Protected and How? The system of property rules and liability rules set forth by Calabresi and Melamed provides a structure for allocating rights in the presence of transaction costs.[53] Under the Calabresi–Melamed model, liability for a certain course of action should fall on the party best able to analyze its costs and benefits—the cheapest cost avoider.[54] When we are unsure as to which party that is, liability should fall on the party who can most cheaply act in the market to correct errors in allocation.[55]

Once we determine who has the entitlement, we must decide how to protect it.[56] This can be done by either "property rules" (i.e., injunctions), which force a party who wishes to infringe on the entitlement holder's rights to pay the holder's preferred price ex ante, or by "liability rules" (i.e., damages), which allow a party to infringe so long as she pays a court-set price after the fact.[57]

Whether a property rule or liability rule is preferable depends on transaction costs.[58] Put simply, we should prefer property rules when transaction costs are low or when costs are high but substantially lower for one party than the other, because in these cases, it is more likely that market transactions will correct any errors in allocation.[59] Conversely, we should prefer liability rules when transaction costs are high because then it is unlikely that

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[51] *Id.* at 19 (noting the desirability for legal rules to reduce the need for transactions and attendant costs).

[52] *See generally* Calabresi & Melamed, *supra* note 21.

[53] Merges, *supra* note 31, at 2664.

[54] Calabresi & Melamed, *supra* note 21, at 1096–97. The decision of where to allocate entitlements also may be affected by society's distributive preferences. *Id.* at 1098.

[55] *Id.*

[56] *Id.* at 1092.

[57] *Id.* A third option is to grant an inalienable entitlement that the holder may not transfer. *Id.*

[58] Merges, *supra* note 31, at 2664.

[59] Calabresi & Melamed, *supra* note 21, at 1118–19.

the market will efficiently reveal the entitlement's value.[60] In such a case, judicial valuation is more efficient.[61]

3. Application to Copyright. Intellectual property shares a "close relationship" with real property,[62] and the question whether musical artists may terminate their grants of sound-recording copyrights is essentially a question of whom, as between the artist and the label, the law should vest with an entitlement to the future interest in the copyright. In a frictionless market, the answer to that question would not matter, but the copyright market is "hardly frictionless."[63] Accordingly, the identity of the initial entitlement holder may affect and be affected by concerns of efficiency, dissemination, and distribution of wealth.[64]

C. TERMINATION OF TRANSFERS

1. The 1909 Act. Under the first American Copyright Act,[65] passed in 1790,[66] copyright vested for fourteen years, with a subsequent renewal term of another fourteen years.[67] Under this scheme, if the author of a work assigned his copyright during the first term, the right remained with the assignee during the renewal term.[68]

When Congress revised the Copyright Act in 1909, the renewal scheme changed.[69] Under the 1909 Act, copyright vested for twenty-eight years and could be renewed for one additional

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[60] *Id.* at 1110.

[61] *Id.* Liability rules may also be preferable where "an objective market price" exists by which to determine an entitlement's value, reducing the costs involved in judicial estimation. Merges, *supra* note 31, at 2665.

[62] Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1745 (2007).

[63] Nimmer & Menell, *supra* note 6, at 412 n.159.

[64] The effects of who copyright protects and how it does so are at the heart of this Note's argument and are explored in greater detail in the next Part.

[65] Act of May 31, 1790, ch. 15, 1 Stat. 124.

[66] *Id.*

[67] Eldred v. Ashcroft, 537 U.S. 186, 194 (2003).

[68] Frank R. Curtis, *Protecting Authors in Copyright Transfers: Revision Bill § 203 and the Alternatives*, 72 COLUM. L. REV. 799, 804 (1972).

[69] *Id.* at 805.

twenty-eight-year term[70] that generally reverted to the author or his heirs rather than remaining with his assignees.[71] Congress intended for reversion to give authors "a second chance to profit" from their works,[72] an intent the Supreme Court foiled by holding that an author could assign his rights in both the renewal and initial terms in a single grant.[73] Corporations then routinely required artists to assign away their renewal rights as part of any transfer.[74]

2. The 1976 Act. Responding to the 1909 Act's failure to protect authors as intended,[75] Congress did away with the renewal system[76] in the 1976 Copyright Act[77] and replaced it with a scheme of termination of transfers.[78] Under section 203, which applies to works made on or after January 1, 1978, an author who assigns any of his rights to a third party may, after thirty-five years, terminate the transfer and recapture his rights.[79] Termination is not automatic;[80] an author must serve written notice to the grantee between two and ten years before the effective date of termination,[81] and the notice is subject to certain formal requirements.[82] Attempting to avoid the failures of reversion under the 1909 Act,[83] Congress made termination rights

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[70] *Eldred*, 537 U.S. at 194.

[71] Curtis, *supra* note 68, at 805.

[72] *Id.* at 806.

[73] Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 657 (1943).

[74] Gould, *supra* note 18, at 101.

[75] *See* Nimmer & Menell, *supra* note 6, at 411 (noting "Congress included the device for termination of transfers in the 1976 Act because of the failure of . . . the 1909 Act").

[76] H.R. REP. NO. 94-1476, at 124 (1976).

[77] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–801 (2006)).

[78] 17. U.S.C. §§ 203, 304(c) (2006).

[79] *Id.* § 203(a). Section 304(c) governs termination for pre-1978 works, which are terminable fifty-six years after the initial grant of copyright. *Id.* § 304(c).

[80] Frisch & Fortnow, *supra* note 19, at 213.

[81] 17 U.S.C. §§ 203(a)(4), 304(c)(4).

[82] *See* 37 C.F.R. § 201.10 (2011) (listing requirements); Melville B. Nimmer, *Termination of Transfers Under the Copyright Act of 1976*, 125 U. PA. L. REV. 947, 977–82 (1977) (discussing notice requirements in depth).

[83] *See* Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright Law's "Inalienable" Termination Rights*, 57 J. COPYRIGHT SOC'Y U.S.A. 799, 805 (2010) (noting that the 1976 Act forbids what *Fisher* permitted).

inalienable.[84] Under the current Act, an author may assign his future interest before termination, but only to the original assignee.[85]

In the case of a joint work,[86] the work's authors may terminate transfers of their rights in the work. If joint authors transfer their rights in a single writing, a majority of the authors must agree to terminate the transfer.[87] But if joint authors transfer their rights separately, each author may terminate the transfer without consent from the others.[88]

Congress's purpose in creating termination rights was to protect authors from unremunerative transfers resulting from the unequal bargaining power between authors and assignees.[89] Because it is difficult to calculate the market value of an untested work at the time of its initial transfer,[90] Congress sought to give authors a chance to renegotiate their transfers once they know the true value of their creations.[91]

3. Termination Rights and the Record Industry. The first set of sound recordings covered by the 1976 Act will be terminable starting in 2013.[92] Because the set of works that retain significant value many years after their creation is so small,[93] and because

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[84] 17 U.S.C. § 203(a)(5); N.Y. Times Co. v. Tasini, 533 U.S. 483, 495 n.3 (2001).

[85] 17 U.S.C. § 203(b)(4).

[86] A "joint work" is one made by "two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." *Id.* § 101. Sound recordings may be joint works in some cases. *See infra* Part III.C.

[87] 17 U.S.C. § 203(a)(1).

[88] Mark H. Jaffe, *Defusing the Time Bomb Once Again—Determining Authorship in a Sound Recording*, 53 J. COPYRIGHT SOC'Y U.S.A. 139, 174 (2006).

[89] H.R. REP. NO. 94-1476, at 124 (1976).

[90] *Id.*; *see* Siegel v. Warner Bros. Entm't, Inc., 542 F. Supp. 2d 1098, 1107 (C.D. Cal. 2008) (noting that the creators of the Superman comic sold their rights in the character for $130 in 1938). Although the information asymmetry with respect to value has a strong impact on unequal bargaining, this Note argues that a different asymmetry—one related to knowledge of potential losses—is equally relevant. *See infra* notes 184–88 and accompanying text.

[91] Frisch & Fortnow, *supra* note 19, at 213.

[92] *Id.* at 214. Under section 304(c), pre-1978 transfers are not terminable until 2028 and thus are not an immediate concern for the record industry. *Id.* Accordingly, they are not addressed by this Note.

[93] *See* Eldred v. Ashcroft, 537 U.S. 186, 248 (2003) (Breyer, J., dissenting) (observing the reality that only "about 2% of copyrights between [fifty-five] and [seventy-five] years old retain commercial value").

artists must take affirmative steps to terminate, termination rights likely will be relevant only to a small set of superstar artists.[94] A number of such artists have already filed for termination.[95]

Joint authorship poses problems for termination of sound-recording copyrights.[96] A risk of holdouts in bargaining over termination rights persists.[97] Further, because joint authors own undivided, nonexclusive rights in their work, each author of a sound recording could grant her rights to a different record label, diluting the market and limiting how much labels are willing to pay.[98] To address this issue, courts or Congress may need to determine who can be a joint author of a sound recording.[99]

D. WORKS MADE FOR HIRE

Under the 1976 Act, a work is made for hire if: (1) it is made "by an employee within the scope of his or her employment" or (2) it is "specially ordered or commissioned," it falls within one of nine enumerated categories, and the parties agree in writing that the work is made for hire.[100] The 1976 Act's work-made-for-hire rules resulted from two decades of careful compromise between the competing interests of authors and publishers.[101] The list singles out categories of works that are made up of many independent

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[94] Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329, 1352 (2010). In the event that the creator of a commercially valueless work wishes to regain his ownership, there is little reason for society to oppose it. *See infra* Part III.B.*3*.

[95] *See* Rohter, *supra* note 8, at C1 (reporting Bob Dylan, Tom Petty, Loretta Lynn, Tom Waits, and others have already filed for termination).

[96] *See infra* Part III.D.

[97] *See infra* Part III.D.

[98] *See* Jaffe, *supra* note 88, at 174 (explaining that "exclusivity of an album is generally necessary for proper exploitation").

[99] Nimmer & Menell, *supra* note 6, at 412.

[100] 17 U.S.C. § 101 (2006). A work can be commissioned "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." *Id.*

[101] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 743 (1989).

contributions.[102] The Act vests ownership when such coordination is done at the employer's "instance, direction, and risk."[103]

Recording contracts usually provide that all recordings produced by the artist are works made for hire.[104] But a contract is not what determines the status of a work—the statute does, and the statute alone.[105] Most recording contracts also contain a backup provision assigning an artist's works to the record company,[106] but that is what artists will seek to terminate in 2013.[107] Works made for hire, on the other hand, are not subject to termination.[108] Not surprisingly, record companies plan to argue that sound recordings are works made for hire.[109] Because the status of a work can only be determined by the statutory language,[110] to that language we must turn.[111]

1. The Employment Prong. In *Community for Creative Non-Violence v. Reid*,[112] the Supreme Court interpreted what it means for a work to be "prepared by an employee within the scope of his or her employment."[113] Relying on the common law of agency, the

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[102] Ryan A. Rafoth, Note, *Limitations of the 1999 Work-for-Hire Amendment: Courts Should Not Consider Sound Recordings To Be Works-for-Hire When Artists' Termination Rights Begin Vesting in Year 2013*, 53 VAND. L. REV. 1021, 1049 (2000).

[103] *Reid*, 490 U.S. at 741.

[104] *See* Peter J. Strand, *What a Short Strange Trip It's Been: Sound Recordings and the Work Made for Hire Doctrine*, 18 ENT. & SPORTS LAW., no. 3, Fall 2000 at 13 (quoting typical contract language).

[105] *United States Copyright Office and Sound Recordings as Work Made for Hire: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. 81 (2000) [hereinafter *USCO Hearing*] (statement of Marybeth Peters, Register of Copyrights).

[106] Nimmer & Menell, *supra* note 6, at 393.

[107] 17 U.S.C. § 203 (2006); Rohter, *supra* note 8, at C1.

[108] 17 U.S.C. § 203(a). This is so because the Act considers the "author" of a work made for hire to be the employer or commissioning party. *Id.* § 201(b). The actual creator of the work never acquires ownership, so there can be no grant to terminate. William Henslee & Elizabeth Henslee, *You Don't Own Me: Why Work for Hire Should Not Be Applied to Sound Recordings*, 10 J. MARSHALL REV. INTELL. PROP. L. 695, 704 (2011).

[109] *See supra* notes 9–11 and accompanying text.

[110] *See Reid*, 490 U.S. at 748 n.14 (emphasizing "[s]trict adherence to the language and structure of the Act").

[111] *See, e.g.*, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) ("[I]n all statutory construction cases, we begin with the language of the statute.").

[112] 490 U.S. 730 (1989).

[113] 17 U.S.C. § 101.

Court set forth thirteen factors relevant to whether a hired person is an "employee" under the Copyright Act.[114]

Lower courts have come to rely primarily on five of the *Reid* factors: "(1) the hiring party's right to control the manner and means of production; (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 additional projects to the hired party."[115] Courts apply these factors on a case-by-case basis,[116] so their application to sound recordings will depend on industry norms and the circumstances surrounding a particular artist–label relationship. If a sound recording has not been created by an artist-employee in the course of employment, it can be a work made for hire only if it is a commissioned work under section 101.[117]

2. The Commissioned-Works Prong. A work must fall within one of nine enumerated categories to be deemed a commissioned work.[118] A close reading of the text is not necessary to recognize that "sound recordings" are absent from the list.[119] Thus, commissioned-work status cannot obtain for a sound recording qua

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[114] *Reid*, 490 U.S. at 751–52. Courts are to consider the following factors:

> the hiring party's right to control the manner and means by which the product is accomplished[;] . . . the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. (footnotes omitted). No one factor is dispositive. *Id.* at 752.

[115] Aymes v. Bonelli, 980 F.2d 857, 861 (2d Cir. 1992). *But see* Gould, *supra* note 18, at 105 ("Commentators have criticized the *Aymes* trend for discounting other *Reid* factors without justification." (footnote omitted)).

[116] Scott T. Okamoto, *Musical Sound Recordings as Works Made for Hire: Money for Nothing and Tracks for Free*, 37 U.S.F. L. REV. 783, 808 (2003); *see infra* Part III.A.*1.*

[117] 17 U.S.C. § 101.

[118] *See supra* note 100 and accompanying text. The parties also must agree in writing that the work is being made for hire. *Id.*

[119] 17 U.S.C. § 101.

sound recording.[120] The existing case law affirms this common-sense proposition.[121]

At one point, the list of categories did include sound recordings.[122] In 1999, Congress amended section 101 by adding "as a sound recording" to the list.[123] The amendment was buried in one sentence at the end of an enactment related to satellite transmissions.[124] Artists were outraged;[125] commentators were critical.[126] Congress quickly backtracked.[127] In October 2000, Congress repealed the amendment[128] and altered section 101 to specify that "work made for hire" should be defined as if neither the 1999 amendment nor its repeal had ever happened.[129] The upshot of this "millennial flip-flop"[130] is that the work-made-for-

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[120] *See* Nimmer & Menell, *supra* note 6, at 390 ("Congress created the 1976 Act in such a fashion as to foreclose the possibility for commissioned status of a sound recording *per se*.").

[121] *See* Lulirama Ltd. v. Axcess Broad. Servs., Inc., 128 F.3d 872, 878 (5th Cir. 1997) (concluding the Act doesn't support commissioned-work status for "purely audio works"); Staggers v. Real Authentic Sound, 77 F. Supp. 2d 57, 61 n.6 (D.D.C. 1999) (noting sound recordings are not a category of commissioned work); Ballas v. Tedesco, 41 F. Supp. 2d 531, 541 (D.N.J. 1999) (noting same); *cf.* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 738 (1989) (holding a sculpture "[q]uite clearly" cannot be a commissioned work because sculpture is not within the nine enumerated categories).

[122] *See generally* Valerie A. Dearth, Note, *1999 Amendment to Work Made for Hire Doctrine Comes Full Circle: Where It Came From, What It's Been Through, and Where It Is Now*, 19 CARDOZO ARTS & ENT. L.J. 215 (2001).

[123] Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, § 1011(d), 113 Stat. 1501, 1501A-544 (1999).

[124] Nimmer & Menell, *supra* note 6, at 390–91.

[125] *See* Brooks Boliek, *New Music Biz Discord over 'Work for Hire' Status / RIAA Comes Under Fire for Copyright Revisions*, HOLLYWOOD REPORTER (May 23, 2000), http://www.allbusiness.com/services/motion-pictures/4931640-1.html ("Artists from Don Henley to Coolio have lined up to oppose the change.").

[126] *See, e.g.*, Rafoth, *supra* note 102, at 1023 (criticizing Congress for ignoring equitable principles and legal precedent).

[127] *See* 146 CONG. REC. 18,490 (2000) (statement of Rep. Conyers) ("We have . . . learned that we should never do business this way.").

[128] Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, § 2(a), 114 Stat. 1444, 1444 (2000) (codified as amended at 17 U.S.C. § 101 (2006)).

[129] *See* 17 U.S.C. § 101 (leaving no trace of the 1999 amendment and repeal).

[130] Corey Field, Note, *Their Master's Voice? Recording Artists, Bright Lines, and Bowie Bonds: The Debate over Sound Recordings as Works Made for Hire*, 48 J. COPYRIGHT SOC'Y U.S.A. 145, 162 (2000).

hire doctrine now exists in its pre-1999 form, preserving the status quo.[131]

That is not to say, however, that no sound recording can ever be a commissioned work.[132] Record labels simply will have to argue that sound recordings should be "shoe-horned" into one of the nine existing categories.[133] The most likely such category is "contribution to a collective work."[134]

E. BEHIND THE MUSIC

Because new artists have very little bargaining power,[135] recording contracts tend to be non-negotiable and overwhelmingly favorable to the label's interests.[136] The label provides the artist with an advance to fund the recording of the album,[137] and the artist receives royalties as a percentage of the album's wholesale price.[138] Because the advance and any other funds are subject to being completely "recouped" by the studio,[139] royalties may be the only payment an artist ever receives from the label.[140]

Yet an artist often will not even get that.[141] The label frequently withholds any royalty payments until the artist reimburses the label for all of its expenses.[142] As a result, the only

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[131] Nimmer & Menell, *supra* note 6, at 388.

[132] *Id*. at 398.

[133] *Id*.

[134] "A 'collective work' is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." 17 U.S.C. § 101; *see infra* Part III.A.*2*.

[135] *See supra* notes 89–90 and accompanying text.

[136] *See* Kathryn Starshak, Note, *It's the End of the World as Musicians Know It, or Is It? Artists Battle the Record Industry and Congress to Restore Their Termination Rights in Sound Recordings*, 51 DEPAUL L. REV. 71, 122 (2001) (noting "the company is in complete control of the deal").

[137] *Id*. at 99.

[138] Carter, *supra* note 7, at 221.

[139] *Id*. at 219.

[140] *See* Starshak, *supra* note 136, at 99–100 (noting that royalties substitute for wages or salaries).

[141] *See* Mike Masnick, *RIAA Accounting: Why Even Major Label Musicians Rarely Make Money from Album Sales*, TECHDIRT (July 13, 2010, 9:06 AM), http://www.techdirt.com/articles/20100712/23482610186.shtml (explaining how an artist may earn nothing despite selling millions of albums).

[142] Carter, *supra* note 7, at 219.

artists that make any substantial profit from album sales are superstars capable of selling enough copies to reimburse the label fully.[143]

Most recording deals involve a series of agreements between the label and the artist, the artist and a producer, and the producer and a recording studio.[144] The artist typically is free to "decide when, where, and how" she will work.[145] For liability reasons, the contract usually specifies that the artist is not an employee;[146] and the artist's creative process is limited by only two things: (1) the number of recordings she must deliver to the label[147] and (2) the label's determination whether the recordings are "commercially satisfactory."[148]

III. ANALYSIS: THE VIEW FROM THE CATHEDRAL

Record industry practices are largely uniform with respect to new artists,[149] so a single authoritative holding or statutory revision could resolve the majority of artist–label conflicts. In the absence of congressional action, any such uniform answer can only emerge after at least a few parties litigate their conflicts to conclusion,[150] and many nonstandard situations will require case-by-case adjudication.[151] The effect that a definitive answer could have on bargaining between artists and labels bears directly on efficiency, distribution of resources, and the normative goals of copyright.

Accordingly, the insights of this Note arise out of close consideration of these bargaining effects. First, this Note briefly sets forth the arguments artists and labels will make as to whether sound recordings are works made for hire. The goal is not

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[143] *Id*. at 222. Further, "creative accounting practices rarely demonstrate that an artist has in fact recouped, thus keeping the artist in debt." *Id*. at 254 n.325.

[144] Gould, *supra* note 18, at 114.

[145] *Id.* at 109.

[146] Henslee & Henslee, *supra* note 108, at 706.

[147] Gould, *supra* note 18, at 109.

[148] *Id.* at 95 (providing typical contract language).

[149] *See supra* Part II.D.

[150] *See supra* note 15 and accompanying text.

[151] *See infra* Part III.C.

to argue how these arguments *will* be resolved but merely to propose how they *could* be, so as to analyze their effects on bargaining. This Note initially undertakes such an analysis with both "easy" and "close" cases,[152] concluding that in the majority of cases, courts and legislators should err toward finding that sound recordings are not works made for hire. In the aggregate, vesting musical artists with termination rights will better serve both efficiency and normative goals. As to the "close" cases, case-by-case resolution is preferable to any absolute rule since the parties' uncertainty about their legal rights will facilitate efficient bargaining in a way that a bright-line rule may not. Finally, this Note turns to the complications created by joint authorship in sound recordings and, drawing on its previous conclusions, offers a few tentative suggestions.

A. HOW WORK-MADE-FOR-HIRE DOCTRINE APPLIES TO THE RECORD INDUSTRY

To be a work made for hire, a work must be either (1) made by an employee in the course of employment or (2) specially commissioned.[153] Whether a work falls within either category depends on the circumstances of its creation.[154] Thus, any inquiry into the work-made-for-hire status of a given sound recording must look to general practices in the recording industry and to details of the particular recording. As most recording-industry practices are uniform across the entire class of new artists,[155] this Part focuses exclusively on generally applicable industry standards.

1. Arguments that Musical Artists Are or Are Not Employees. Under *Reid*, a court must undertake a two-part analysis to determine if a work was made for hire under the employment

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[152] "Easy" refers to the set of cases that are so factually similar they could uniformly be resolved by a single high-court decision. "Close" refers to the idiosyncratic cases that diverge factually from the "easy" cases and will be resolved on a case-by-case basis.

[153] *See supra* Part II.D.

[154] *See supra* note 116 and accompanying text.

[155] *See supra* Part II.D.

prong.[156] First, the court must apply the *Reid* factors to determine if the creator of the work is an employee.[157] If the creator is an employee, the court must determine if the work was made within the scope of employment.[158] If the creator is not an employee, the work must satisfy the commissioned-works test.[159]

If recording artists are found generally to be employees, their recordings probably were made in the course of employment.[160] The important question, then, is whether or not recording artists are the labels' employees. As noted above, most courts have focused primarily on five of the *Reid* factors in determining a creator's employment status.[161]

The first of these factors, the right to control the manner and means of production, is shared by artists and labels. The label sets the artist's budget and usually has the final say over what songs the label will release.[162] On the other hand, the artist is free to "decide when, where, and how" she will work.[163] It is important to note that *Reid* dismissed as irrelevant the question whether the employer exercised ex post control over the work once completed, focusing solely on control during creation.[164]

The second factor, the skill required, favors the artist, as a recording results largely from the artist's own creative abilities. The label may point to its skill at marketing and distributing the work, but those skills relate to exploiting the work once created, not to the creation of the work itself. The third and fourth factors, provision of employee benefits to and tax treatment of the employee, clearly favor the artist. Generally, artists are not

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[156] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

[157] *See supra* note 114.

[158] Aymes v. Bonelli, 980 F.2d 857, 860 (2d Cir. 1992); *see also* 17 U.S.C. § 101 (2006) (defining "work made for hire" as "a work prepared by an employee within the scope of his or her employment").

[159] *See supra* Part II.D.*2*.

[160] Gould, *supra* note 18, at 110.

[161] *See supra* note 115 and accompanying text.

[162] *See supra* notes 137–42, 147–48 and accompanying text.

[163] *See supra* note 145 and accompanying text.

[164] *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 742 (1989) (emphasizing the importance of supervision over the creative process).

salaried and do not receive employee benefits;[165] compensation is limited to royalties.[166] The label does not withhold taxes for the artist.[167]

The final factor, the right to assign additional work, is somewhat trickier. The duration of recording contracts usually is set by a number of albums the artist is required to produce, and the label has the option to reject these recordings as "commercially unsatisfactory."[168] The label may also require the artist to re-record songs, which could qualify as assigning extra work.[169] However, the label's ability to order work is limited to the number of recordings contemplated by the contract. If an artist is required only to record five albums, the label may not order a sixth.

On balance, artists have a strong argument they are not employees, though the labels have points in their favor as well.[170] If artists are found not to be employees, sound recordings can only be works made for hire if they are commissioned works.

2. Arguments that Recordings Are or Are Not Commissioned Works. Sound recordings cannot on their own qualify as commissioned works, so labels will have to argue that they fall within one of the nine existing categories.[171] Of the categories of commissioned works, the most promising one for labels is "contribution to a collective work."[172] The argument for labels is that recording contracts call for the artist to create albums, which are collective works made up of individual recordings—contributions qualifying as works made for hire.[173]

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[165] Frisch & Fortnow, *supra* note 19, at 219.

[166] *See supra* note 140 and accompanying text.

[167] Henslee & Henslee, *supra* note 108, at 712.

[168] Gould, *supra* note 18, at 110.

[169] *Id.*

[170] The consensus among commentators appears to be that recording artists are not employees. *See, e.g.*, Frisch & Fortnow, *supra* note 19, at 221 (concluding that recording artists are not employees); Gould, *supra* note 18, at 109 (affirming the consensus); Henslee & Henslee, *supra* note 108, at 709 (noting same).

[171] *See supra* notes 120–21, 132–33 and accompanying text.

[172] *See supra* note 134 and accompanying text. One could certainly imagine circumstances in which a sound recording would qualify under other categories, *see* Nimmer & Menell, *supra* note 6, at 398 (posing a circumstance in which a sound recording could conceivably qualify as a supplementary work), but very few recordings for labels could so qualify.

[173] In the digital-music era, in which consumers care less about albums than individual

It is unclear whether a single artist's album can be a collective work, or if that status is limited to compilations of distinct individuals' efforts.[174] The purpose of the work-made-for-hire doctrine—to cover categories of works in which a producer must coordinate many disparate parts[175]—points to the latter. A set of thirteen songs created by the artist as a cohesive artistic statement does not require extensive coordination by the label; the bulk of the coordination is done by the artist or producer.[176] At the same time, little reason exists why a collection of a single artist's "greatest hits" could not qualify as a collective work.[177] The difference is that the label compiles a greatest hits album as a collection of discrete tracks, whereas the artist generally envisions a typical album as one unified whole. But the question remains open,[178] and at least one prominent scholar maintains that a single artist's album could qualify.[179]

B. IN "EASY" CASES, COURTS AND LEGISLATORS SHOULD ERR TOWARD FINDING THAT SOUND RECORDINGS ARE NOT WORKS MADE FOR HIRE AND ARE SUBJECT TO TERMINATION

The year is 1978. Imagine a young musician, Ron, trying to make it as a singer-songwriter. He has paid his dues playing small shows in bars and clubs. A representative from C&M Records (C&M), a major American label, attends one of Ron's shows and likes what he hears. C&M approaches Ron with its

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songs, it is unlikely that any single recording, standing alone, could qualify as a contribution to a collective work. Nimmer & Menell, *supra* note 6, at 400. But for the purposes of this discussion, the state of recordings in 1978 is of interest, not how recordings are perceived today.

[174] *See id.* at 399 (noting competing views).

[175] *See supra* notes 102–03 and accompanying text.

[176] *See* Rafoth, *supra* note 102, at 1043 (arguing that an album is "an integrated work—a package of songs unified by a common concept").

[177] *See* Nimmer & Menell, *supra* note 6, at 403 n.103 ("An anthology of works by a single author first published at different times presumably qualifies as a collective work.").

[178] *See* Okamoto, *supra* note 116, at 808 (arguing "one can easily envision the situation in which an album could be considered a 'collective work' ").

[179] *See USCO Hearing*, *supra* note 105 (statement of Paul Goldstein, Lillick Professor of Law, Stanford Law School) ("The contribution of an individual sound recording as one of several selections on a CD or other album will typically constitute a 'contribution to a collective work' . . . .").

standard recording contract and offers him a take-it-or-leave-it deal.[180] Ron signs and begins work on his first album. In late 1978, C&M releases Ron's debut album, *Cattle Raisers and Railroads* (*CRR*), to critical acclaim and staggering sales.

The year is 2013. Ron is now a rock-and-roll institution, commonly mentioned in the same breath as Dylan and Springsteen. He plays to sold-out crowds, and his albums reliably top the charts. Thirty-five years after its release, *CRR* continues to bring in big returns for Ron and C&M. In 2010, Ron served notice of his intent to terminate his transfer of his rights in *CRR*. Now, with the termination deadline looming, C&M approaches Ron to bargain for a transfer of the future interest in *CRR*. What might that bargain look like, and what can it tell us about whether Ron should be able to terminate his transfer?

For this Part, assume that artists in positions substantially similar to Ron—and most artists—have already gone to court over their termination rights and that a high-court decision in those cases controls whether or not Ron can terminate. Ron's case is then "easy"—clearly applicable law determines the outcome ex ante, and both Ron and C&M are fairly certain who owns the future interest.

1. When the Focus Is on Private Efficiency Only, Entitlements Theory Favors Letting Musical Artists Terminate. For now, also assume the following: (1) the bargain is bilateral, meaning there are no parties other than C&M and Ron;[181] (2) both parties are "rational" actors, meaning their valuation of Ron's work is equal to its market value;[182] (3) we care only about efficiency as between Ron and C&M, not externalities or normative considerations; (4) ownership in the termination right is protected by property rules;[183] and (5) transactions are not frictionless—transaction costs

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[180] *See supra* Part II.C.

[181] *Compare infra* Part III.D.

[182] The use of "rational" here is specialized. It is not irrational for an artist to attach nonpecuniary value to his work, but it is not rational under this meaning either.

[183] *See supra* note 57 and accompanying text. Copyrights usually are protected by property rules. *See* Robert P. Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1302 (1996) (noting intellectual property rights are actually "quintessential property rule entitlements").

and distributive effects matter. Some of these assumptions are unrealistic and will be relaxed later, but they provide a productive starting point.

In 1978, when Ron signed his contract, he had no idea how much value *CRR* would have in the marketplace.[184] C&M had a slightly better idea based on its experience with similar artists,[185] but it was still gambling. C&M, however, could be largely indifferent to its inability to measure value accurately because it can more or less predict its maximum losses in advance. Through experience, C&M and other labels know roughly how much they will have to spend to fund, promote, and distribute an album;[186] in the nightmare scenario of an album that sells zero copies, the label's losses will equal, but not exceed, those expenditures. To be sure, a label's losses could be severe.[187] But they are predictable and therefore limited, and the label can structure its business so that its successes compensate for its failures. In the event that the album fails miserably, the artist loses nothing. Conversely, if the album is successful, the artist has lost the difference between his actual payment and what he could have made had the value of his work been known in advance. At the time of contracting, this loss is unpredictable and effectively limitless.[188] So while both the label and the artist are unable to attach an accurate value to the work, that inability matters relatively more to the artist than to the label.

Congress attempted to remedy this inequality by letting artists renegotiate their contracts once their work's value is established.[189] Based on the historical value of his work, Ron attaches to an entitlement in the future interest a value, V_A, equal to the money Ron believes he could earn in the market. The label similarly attaches a value, V_L. Because ownership of the future

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[184] *See supra* note 90 and accompanying text.

[185] *See* I.T. Hardy, *An Economic Understanding of Copyright Law's Work-Made-for-Hire Doctrine*, 12 COLUM.-VLA J.L. & ARTS 181, 193 (1988) (noting large publishers "will usually be better able to estimate future value").

[186] *See supra* note 142 and accompanying text.

[187] *See* Day, *supra* note 15, at 87 (identifying labels' "significant and risky up-front costs").

[188] *See supra* note 90 and accompanying text.

[189] *See supra* notes 89–91 and accompanying text.

interest is known in advance, the bargaining situation is relatively simple: the rights-holder will use that certainty to extract payment from the other party.[190]

In a Coasean world, it would not matter whether Ron or C&M owns the future interest.[191] If the higher-valuing user owns the entitlement, he will keep it; if the lower-valuing user owns the entitlement, he will sell it.[192] If Ron owns the entitlement and $V_L > V_A$, Ron will sell the entitlement for some value between V_L and V_A. Conversely, if C&M owns the entitlement and $V_A > V_L$, C&M will sell the entitlement for a value between V_A and V_L. If $V_A = V_L$, no trade will (or should) occur, no matter who gets the entitlement.[193]

But copyright transactions are not frictionless, even in the idealized bargain we have assumed into existence.[194] We have assumed away externalities and heavy search costs[195] but not distributional inequalities. Because the vast majority of termination questions will involve works that remain successful after thirty-five years, the value of these works to each party is likely to be substantial.[196] Consequently, the distribution of wealth between the parties prior to the bargain is relevant as follows.

Calabresi and Melamed teach us that when it is not clear which party is the cheapest cost avoider, the entitlement should go to the party less capable of acting in the market to correct errors in allocation.[197] C&M, as a major corporation, is likely to have more

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[190] *See* Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1309 (2008) (noting that the threat of injunction allows owners to extract payment from prospective users).

[191] *See supra* Part II.B.*1*.

[192] *See supra* notes 47–48 and accompanying text.

[193] That we prefer no trade here again assumes we care only about private efficiency and nothing about external considerations. This is not a realistic assumption. *See infra* Part III.B.*2*.

[194] *See supra* note 63 and accompanying text.

[195] Externalities are absent because we have assumed we care only about private efficiency. Search costs are absent because we have assumed the placement of the entitlement is known. *See* Sterk, *supra* note 190, at 1285 (acknowledging the significant costs of determining scope of property rights).

[196] *See supra* note 94 and accompanying text.

[197] *See supra* notes 54–55 and accompanying text. Because the termination right provides

resources than Ron, notwithstanding his success. Assuming this, suppose Ron terminates his grant. If $V_L > V_A$, we have erred in giving Ron the entitlement. But C&M's substantial resources allow us to be confident that C&M will pay Ron's price, thereby remedying our mistake. Now suppose C&M owns *CRR* as a work made for hire. If $V_A > V_L$, we have erred again, but now the efficient result is not assured. As V_L increases, a point may come at which Ron, because of his comparatively limited resources, is unable to purchase the entitlement regardless of the extent by which V_A exceeds V_L. This is a market failure, the risk of which we can minimize by giving Ron the entitlement.[198]

This is particularly true once we abandon our assumption that the parties are "rational."[199] Ron will almost certainly attach nonpecuniary value to his work, far more so than profit-minded C&M.[200] Now it is even more likely that giving C&M the entitlement will result in market failure, as the likelihood that V_A will exceed V_L increases along with the likelihood that Ron cannot afford to pay. Simultaneously, the price C&M has to pay when V_L exceeds V_A likely decreases because Ron enjoys some nonpecuniary rewards from C&M's distribution of his work; he may therefore demand less payment to overcome V_A. This eases C&M's ability to act in the market. If we care nothing about externalities, Ron's nonpecuniary interests should be given just as much weight as market valuation, and the argument in favor of giving Ron the entitlement becomes even stronger.

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a chance to bargain with accurate information about a work's value, artists and labels likely are equivalently cheap cost-avoiders. To the extent that labels remain better able to gauge a work's value, we should prefer the artist to get the entitlement.

[198] One could object to this conclusion by pointing out that V_L and V_A depend on the parties' resources—that is, each value incorporates the party's judgment of how well they will be able to exploit the work using their resources that remain after the entitlement is purchased. The argument, then, is that if Ron's resources make paying C&M's price impossible, V_L will not rationally exceed V_A. Under our assumptions against external effects, though, it is perfectly possible for V_A to represent what Ron thinks he could earn *if he could afford to buy the entitlement*. The conclusion does not depend on market failure being probable if C&M gets the entitlement, just on it being more likely.

[199] *See supra* note 182 and accompanying text.

[200] This value may include emotional attachment or an artist's sense of "moral rights." *See* Henslee & Henslee, *supra* note 108, at 705–06 (describing some examples of nonpecuniary interests).

2. When External Effects Are Considered, Efficiency and Normative Goals Favor Letting Musical Artists Terminate. Of course, since copyright exists primarily to benefit the public,[201] we in fact do care about its external effects. Although private efficiency matters,[202] we may worry that to the extent V_L exceeds V_A based on nonpecuniary interests, Ron's valuation will not account adequately for his ability to market or distribute the work. If C&M's greater resources equate to a greater ability or willingness to disseminate the work, public welfare may prefer that C&M get the entitlement even when private efficiency would favor Ron.

The relative abilities of artists and labels to disseminate a work is an empirical question, which will develop as more artists attempt to forego working with labels entirely.[203] It is far from obvious, however, that labels are necessarily in a better position than successful artists to advance social welfare through dissemination.

It is true that the value of record labels traditionally has come from their ability to market and distribute works.[204] And yet, being able to more *profitably* disseminate a work does not equal being able to more *widely* disseminate a work, and the latter factor is what concerns us most.

The Internet makes it so that labels no longer have any inherent advantage as to the scope of dissemination. Indeed, some successful artists have begun to experiment with self-distribution.[205] Where labels may retain an advantage is in their ability to promote works and distribute them profitably. But because termination will be relevant primarily to well-known, successful artists for well-known, successful works, the label's

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[201] *See supra* notes 27–30, 35–36 and accompanying text.

[202] *See supra* Part III.B.*1*.

[203] *See, e.g.*, Josh Tyrangiel, *Radical Remix*, TIME, Oct. 15 2007, at 60–61 (describing Radiohead's digital, pay-what-you-want release for their album *In Rainbows*); Andy Gensler, *Wilco Leaves Nonesuch Records, Starts Own Label*, BILLBOARD.COM (Jan. 27, 2011), http://www.billboard.com/news/wilco-leaves-nonesuch-records-starts-own-1005013992.story (reporting rock band Wilco's plan to distribute music on its own label).

[204] Henslee & Henslee, *supra* note 108, at 706.

[205] *See supra* note 203.

promotional advantage is diminished. A superstar artist may be able to market his work just as profitably as a label.[206]

There is reason to think that in a digital world, normative goals as well as efficiency point toward letting musical artists terminate their transfers. The Internet undoubtedly provides for far broader dissemination than physical album releases—the difficulty is in monetizing that dissemination successfully. For labels, public dissemination is a means to make money, so they will not invest in distribution schemes unlikely to generate returns. For artists, particularly those who attach significant nonpecuniary value to their work,[207] wide public dissemination may be desirable in itself.[208] Especially since artists will already have profited substantially from their recordings' long-term success, they may be willing to sacrifice additional proceeds to maximize public dissemination.[209] Therefore, even if artists are unable to distribute their works as profitably as labels, they may well be more able—or willing—to distribute the works most widely.[210]

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[206] *See Exclusive: Warner Chappell Reveals Radiohead's 'In Rainbows' Pot of Gold*, MUSIC ALLY (Oct. 15, 2008), http://musically.com/blog/2008/10/15/exclusive-warner-chappell-reveals-radioheads-in-rainbows-pot-of-gold/ (noting that *In Rainbows* made more money online than Radiohead's previous album overall).

[207] *See supra* note 200 and accompanying text.

[208] For instance, an artist who believes his work is artistically valuable simply may want to maximize its cultural impact. A political artist may want her work widely distributed to foment political consciousness or dissent. Some artists may even wish to distribute their music for free out of gratitude for fans' continued support. A reclusive artist also could seek to *stop* public distribution of his work. *See* Salinger v. Colting, 607 F.3d 68, 71 (2d Cir. 2010) ("[J.D.] Salinger has not published since 1965 and has never authorized any new . . . work derivative of *Catcher* [*in the Rye*].."). While this seems likely to be the exception to the general practice, it is a possibility that courts and legislators should consider.

[209] *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 952 (2005) (Breyer, J., concurring) (noting "artists such as Wilco, Janis Ian, Pearl Jam, Dave Matthews, John Mayer, and others" authorize free sharing of their music on file-sharing software). One could say this argument proves too much—if all music were free, it would certainly be more publicly available, but there would also be many fewer works created in the first place. *See supra* notes 31–32 and accompanying text. But no creative disincentive is involved in permitting authors to terminate and then distribute freely, as the right only accrues after thirty-five years of royalty-earning distribution. In fact, the future "reward" of termination may increase artists' incentives to create in the first place.

[210] There is a third possibility, which is that labels and artists will prove equally capable of wide dissemination. In such a case, we might favor the artist for distributive reasons,

Let us return now to Ron and C&M, and to the consideration of the costs of errors.[211] The problem demonstrated above—that giving C&M the entitlement decreases Ron's ability to act in the market to fix an error in allocation—remains, and indeed is worsened. V_A now includes the value Ron attaches to wide dissemination; however, since some or most of that dissemination has no direct monetary value, the risk that Ron will not be able to afford to pay C&M's price increases. C&M, knowing Ron might be able to afford only a portion of V_L, may attempt to exploit that knowledge by falsely overstating V_L, further increasing the risk of market breakdown.[212] Efficiency alone suffering from market failure is bad enough; public dissemination also suffering is much worse, particularly in the copyright context.[213]

3. If Musical Artists Seek To Terminate Transfers of Unsuccessful Works, the Law Should Permit It. Thus far, we have assumed that all terminations will be sought by successful artists respecting successful works.[214] This will be true in the majority of cases, but likely not all. The creator of an unsuccessful work may, for example, wish to regain his rights for emotional reasons or to increase the work's public exposure without regard to profit.

If a recording is no longer profitable, V_L is close to zero, and the label will be reluctant to invest in continued dissemination. In this case, if V_A is high enough for the artist to incur the costs of hiring a lawyer and filing for termination, the artist is the highest-value user and should get the entitlement.[215] And if there is even

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preferring as a normative matter that the financial benefits of a successful work go to its "creative genius." Loren, *supra* note 94, at 1349–50.

[211] *See supra* notes 197–200 and accompanying text.

[212] *See* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1030 (1995) (noting that incentives to misrepresent private valuations lead sellers to "overstate the value they place on the bargained-for item").

[213] *See* Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 819 (1st Cir. 1995) (Boudin, J., concurring) ("[T]he 'cost' side of the equation may be different where one places a very high value on public access . . . ."), *aff'd by an equally divided Court*, 516 U.S. 233 (1996), *reh'g denied*, 516 U.S. 167 (1996).

[214] *See supra* note 94 and accompanying text.

[215] This transfer might occur in the market, but avoiding wasteful transaction costs by giving the artist the initial entitlement is better. *See supra* note 55 and accompanying text.

a slight chance that the artist will distribute to the public when the label would not, normative considerations also favor termination.[216]

4. Courts Should Be Reluctant To Expand the Scope of the Work-Made-for-Hire Doctrine. It is important to note that the preceding analysis is flexible. If empirical evidence were to show, for example, that labels are far better than superstar artists at widely disseminating sound recordings, the analysis would change. But because the work-made-for-hire doctrine was carefully crafted as a compromise between the interests of authors and publishers, courts should be reluctant to expand it when doing so is not obviously proper.[217]

This is why this Note argues that courts should "err" in favor of artists. Most new albums are recorded under similar circumstances, so most will be governed by the same set of legal standards. This Note has demonstrated that, as a general matter, efficiency and normative considerations favor letting artists terminate, with parties bargaining to correct errors in allocation. As the facts of a given case depart from the norm,[218] the correct answer may well be different.

C. IN "CLOSE" CASES, UNCERTAINTY OF LEGAL RIGHTS IS PREFERABLE TO A BLANKET RULE

Cases may depart from the easy case in two ways. First, the work clearly may not be a work made for hire. Because the proposed baseline is terminability, these cases present no problem. Cases may also arise where the artist seems more like an employee than the norm and the work more like one made for hire. These cases can be handled in two ways: (1) set a blanket rule applicable to all sound recordings, or (2) let courts analyze them on

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[216] *See* Golan v. Holder, 132 S. Ct. 873, 905 (2012) (Breyer, J., dissenting) (noting the problem of " 'orphan works'—older and more obscure works with minimal commercial value" that are not disseminated but "can prove culturally invaluable").

[217] *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 748 n.14 (1989) ("Strict adherence to the language and structure of the [Copyright] Act is particularly appropriate where, as here, a statute is the result of a series of carefully crafted compromises.").

[218] *See infra* Part III.D.

a case-by-case basis. As demonstrated above, a blanket rule favoring labels is suboptimal.[219] Without a reason to prefer uncertainty of legal rights, a blanket rule favoring artists would be better but still would lead to many errors. Uncertainty, however, can have benefits.[220]

1. Uncertainty of Legal Rights Facilitates Efficient Trade. Consider again Ron and C&M. Assume now there is good evidence that Ron and his *CRR* album would satisfy one of the work-made-for-hire tests, but plausible arguments to the contrary are also present. One might think this uncertainty would lead to litigation, but parties frequently resolve uncertain disputes prior to trial.[221]

Suppose past cases lead the parties to believe Ron will be able to terminate with probability p. Thus, the value to Ron of his future interest in *CRR* is $V_A(p)$, and its value to C&M is $V_L(1 - p)$. As some scholars have shown, this situation can facilitate trade by reducing the incentive to misrepresent one's private valuation.[222] When property rights are clear, parties have incentives to misstate their private valuations.[223] But when parties are unsure as to whether they are buying or selling an entitlement, they know their statements of valuation could be turned around on them, so they are less likely to lie.[224]

Here, as p approaches 50%, both Ron and C&M will be unsure as to whether they are buying or selling the future interest in *CRR* and will be more honest about their valuations. If Ron states a V_A substantially higher than *CRR*'s market value, C&M will have reason to believe it as a truthful statement of nonpecuniary value rather than a bargaining tactic. When information is reliable in

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[219] *See infra* Part III.B.

[220] *See* Christian Turner, *The Burden of Knowledge*, 43 GA. L. REV. 297, 299 (2009) ("Despite the advantages knowledge often confers, ignorance is sometimes preferable . . . .").

[221] Sterk, *supra* note 190, at 1299. In easy cases, it does not matter whether Ron and C&M bargain before or after Ron terminates. Here, by contrast, the bargain must occur before a determination of whether Ron can terminate.

[222] Ayres & Talley, *supra* note 212, at 1073–74.

[223] *Id.* at 1029–30.

[224] *Id.* at 1030–31. If one party overstates his valuation, the other party may offer to sell at that price. If one party understates his valuation, the other party may offer to buy. This is a powerful incentive for honesty. *Id.*

this way, bargaining is more likely to be efficient and clear legal placement of entitlements is less necessary.[225]

Bargaining in the face of uncertainty also may mitigate the risk of market failure arising from distributive inequality. Because Ron and C&M's valuations are now discounted by the probability that Ron will be able to terminate, the acceptable payment will always be less than when their rights are certain. Thus, there will be fewer circumstances in which Ron is unable to afford his valuation.

2. Courts Should Consider Adopting Liability Rules When a Party Reasonably Acts in Violation of the Other's Right. One result of uncertainty may be that an artist or label will act as if the transfer is (or is not) terminable without first bargaining or litigating.[226] This is not necessarily imprudent. Search costs—the costs of determining who owns an entitlement—are high in copyright, particularly in "close" cases where litigation is the only path to certainty.[227] The public costs of search may sometimes outweigh its public benefits.[228] Professor Stewart E. Sterk has argued that property rules, by imposing harsher penalties on the liable party, may encourage inefficient search more than liability rules.[229] In situations where this is true, liability rules may be preferable.[230]

Termination of transfers in sound recordings may be such a situation. Rights in sound recordings are complicated,[231] the cost of litigating to clarity is high, and little social benefit is produced when an artist or label refrains from public distribution. Where a court determines that a party reasonably acted without search—where the cost of determining whether the artist could terminate

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[225] *Id.*

[226] *See* Rohter, *supra* note 8, at C5 ("[S]ome recording artists . . . are talking about simply exercising their rights and daring the record companies to stop them.").

[227] *Cf.* Sterk, *supra* note 190, at 1303 n.78 (noting that search in patent-validity cases occurs "inevitably through litigation").

[228] *Id.* at 1289.

[229] *Id.* at 1288.

[230] *Id.* at 1313.

[231] Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 679 (2003).

outweighs the harm avoided—the court should consider imposing damages rather than an injunction, so as to avoid encouraging inefficient search.[232] Liability rules may also be appropriate given that thirty-five years of exploitation of the work has provided "an objective market price" by which to calculate damages.[233]

3. Unclear Standards Trend Toward Rules over Time. The law abhors entropy—it trends from chaos to order, standards to rules.[234] Within the broad set of what this Note calls "close" cases, there are subsets of similarly situated cases that, as like cases go to trial, will move from uncertainty to certainty and become "easy." When this happens, to adjust for the loss of bargaining efficiency, courts should bear in mind the efficiency and normative analyses laid out in Part III.B.

D. THE JOINT AUTHORSHIP PROBLEM, WITH A FEW SUGGESTIONS

So far, this Note assumes that termination would involve a bilateral negotiation between artist and label. In reality, multiple parties may claim joint authorship of a given recording.[235] Assuming bilateral negotiations is productive in narrowing the focus on efficiency,[236] the problem of which (and how many) parties will be able to terminate should not be overlooked.

A full discussion of the problems involved in joint authorship of sound recordings must remain in the darkness beyond the scope of

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[232] Although injunctive relief in copyright is favored, it is not required, 17 U.S.C. § 502(a) (2006), and the Supreme Court recently endorsed the discretionary nature of injunctions. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 393–94 (2006) (rejecting automatic injunctions for patent infringement). Courts have favored damages when search costs are high in property law's "innocent encroacher" cases. *See, e.g.*, Somerville v. Jacobs, 170 S.E.2d 805, 813 (W. Va. 1969) (employing a form of liability rule where a party built on a neighbor's land due to good-faith boundary mistake); Golden Press, Inc. v. Rylands, 235 P.2d 592, 595 (Colo. 1951) ("Where defendant's encroachment is unintentional and slight, plaintiff's use not affected and his damage small and fairly compensable, while the cost of removal is so great as to cause grave hardship or otherwise make its removal unconscionable, mandatory injunction may properly be denied and plaintiff relegated to compensation in damages.").

[233] *See* Merges, *supra* note 31, at 2665.

[234] Ayres & Talley, *supra* note 212, at 1078.

[235] *See supra* notes 86, 97–99 and accompanying text.

[236] *See supra* Part III.B.

this Note.[237] It seeks not to argue for who should be considered joint authors, nor to propose a specific course of congressional action. It suggests only few things entitlements theory reveals about the problem.[238]

First, the problem should not be solved by treating all sound recordings as works made for hire. One suggestion for resolving the joint-authorship dilemma is to treat all sound recordings as works made for hire and eliminate termination entirely.[239] But vesting authorship solely in the primary artist of a recording would have the exact same result, and this Note has shown that doing so is preferable to treating all recordings as works made for hire.[240]

Second, liability rules may point to some solutions. As the numbers of parties to a transaction increase, so too do the risks of holdouts and market failure. The risk of holdouts in termination of transfers is mitigated somewhat by allowing termination by a simple majority of joint authors,[241] but it is not eliminated. If a joint author is the swing vote between two factions of authors, she has some incentive to hold out for the best offer from the factions or the label. In such a case, a liability-rule regime may be appropriate.[242] That is, if a minority of authors treat their transfers as terminated, a court could limit remedies for the label and majority authors to damages when evidence shows that market failures prevented bargaining ex ante.

While a liability-rule regime would address ex ante market inefficiencies, it would not solve dilution problems that may arise after termination.[243] Formal liability-rule protection of joint

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[237] For such a discussion, see generally Jaffe, *supra* note 88.

[238] These suggestions are tentative, as they must be until the problem arises and we can consider its empirical effects.

[239] *See* Jaffe, *supra* note 88, at 184–87 (summarizing the argument).

[240] *See supra* Part III.B. Making the primary artist the sole author may not be ideal, Jaffe, *supra* note 88, at 188–89, but it remains superior to treating all recordings as works made for hire.

[241] *See supra* note 87 and accompanying text.

[242] *See* Merges, *supra* note 31, at 2664 (noting that liability rules better effectuate bargaining when the number of parties and risk of holdouts are high).

[243] *See supra* note 98 and accompanying text.

authors' rights could worsen this problem by undercompensating authors for infringement.[244]

The problem may be addressed, however, by allowing—or forcing—authors to "contract into" liability rules. Professor Robert Merges has argued that when transaction costs are high, property-rule protection leads actors to form institutions that streamline the licensing process.[245] If joint authors find that dilution is harming their profits, they could agree to license the work collectively and share the returns. If contracting fails,[246] Congress could seek to create a licensing institution, or its administrative equivalent, through regulation.

IV. CONCLUSION: DAYBREAK

The darkness is here. Courts soon will be faced with the question whether musical artists can terminate grants of their copyrights to record labels, and legislative clarification grows more unlikely by the day. A solution should be based on law and policy, not on the faint glimmer of congressional action.

Congress created termination of transfers to effect bargaining between authors and publishers, and the decision whether to allow sound-recording terminations is effectively a decision of where to allot the future interest in a copyright. As such, foundational theories of bargaining and entitlements provide substantial guidance. They permit us to analyze systematically the effects that the choice of entitlement will have on the bargaining positions of musical artists and labels. Changes in bargaining position, in turn, affect economic efficiency and normative considerations.

In the majority of cases, allowing artists to terminate would more often ensure that the future interest goes to the user who values it most. Termination also would maximize the chance of

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[244] Merges, *supra* note 31, at 2667 (quoting Paul Goldstein).

[245] Merges, *supra* note 183, at 1296–97. The American Society of Composers, Authors and Publishers (ASCAP) is such an institution for sound-recording public-performance licenses. *Id.* at 1295.

[246] Contracting could fail, for example, if individual authors cannot fully internalize the social harms of dilution or if tracking down the authors necessary to contract proves too costly.

wide public distribution, thereby satisfying the core goals of copyright. Entitlements theory also shows that as individual cases deviate from standard fact patterns, the resulting uncertainty as to parties' legal rights would facilitate efficient bargaining more effectively than would a blanket rule. And while problems relating to joint authorship remain, entitlements theory provides useful insights into that debate as well.

Courts and legislators should turn to entitlements theory to shine a light on termination of transfers in sound recordings. In so doing, they will be better able to peer into the darkness on the edge of town and find the answers hidden there.[247]

Matthew Vincent H. Noller

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[247] *See supra* note 1.