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The Time Has Come: A Proposed Revision to 17 U.S.C. § 203

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— Note —

THE TIME HAS COME: A PROPOSED
REVISION TO 17 U.S.C. § 203

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INTRODUCTION

An unknown, struggling single mother wrote a novel in 1995.¹ She was eager to get her work published and it is clear now that, at that moment in time, no one could have known that one book would be the beginning of a worldwide phenomenon.² That novel turned out to be the first of the Harry Potter book series, written by J.K. Rowling. In

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1. Bernice Conn & Dan Stone, *Negotiating Contracts Involving Copyrights Subject to Termination*, 37 L.A. LAW 10, 10 (2014).
 2. *Id.*; see James C. Smith et al., *Harry Potter, Law, and Culture: Harry Potter and the Law*, 12 TEX. WESLEYAN L. REV. 427, 429 (2005) (quoting Nancy Gibbs, *The Real Magic of Harry Potter*, TIME, June 23, 2003, at 60) (detailing various statistics regarding the success of the book series, including that it is “the most popular series ever written”).

such a situation, the initial contract entered into by the author of the work and the publishing company could in no way adequately reflect the actual value of the work, as no one could have predicted Harry Potter's immense success. This is exactly what 17 U.S.C. § 203, the copyright termination provision, was designed to remedy. This provision recognizes that there is an inherent valuation problem in contracting before a work has been subjected to the market and its value more accurately determined.³ Such a situation typically results in authors being inadequately compensated for their work and, thus, the provision gives authors a "second bite of the apple" by providing them the ability to terminate these contracts and regain their copyright interests in the work.⁴ Ultimately, termination allows authors the opportunity to recapture some of the work's value.

As a general principle, copyright law protects "original works of authorship fixed in any tangible medium of expression,"⁵ and this protection lasts, in most cases, for the author's life plus seventy years.⁶ The fundamental policy objectives behind copyright law are to encourage artistic creativity and innovation while, at the same time, providing benefits to authors for their work, and enabling society to gain access to their work.⁷ For the most part, copyright law has been able to accomplish these goals. However, it is important to recognize that "copyright law as we know it 'on the books' is not exactly how copyright law operates in practice."⁸ And historically, "[s]ome of the most seminal developments in copyright law have been driven by technological change."⁹

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3. H.R. REP. NO. 94-1476, at 124 (1976).
 4. Mark Avsec, Comment, *Comment: Copywrongs Will Not Make Copyright*, 53 CASE W. RES. L. REV. 723, 729 (2003).
 5. 17 U.S.C. § 102(a) (2012).
 6. *Id.* § 302(a).
 7. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (explaining that copyright law is "intended to motivate the creative activity of authors . . . and to allow the public access to the products of their genius" and the reward to the author is also a consideration); see also Elissa D. Hecker, Comment, *Comment: Understand and Respect the Copyright Law: Keep the Incentive to Create*, 53 CASE W. RES. L. REV. 741, 742 (2003) (explaining the importance of compensating the author or he will not be able to create because he cannot afford to).
 8. Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1461 (2008).
 9. *Matthew Bender & Co. v. West Pub. Co.*, 158 F.3d 693, 710 (2d Cir. 1998) (Sweet, J., dissenting). See also Avsec, *supra* note 4, at 731 ("[T]echnology has again forced us to rethink copyright law. But new technology, including Gutenberg's printing press, has always forced society to do that periodically. The Internet and digital technology have forever changed the entertainment business, that is for sure."); *Commonwealth v. Serge*, 896 A.2d 1170, 1176 (Pa.

The copyright interest in a work “vests initially in the author,”¹⁰ but such interests are also easily transferrable.¹¹ Generally, copyright law only protects the interests of the copyright *holder*, which in many cases is not the actual *author* of the work. However, beginning in 2013, authors have been able to reclaim copyright interests that they had once contracted away; and Section 203 of the Copyright Act,¹² known as the termination provision,¹³ has enabled them to do so.¹⁴ Not only have authors exercised their rights under this provision, they have also been taken to court over it—and won.¹⁵

The termination provision is important from a policy perspective in terms of author rights; however, given the current state of affairs in the copyright-based industry¹⁶ due to the Internet and digital technologies, the provision, as written, causes unintended negative effects for authors, the industry,¹⁷ and society. The major issues stem from the overbroad

2006) (“With each technological advancement, the practice of law becomes more sophisticated and, commensurate with this progress, the legal system must adapt.”).

10. 17 U.S.C. § 201(a).
11. *Id.* § 201(d)(1). *See id.* § 101 (“A ‘transfer of copyright ownership’ is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including nonexclusive license.”).
12. The Copyright Act of 1976 currently governs copyright law. All references to the “Copyright Act” throughout this Note refer to the Copyright Act of 1976 and any amendments made since its adoption.
13. All references in this Note to “Section 203” or the “termination provision” refer to 17 U.S.C. § 203.
14. This provision was introduced in the 1976 Copyright Act, of which Title 17 of the United States Code governs copyright. Section 304(c) of the Act also contains a termination provision but is specifically for works created prior to 1978, whereas the focus of this Note will be on Section 203 governing works created in 1978 or later. *See* 17 U.S.C. § 304(c); *Id.* § 203.
15. *E.g.*, *Scorpio Music (Black Scorpio) S.A. v. Willis*, No. 11cv1557 BTM(RBB), 2013 WL 790940 (S.D. Ca. May 7, 2012) (holding that a joint owner who separately transferred his interest could terminate that grant).
16. Copyright-based industries are books, music, motion pictures, radio and TV broadcasting, computer software, newspapers, periodicals, and journals. *See* STEPHEN E. SIWEK, INT’L INTELLECTUAL PROP. ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2014 REPORT (2014) (analyzing the effect of the core copyright industries on the U.S. economy); *see* ECON. & STATISTICS ADMIN., INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: INDUSTRIES IN FOCUS 31 (2012) (listing copyright-intensive industries).
17. For the purposes of this Note and to simplify matters, the “industry” means the entity to which the author has contracted away his copyright interest—the copyright holder. For example, in the context of the music industry, the industry would be the record label; in the context of the publishing industry,

inalienability of the provision and the far too expansive notice requirement.

In terms of the industry, there have been recent technological developments enabling, among other things, the immediate access to and easy distribution of copyrighted materials, all of which occurred after the enactment of Section 203 and fundamentally transformed the copyright-based industry. The industry is trying to adapt to the new, digital environment that has completely changed the nature of its business and resulted in declining sales and profits.¹⁸ In addition, the industry now must worry too about losing the copyright interests in some of its older, successful works, works upon which these industries are now disproportionately more dependent.¹⁹

Additionally, in respect to the author, although the termination provision is beneficial to authors' rights in general, it may put the author in a difficult initial bargaining position, which was definitely not its intent.²⁰ Section 203's statutorily imposed thirty-five-year term is taken into account in the determination of the initial deal, whether or not that is what the parties would want. The termination provision prevents the industry from purchasing the full rights for the life of the copyright, as was possible prior to Section 203's enactment. This is because no matter what, authors will be able to terminate the agreement in thirty-five years, well before the life of the copyright ends. As these grants are not—and cannot be—full grants of the author's copyright interest in the work, they will not be compensated as such. The industry knows that it will inevitably lose the copyright interest in the work, and this makes it even more important for the industry to get the most out of its investment while it can, meaning that authors will ultimately receive worse deals as a result of the inalienability of this provision.²¹

Along the same lines, due to the disproportionate bargaining situation, the industry is in a position to force the work into the category of work made-for-hire, an exception to termination.²² The industry can

the industry would be the publishing company; and in the context of the motion picture industry, the industry would be the production company or film studio.

18. *See infra* Part I.

19. *See infra* Part I.

20. *See* H.R. REP. NO. 94-1476 at 124 (“A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited.”); *infra* Part II.B.

21. *See* Stella Brown, *It Takes a Village to Make a Difference: Continuing the Spirit of Copyright*, 12 NW. J. TECH. & INTELL. PROP. 129, 147 (2014) (explaining that music entities “may negotiate even lower-paying royalties and less favorable deal points”).

22. 17 U.S.C. § 203(a) (2012); *see infra* Part III.B.

accomplish this by either changing the parties' arrangement to reflect that of an employer-employee relationship or by conditioning the production of the work on the author agreeing in writing that the work be made-for-hire, a potential tactic only if the work falls within one of the statutorily enumerated categories.²³ Another tactic to accomplish this goal without fundamentally restructuring the relationship is that the industry is likely to take more control of the work from the beginning, and basically quell the author's creativity in the process, in an attempt to have the work qualify as made-for-hire under agency principles.

And finally, there are significant risks that authors may have their anticipated interest in the work diminished through the industry's use of derivatives. Derivatives, like works made-for-hire, are also exempt from termination and, therefore, the industry can use the derivatives to continue to compete with the author's work even after termination.²⁴ The industry might also make the work widely available, in which case the value of the interest in the terminated work can be potentially significantly diminished²⁵—just as the value has already been diminished through piracy.

Copyright law also has vast impacts on society as a whole. Certainly, copyright effects society from an economic perspective, but copyrighted material also has broad effects on the average person's everyday life. For example, it has been estimated that, by 2015, the average American will consume over fifteen hours of media each day.²⁶ And copyright law directly affects a person's access to and enjoyment of these types of works. Therefore, copyright law has to take this reality into account not just when determining what the law's objectives are and what the law says—but also in how it operates.

Due to its unintended negative effects on authors, the industry, and society and, as a result, its failure to accomplish the purpose of having such a provision in the first place, this Note argues that Section 203 should be revised. The proposed solution limits the broad language that makes the statute inalienable to situations in which the purpose of the provision would be furthered and narrows the statute's far too expansive notice requirements. This revision takes into account the nature of the industry in terms of risks and the recent technological developments by upholding the ideals of freedom of contract and attempting to cure the various issues surrounding anticipatory termination. Part I of this Note provides an overview of how the copyright-based industry operates today through an economic analysis of the mechanics that drive

23. 17 U.S.C. § 101; *see infra* note 90 and accompanying text.

24. *See infra* Part III.C.

25. *See infra* Part III.D.

26. JAMES E. SHORT, HOW MUCH MEDIA? 2013 REPORT ON AMERICAN CONSUMERS 7 (2012) (taking into account both traditional and digital media in its calculations).

this area of the market. Part II examines the current copyright law governing termination, including Section 203's key elements, the intent behind the provision, its exceptions and limitations, and how an effective termination would occur. Part III discusses some realistic scenarios and the negative implications the provision may have in these common situations. And finally, Part IV suggests a revision to Section 203 that reflects these practical considerations.

I. THE COPYRIGHT-BASED INDUSTRY

The copyright termination provision applies to all copyrighted works²⁷ except derivative works and works made-for-hire.²⁸ Before understanding the specific details of the provision, it is important to understand the operational framework of a copyright-based industry. A copyright-based industry is one in which its "primary purpose is to create, produce, distribute or exhibit copyright[ed] materials."²⁹ Most copyright-based industries, including the music industry, the book publishing industry, and the motion picture industry,³⁰ operate in a similar manner—they essentially rely exclusively on copyright grants from authors or directly developed copyrighted materials that are then delivered to an audience.³¹

Historically, technological changes have forced revisions to copyright law in order to better align copyright's fundamental goals with the law in light of such changes.³² Due to recent technological developments, including the expansion of the Internet and the now primarily digital nature of copyrighted material, these industries have been changed forever.³³ Such advancements now provide practically immediate

27. The Act lists eight broad categories that are protected by copyright: literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; architectural works; and sound recordings. 17 U.S.C. § 102(a).

28. *See id.* § 203; *infra* Part II.C.

29. SIWEK, *supra* note 16, at 5.

30. *See supra* note 16 and accompanying text.

31. ECON. AND STATISTICS ADMIN., *supra* note 16, at 32.

32. *See* Kevin M. Lemley, *The Innovative Medium Defense: A Doctrine to Promote the Multiple Goals of Copyright in the Wake of Advancing Digital Technologies*, 110 PENN. ST. L. REV. 111, 112 (2005) (listing various advancements in technology throughout history that have impacted changes in copyright law, including computers, VCRs, Xerox machines, photographs, blank cassette tapes, musical instruments, writing instruments, and paper).

33. *See* Matthew C. Mousley, *Peer-to-Peer Combat: The Entertainment Industry's Arsenal in Its War on Digital Piracy*, 48 VILL. L. REV. 667,

access to, and distribution of, copyrighted materials, not to mention the ease of infringement upon such works.

Prior to 1999, copyrighted materials such as music, movies, and books were largely physical goods built on a “distribution chain from manufacturer to retailer to consumer;” but now, it’s clear that digital distribution and file-sharing have turned that business model on its head.³⁴ The industry must now adapt or struggle to survive in light of these developments in technology.³⁵ And the fact “[t]hat this revolutionary technology [has] created upheaval in copyright law is well-known.”³⁶

Generally, the Internet has made it much more difficult to profit from copyrighted material for both the author and the industry.³⁷ Whether this is due to piracy³⁸ or the fact that the industry has been

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- 669–75 (2003) (discussing the impacts on the software industry, the recording industry, and the motion picture industry); Avsec, *supra* note 4, at 731.
34. Casey Rae-Hunter, *Better Mousetraps: Licensing, Access, and Innovation in the New Music Marketplace*, 7 J. BUS. & TECH. L. 35, 35 (2012) (speaking directly about the music industry); see Matthew Fagin et al., *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 490 (2002) (“The major labels’ historical dependence on high margins in the sale of physical music ‘products’ is basically incompatible with the economics of digital distribution.”); Mousley, *supra* note 33, at 667 (“The entertainment industry has employed, is employing and is looking to employ various methods to protect more efficiently its intellectual property rights in a world that is largely tolerant of copyright infringement.”).
35. See Steven Bolanos, Note, “*Knock, Knock, Knockin’ on [Congress’s] Door*”: *A Plea to Congress to Amend Section 203 of the Copyright Act of 1976*, 41 W. ST. U. L. REV. 391, 401 (2014). An attempt to adapt to the digital marketplace has occurred through digital downloads from iTunes, and services like Pandora or Spotify. Record labels negotiate licensing fees directly with these services and this new business model has allowed for the adjusted dissemination of copyrighted content. See *id.* However, the effect remains that if the label loses its copyright to the licensed song, it is unclear what will happen with the standing licensing contract with these services and ultimately might result in consumers losing their access to these songs through these services. See *id.*
36. Fagin et al., *supra* note 34, at 454 (discussing peer-to-peer technology such as Napster and its equivalents).
37. See Abdullahi Abdullahi, Note, *Termination Rights in Music: A Practical Framework for Resolving Ownership Conflicts in Sound Recordings*, 2012 U. ILL. J.L. TECH. & POL’Y 457, 472 (2012) (noting the music industry’s difficulty in adapting to the digital age); Sara Karubian, Note, *360° Deals: An Industry Reaction to the Devaluation of Recorded Music*, 18 S. CAL. INTERDISC. L.J. 395, 398 (2009) (providing a table reflecting record sales from 1997–2006); see also Fagin et al., *supra* note 34, at 463 (noting that “especially since 1999, music has been widely distributed without copyright owners’ authorization and certainly against their wishes”).
38. See e.g., *Scope of the Problem*, RECORDING INDUSTRY ASS’N OF AM., http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-

unsuccessful in its attempt to adapt to the new digital environment remains a heated debate—a debate beyond the scope of this Note.³⁹ Even if consumers are not pirating copyrighted materials, the industry might simply be making less money because consumers are now able to purchase one song at a time instead of being forced to purchase an entire album at once, or download a movie onto their computer for less money than purchasing the physical DVD.⁴⁰

No matter the cause, it seems that the decline in sales revenue is leaving the industry “disproportionately dependent” on sales from its older, successful works.⁴¹ And this means that this new “landscape will likely be profitable only to those entities that have direct ownership and control of copyrighted works.”⁴² Under these circumstances, the use of an author’s right to terminate may have far greater impacts than it might have prior to these developments.

scope-of-the-problem [<http://perma.cc/E6JX-H959>] (last visited Oct. 13, 2015) [hereinafter RIAA] (painting a grim picture as to just how much the unauthorized downloading of music has hurt the industry and reporting that since 1999, “music sales in the U.S. have dropped 53 percent, from \$14.6 billion to \$7.0 billion in 2013,” and that in 2009, only thirty-seven percent of music was actually paid for).

39. Although the decline in music sales is apparent, and there is significant research on file-sharing, there is still some debate over the degree of file-sharing’s impact. The industry’s concern that customers will not purchase content when it is freely available is a logical one. However, the different methods applied by empirical studies have led to contradictory results. PETER TSCHMUCK, *THE ECONOMICS OF MUSIC FILE SHARING—A LITERATURE OVERVIEW* 1 36 (2010) (providing an overview of each study/approach in which fourteen studies out of twenty-two identify a negative impact of file-sharing on music sales, five studies see a positive effect, and three studies find no significant impact). For more information regarding the various studies, see *id.*; Stan J. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1, 1 (2006) (evidencing the negative impact of file-sharing on record sales); Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, 38 (2007) (concluding that there is no statistically significant effect of file sharing on sales); FELIX OBERHOLZER-GEE & KOLEMAN STRUMPF, *FILE SHARING AND COPYRIGHT* 19 (2010) (reevaluating their prior conclusion and now suggest that “no more than 20% of the recent decline in sales is due to [file] sharing”); see generally WENDY CHI, *DOES FILE SHARING CROWD OUT COPYRIGHTED GOODS? EVIDENCE FROM THE MUSIC RECORDING INDUSTRY* 1 (2008) (suggesting that the overall effect is positive and due to the sampling effect).
40. See *supra* note 34 and accompanying text.
41. Larry Rohter, *Record Industry Braces for Artists’ Battles Over Song Rights*, N.Y. TIMES (Aug. 16, 2011), <http://www.itp.nyu.edu/~mp51/commlab/nytimes-springsteeneligible.pdf> [<http://perma.cc/2ZD2-E3JB>] (specifically referring to the music industry).
42. Abdullahi, *supra* note 37, at 472 (discussing the music industry context in particular).

Just as it has in the past, copyright law must adapt to reflect these technological changes, the resulting societal uses, and its impacts on the industry in order to effectively accomplish its fundamental goals.⁴³ These industries add value in a way that greatly affects the United States economy⁴⁴ and, therefore, it is important to understand the current impacts of a copyright law that was enacted in a time when the effects of these technologically based issues could not have been even marginally appreciated.⁴⁵ The industry is trying to adjust its business model to survive in this new digital market, and it must now also worry about losing the copyright interests in some of its most successful works—a problem it has never faced before. Consequently, in light of the current circumstances under which these copyright-based industries now operate, it is clear that the law needs to be revised.

Taking these present issues into account, an author's use of his termination rights will have far greater effects than the legislature could have meaningfully appreciated at the time of its enactment. These copyright-based industries are now more dependent than ever on sales from their older, successful works and, as a result, much more heavily impacted by an author's use of his termination right.⁴⁶ The reality is that these industries may not survive the loss of such copyrights, and the threat of such losses are now constantly looming in the background as termination rights have now begun to be exercised by authors and challenged by the industry through litigation.

Although these issues are broadly applicable to the copyright-based industries as discussed, it is helpful to look specifically at one industry as a way to illustrate the economics of the copyright-based industry and the impacts of the termination provision. In the music industry context, for example, record labels are essential to an artist's success. Artists rarely, if ever, make it on their own.⁴⁷ The backing of a record

43. See *supra* notes 9, 32 and accompanying text.

44. See SIWEK, *supra* note 16 (reporting that these copyright-based industries add \$1.1 trillion in value to the United States economy, make up nearly seven percent of the United States economy, and employ more than 5.5 million people).

45. The Copyright Act of 1976 went into effect in 1978. Admittedly, there has been some more recent, although unsuccessful, consideration of these issues at least in the music context. In 1999, Congress adopted and then repealed, less than a year later, an amendment including sound recordings on the list of works made-for-hire under 17 U.S.C. § 101, thereby exempting sound recordings from termination. See Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 375 (2002) (explaining the prior sound recording exemption from termination).

46. See Rohter, *supra* note 41.

47. Bolanos, *supra* note 35, at 396–97 (citing Ian Youngs, *Music Stars 'Still Need Labels'*, BBC NEWS (Mar. 9, 2010), <http://news.bbc.co.uk/2/hi/entertainment/8557734.stm> [<http://perma.cc/LW6D-9ZTX>]).

label used to be fundamentally essential to making an artist's career and still heavily influences the actual value of the copyrighted works that are created.⁴⁸ An artist would be unlikely to reach a relatively decent level of success without the power in distribution and marketing that a record label brings to the table.⁴⁹ In addition to fronting nearly all of the costs associated with making the album,⁵⁰ record labels heavily invest money and expertise in the artist and his work through development and promotion.⁵¹ There is no formula as to what makes a hit record or what makes a star. The record label fronts the cash,⁵² and essentially takes all of the risks, with the hopes that the work will be successful, and thereby allow the label to collect on its investment.⁵³

This manner of operation is primarily the same for the other copyright-based industries, whether it be book publishing or motion pictures, to name a few. In the context of the motion picture industry, "[i]t is not all that uncommon for a film to cost a studio \$100 million to produce with absolutely no guarantee that the film will be a box office success. The studio alone bears this risk."⁵⁴ The economics of the industry are simply that, at least ideally, the hits make up for the flops,⁵⁵ and there is significant reliance on revenue generated from older,

48. *See id.* at 397; *infra* Part IV.A.

49. *See* Bolanos, *supra* note 35, at 397 (explaining that "[w]ithout the distribution and marketing power of record labels, a musician would be unable to reach the same success or any success at all, even if that musician had created a musical masterpiece"). However, given the new avenues of distribution available to authors via the Internet, the industry is less essential than it has been in the past. *See* Tyrone Scott, *Saving the Modern Record Industry: Partnership and Fiduciary Duty Between Labels and Artists*, ENT. & SPORTS LAW., June 2013, at 1, 30 (citing examples of artists who have reached great success without major label support such as Macklemore, Ingrid Michaelson, and Ani DiFranco); *infra* Part IV.A.

50. Bolanos, *supra* note 35, at 397 (stating that these costs include: studio costs, hiring additional musicians, engineers, and producers).

51. *Id.*

52. This investment adds up to billions of dollars every year. *Id.*

53. *See* Brian Day, *In Defense of Copyright: Record Labels, Creativity, and the Future of Music*, 21 SETON HALL J. SPORTS & ENT. L. 61, 63 (2011) ("[I]t is estimated that only 10-20% of artists are commercially successful, and that only 5% of new artists will ever generate a profit great enough to cover the losses of all the other unsuccessful artists.").

54. Kathleen M. Bragg, *The Termination of Transfers Provision of the 1976 Copyright Act: Is It Time to Alienate It or Amend It?*, 27 PEPP. L. REV. 769, 801-02 (2000) (citation omitted).

55. *See* Bolanos, *supra* note 35, at 398 (noting that record labels take on the risk of investing in music because of the prospect of making a profit); Ian Youngs, *Music Stars 'Still Need Labels'*, BBC NEWS (Mar. 9, 2010), <http://news.bbc.co.uk/2/hi/entertainment/8557734.stm> [<http://perma.cc/Q3YL-R8RQ>] ("[L]abel executives point out that they take the risk and

successful works to finance the investment needed to fund the next new project.⁵⁶ “Without that revolving door of investment and revenue, the ability to bring the next [project] is diminished—as is the incentive for the [new author] to make [the new work].”⁵⁷ Diminished incentives are highly problematic as incentivizing new works is a seminal underlying purpose of copyright law.

Another aspect inherent in copyright-based industries is that there is no way to properly predict the commercial value of the work at the time the agreement is entered into, as there is no way to know whether the work will be successful and to what degree. Accordingly, a successful work results in the author being undercompensated. This seems to have been the legislature’s focus when it enacted Section 203.⁵⁸ At the same time, however, that very same work could be disappointingly unsuccessful, in which case the author would end up being overcompensated.⁵⁹ This is the basic foundation of operation—high risk, high reward.

There are also counteracting incentives imbedded in these transactions. The author has an incentive to give up his copyright because he is unable to bear the risks and costs primarily associated with the production and distribution of his work.⁶⁰ At the same time, the industry has an incentive to take on these risks and costs because they will be assigned the author’s copyright interest in the work.⁶¹ Due to the fact that, at the time these transactions are entered into, there is no way for either party to know the value of the work, both sides are taking risks.⁶²

As will be further discussed in Part II, Section 203 attempts to address the legislature’s concerns for authors by encouraging them to take those initial risks by compensating them for it down the road. This is accomplished by giving artists the right to essentially terminate

recoup their investment in fewer than one in five cases.”); Day, *supra* note 53, at 62 (“[R]ecord labels provide upfront capital, and diversify their assets in an effort to recoup their expenditures and earn a profit from a small percentage of successful investments.”).

56. RIAA, *supra* note 38.

57. *Id.*

58. See H.R. REP. NO. 94-1476 at 124 (1976); *infra* Part III.B.

59. In terms of overcompensation, it is by no means that the author receives a windfall of any real magnitude. Instead, it is simply that the author ended up in a better position than the industry did in relation to the lack of success of the work, taking into account the industry’s production and distribution expenditures compared against the resulting profits from the work.

60. Bolanos, *supra* note 35, at 398.

61. *Id.*

62. See *id.* at 397–98 (explaining that these transactions induce artists into giving up their copyrights and incentivize record labels to take on risks).

a bad contract, although they do not afford the industry that same right.⁶³ These are mutually beneficial exchanges in which one side will ultimately end up inadequately compensated due to the nature of these contracts—but only one side has the power to terminate if they made a bad deal.⁶⁴ The termination provision is a departure from the general operation of copyright law, which affords its protections to the copyright *holder*, by providing the *author* with this exclusive right. And it is a further departure from the general operation of contract law by allowing authors to break their otherwise legally binding contracts.

II. THE CURRENT LAW

A. *The Termination Provision*

Section 203 of the Copyright Act of 1976, which took effect in 1978, governs the termination of transfers and licenses assigned by authors for works created after 1978.⁶⁵ Essentially, it allows the author to break his contract with the party to whom he licensed or transferred his interest in the copyrighted work. Section 203 provides that such licenses or transfers may be terminated after thirty-five years with advance notice, subject to a few exceptions.⁶⁶ Thus, the first time termination rights could have been exercised was 2013 and, as a result, there have been very few published cases providing guidance as to how the courts will interpret the termination provision.

B. *The Intent Behind the Right to Terminate*

The House of Representatives Report, discussing the 1976 Copyright Act, specifically elaborates on the legislature's considerations regarding certain sections of the Act, including Section 203.⁶⁷ In its discussion of Section 203, the Report explains that “[a] provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it

63. *See id.* at 398. (explaining that “it would be absurd to grant record labels the power to terminate or nullify an assignment agreement and demand repayment of all costs and losses from the artist if a particular work is unsuccessful,” even though both sides are essentially taking similar risk in regard to the valuation of a work).

64. *See id.* This Note is by no means arguing that the industry should too have a right to terminate. It is just simply highlighting the nature of these contracts in terms of risks taken by both parties.

65. 17 U.S.C. § 203 (2012). The statute has no retroactive effect and only affects the grants of works after January 1, 1978. H.R. REP. NO. 94-1476, at 125 (1976).

66. 17 U.S.C. § 203.

67. *See generally* H.R. REP. NO. 94-1476.

has been exploited” and that “Section 203 reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.”⁶⁸

Although the legislature does not expand on what “the objectives of the copyright law” are, fundamentally, the goal of copyright protection is to encourage authors to create and share their created works with society.⁶⁹ And the termination right aligns with these objectives.⁷⁰ More specifically, termination provides an incentive for authors to enter into contracts in the early stages of their work by providing some opportunities to remedy the situation if it turns out that the author entered into a bad contract. A bad contract, from the author’s perspective, would be one in which the work ended up being more successful than either party anticipated at the time the contract was entered into and, therefore, one for which the author was undercompensated. The termination provision provides the author with the opportunity to recapture some of the actualized value of his work. It adjusts for the author’s initial undercompensation by granting the opportunity to regain his copyright interest in the work with the assumption that he can then renegotiate a better deal for himself.

Even more profoundly, termination provides opportunities for authors beyond purely economically driven motives.⁷¹ The termination provision gives authors the chance to reevaluate if they are happy or not with the use of their work. It can allow authors the opportunity to change the direction of the work to better align with their vision or values. Without termination, the author would otherwise be unable to make such changes happen as the copyright holder may do with the work as he wishes. Even if changing the use of the work is not the author’s goal, termination allows the author a chance to renegotiate with the industry, and, this time, the author will be in a much stronger position—as the value of the work is better understood than it was initially—so that he can be more adequately compensated for the work by obtaining a better, fairer contract this time.

On the other hand, the industry purchaser and society, the consumers, have had a long enough period of time—thirty-five years—to reap their own benefits from the work. The benefits for the industry are that if the work does well, it can recapture its investment and, of course,

68. *Id.* at 124.

69. *Id.*; Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the “Inalienable” Right to Terminate*, 62 FLA. L. REV. 1329, 1349 (2010).

70. *Id.* (“[T]ermination rights help fulfill the utilitarian goal of dissemination of creative works.”).

71. For instance, absent a termination provision, if the author does not want his song to be used in advertisements or morally objects to the use of the work, there is nothing the author can do to stop such use.

make a profit. The benefits to society are that the work has been distributed to consumers, affording widespread access to the work—a fundamental objective of copyright law.

It is also important to note that the industry is not going into these contracts blind. They can in no way claim to be surprised thirty-five years down the line when the author decides to exercise his right to terminate. The industry knows that there is this thirty-five-year time limit when it enters into these contracts, and this is certainly taken into account when making the initial deal with the author.⁷²

The overarching difficulty faced by deals involving copyrighted works is in estimating the work's value before the market is able to respond and determine its commercial value.⁷³ This is the nature of these kinds of contracts—they are embedded with risks *for both sides*—as neither party has such information.⁷⁴ At a glance, there is obvious appeal behind these fairness notions, but further understanding of the copyright-based industry and how the provision operates in practice, as will be further discussed in Parts III and IV, must be considered in determining whether or not the provision is accomplishing its intended purpose.

C. The Exceptions & Limitations

There are a few instances in which the author of a work would not be afforded the right to terminate. Excluded from the exercise of an author's right to terminate are works that qualify as works made-for-hire⁷⁵ as well as derivative works completed before the termination date.⁷⁶ Additionally, the right is limited by the fact that it cannot be contracted around or waived in advance—it is an absolute or inalienable right.⁷⁷

72. See *infra* Part IV.A; Brown, *supra* note 21, at 147.

73. Loren, *supra* note 69, at 1346.

74. See *supra* Part I.

75. 17 U.S.C. § 203(a) (2012).

76. *Id.* § 203(b).

77. *Id.* § 203(a)(5). In addition to the exceptions discussed in this Note, the termination right cannot be inherited, and termination only applies to rights under the United States Copyright Act. *Id.* § 203(b)(5). Depending on the situation, this limitation regarding rights under other laws could have significant implications on the ultimate benefit of termination. For instance, if copyrighted works are primarily distributed internationally, authors will be without remedy to stop such foreign distribution of their work—nor regain any of that value.

1. Works Made-for-Hire

Section 203 specifically excludes works created as “made-for-hire” from the scope of termination.⁷⁸ The made-for-hire doctrine serves to identify which party—the employer or the original author—owns the copyright interest in the work.⁷⁹ For copyright purposes, if a work qualifies as a work made-for-hire, the employer or hiring party is considered to be the author and owner of the work, not the employee who actually created the work.⁸⁰ The author for statutory purposes is the employer. Therefore, if a work is determined to be a work made-for-hire, it effectively bars the actual author’s right to terminate—as the employee has no claim to the work.⁸¹

For guidance as to what constitutes a work made-for-hire, 17 U.S.C. § 101 provides a definition detailing two categories of works that would qualify as made-for-hire. However, it is not an entirely straightforward determination and requires a court’s thoughtful, fact-specific analysis. The first type of work made-for-hire consists of a work that a person creates during his time as an employee within the scope of his employment.⁸² This is governed by common law agency principles.⁸³ Although the statute itself does not give much guidance as to what constitutes an employee or his scope of employment, the Supreme Court, in its application of Section 101, has addressed this issue and set forth a list of factors relevant to such a determination.⁸⁴ “In determining whether a hired party is an employee under the general common law of agency, [courts] consider the hiring party’s right to control the manner and means by which the product is accomplished.”⁸⁵ The factors include:

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

78. *Id.* § 203(a).

79. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 137–38 (2d Cir. 2013).

80. *Id.*

81. *See id.* at 137 (“[T]ermination rights . . . do not exist with respect to works made for hire.”).

82. 17 U.S.C. § 101.

83. *Cmt’y. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989).

84. *See id.* at 751–52 (interpreting 17 U.S.C. § 101).

85. *Id.* at 751.

party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.⁸⁶

An example of a work made-for-hire in this respect would be an artist employed by a publishing company as an illustrator. The illustrator receives both a fixed wage or salary and other benefits from the company. He is also reimbursed for expenses and overhead regarding his drawings, and the publisher provides directives and specifies the desired results for the work. This is a typical employer-employee relationship and, therefore, the artwork made within the normal course of such employment would qualify as work made-for-hire under the first part of Section 101.⁸⁷ As a result, in this scenario, the publishing company owns the copyright in the created work, not the illustrator, and, accordingly, the illustrator would not have a termination right.

However, this is not the typical relationship in copyright-based industries. Authors are rarely formal employees.⁸⁸ The form of payment carries considerable weight in this determination, and when an author receives payment through royalties, it generally weighs against a finding of an employment relationship.⁸⁹

Alternatively, under the second part of Section 101, a work could still be considered a work made-for-hire if it is: (1) specially ordered or commissioned; (2) the work falls within one of the statutorily enumerated categories;⁹⁰ and (3) the parties agree in writing to that designation.⁹¹ Essentially, the author is not an employee, rather he is an independent contractor, but the work can still qualify as made-for-hire under this provision.

For example, let us assume that the illustrator in the prior example was not a formal employee of the publishing company, but instead a freelance illustrator. He was neither paid a fixed wage or salary, nor reimbursed for expenses or overhead in creating the drawings. In addition, the illustrator set his own hours and worked from his home. When

86. *Id.* at 751–52.

87. *See* *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 137–38 (2d Cir. 2013).

88. *See* Catherine A. Kling, Note, *The Work Made for Hire Doctrine Under the Copyright Act of 1976: Employees, Independent Contractors and the Actual Control Test*, 22 IND. L. REV. 619, 620 (1989) (explaining that authors have characteristics of both employees and independent contractors).

89. *Marvel*, 726 F.3d at 140.

90. Section 101 specifies categories of works that would satisfy this section: “a work specially ordered or commissioned for use as a contribution to a collective work; as part of a motion picture or other audio visual work; as a translation; as a supplementary work; as a compilation; as an instructional text; as a test; as an answer material for a test; or as an atlas.” 17 U.S.C. § 101 (2012).

91. *Id.* (stating that parties must “expressly agree in a written instrument signed by them”).

the publishing company needed a particular piece of artwork, they would contact the illustrator and order or commission him to produce what they needed at that time. The publishing company would then pay the illustrator a per-picture rate for the completed work.⁹² As a result, the illustrator would not qualify as an employee under the first part of Section 101, but since the work was specially ordered or commissioned for use as a contribution to a collective work (one of the specifically enumerated categories), such as a magazine or newspaper, a work made under these circumstances would qualify as a work made-for-hire under the second part of Section 101 so long as the parties agree in writing that the work is made-for-hire.⁹³

Accordingly, just as in the employer-employee scenario, the publishing company would own the copyright in the work, not the illustrator.⁹⁴ The most relevant of the enumerated categories⁹⁵ in the context of the copyright-based industry are works specially ordered or commissioned for use as a contribution to a collective work,⁹⁶ part of a motion picture or other audio visual work, or a compilation.⁹⁷

If the work qualifies under either approach as a work made-for-hire, the author does not own the copyright in the work—in fact, the author never did. Instead, those rights initially vest with the employer or commissioner. Logically, it then becomes clear as to why made-for-hire works are exempt from the termination provision—the author never had any interest to transfer or grant and, thus, there is nothing to revert back to the author through termination. The termination provision applies to copyrights that were granted or transferred from the author to another party and the provision allows them to regain their previous

92. *See Marvel*, 726 F.3d at 125–26 (illustrating Marvel’s arrangement with a freelance illustrator).

93. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 731 (1989) (finding the author to be an independent contractor, but the work was not made-for-hire under the second part of Section 101 because sculptures are not one of the nine enumerated categories and the parties did not agree in writing that the work would be made-for-hire).

94. *See id.* at 738 (explaining that the Copyright Act of 1976 provides the employer or hiring party with ownership rights over the copyright, unless otherwise specified in a written agreement).

95. *See supra* note 90 and accompanying text.

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

97. *See id.* (“A ‘compilation’ is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”).

rights. Because authors in a work made-for-hire scenario never actually had any rights to the work to begin with, they likewise have no termination rights. Without this exception, the employer or commissioner—the author in terms of the law—would be granted the termination right. Such a result simply does not align with the intent behind the provision⁹⁸ and, therefore, works made-for-hire are not eligible for termination.

2. Derivative Works

Another exception to the termination right is in respect to derivative works.⁹⁹ Section 101 defines a derivative work as “a work based upon one or more preexisting works.”¹⁰⁰ Although an author can terminate the right to the original work, the creator of the derivative work retains the right to use any derivative work that was sourced from the original prior to termination.¹⁰¹

Derivative works are ubiquitous. Rarely is a work ever wholly original anymore.¹⁰² That is not necessarily a bad thing, it is simply that authors are inspired by the works around them and build upon them to create new works and new ideas, which in turn benefits society.¹⁰³ Borrowing from and building upon an existing work “is at the heart of what we know as progress.”¹⁰⁴ And this is the essential purpose of copyright law—incentivizing authors to make their works publicly available such that others can derive inspiration therefrom and create more works.

For instance, within the music industry, a common derivative work is the use of a sample of another artist’s work. A sample is when one artist uses an existing copyrighted work that he may manipulate and

98. *See supra* Part II.B.

99. *See* 17 U.S.C. § 203(b)(1).

100. *Id.* § 101. Section 101 lists examples of works that would qualify as derivative works:

[A] translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotation, elaboration, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’

Id.

101. *Id.* § 203(b)(1).

102. *See* Deidre A. Keller, *Recognizing the Derivative Works Right as a Moral Right: A Case Comparison and Proposal*, 63 CASE W. RES. L. REV. 511, 512 (2012) (demonstrating how all authors develop works based on existing materials, rather than wholly independent creations).

103. 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 12:1 (2015).

104. *Id.* (quoting Laddie, J.).

then combine with another work, usually his own.¹⁰⁵ One of the most famous modern examples of sampling, and thus a derivative work, is Vanilla Ice's song *Ice Ice Baby*¹⁰⁶ in 1990, which sampled the David Bowie and Queen song *Under Pressure*¹⁰⁷ from 1981.¹⁰⁸ In *Ice Ice Baby*, Vanilla Ice adapted the underlying beat from *Under Pressure* and coupled it with his own rap lyrics to create a new, derivative work—a work entitled to its own copyright protections.¹⁰⁹

There are plenty of derivative works in other copyright-based industries as well. For example, in the motion picture industry, sequels, remakes, and adaptations all qualify as derivative works.¹¹⁰ Take, for instance, Spider-Man. The original film was a derivative work based on the Marvel comic books. The sequels were also derivatives, and the newest version of the franchise, *The Amazing Spider-Man*, and its own accompanying sequels, are further derivatives. Even the Spider-Man Broadway musical was a derivative work. These are not original concepts—the comic book was the original work. The other versions are fundamentally based upon that preexisting work, the comic book, and are thus considered to be derivative works under copyright law.

Section 203's exception regarding derivative works is that a derivative work prepared prior to termination "may 'continue to be utilized' under the conditions of the terminated grant."¹¹¹ For instance, if the author of the Spider-Man comic book terminates¹¹² under Section 203, the publishing company can no longer publish or distribute the comic book. The legislature expressed that this exception was not overly broad because once the grant has been terminated the derivative work could

105. See Bruce J. McGiverin, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1724–25 (1987) (defining "digital sound sampling").

106. VANILLA ICE, *ICE ICE BABY* (SBK Records 1990).

107. QUEEN & DAVID BOWIE, *UNDER PRESSURE* (EMI 1981).

108. Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 HARV. L. REV. 726, 728 n.10 (1992). This is a controversial example as there was much dispute over whether Vanilla Ice had permission to sample *Under Pressure*. *Id.* Without permission, in terms of consent or license, use of another's work would constitute copyright infringement. *Id.*

109. See 17 U.S.C. § 103(b) (2012) ("[T]he copyright in a . . . derivative work extends only to the material contributed by the author of such work . . . and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.").

110. PATRY, *supra* note 103, § 12:9.

111. H.R. REP. NO. 94-1476, at 127 (1976) (quoting 17 U.S.C. § 203(b)(1) (2012)).

112. Termination means that the copyright interest and rights in the work revert back to the author. See *infra* Part II.D.2.

continue to be licensed, but any further derivative rights would be cut off.¹¹³ Accordingly, if the publishing company sold the motion picture rights in the comic book to a movie studio and the studio produced a movie before the author of the comic book exercised his termination right, then the movie studio could still continue to distribute the film after termination. It would not, however, be able to create further derivative movies or other works after termination. This illustrates the typical derivative scenario and Section 203's effect on, and differences between, such pre- and post-termination derivative works.

The derivative exception is practical for the simple reason that a derivative work has its own separate copyright protections and it would be unfair for one author's termination right to extinguish another author's rights in his derivative work. However, as discussed in Part III, since an author must provide between two and ten years advance notice of his intent to exercise the termination right,¹¹⁴ there exists plenty of time to create derivative works prior to termination.

3. Inalienability

Finally, the termination provision explicitly states that regardless of "any agreement to the contrary," all rights granted will revert back to the author.¹¹⁵ This means that the termination right cannot be contracted around or waived in advance—it is an absolute or inalienable right. Even if both parties are competent and wish to exercise their freedom to contract, the legislature has precluded them from so doing. For example, if the contract entered into between the author and the industry stated that the transfer or grant is for the life of the copyright¹¹⁶ and the author agrees that he will not terminate the grant of rights in the future, he may still terminate under Section 203—as such an agreement would be entirely unenforceable.

D. Termination

1. Notice

Instead of being automatic, the legislature made the termination of a grant under Section 203 require the author to serve advance notice that complies with certain guidelines regarding the time frame as well as other specific conditions addressed in the statute.¹¹⁷ Section 203

113. H.R. REP. NO. 94-1476, at 127.

114. See 17 U.S.C. § 203(a)(4)(A) (2012).

115. *Id.* § 203(a)(5).

116. The entire term would be the author's life plus seventy years. *Id.* § 302(a).

117. *Id.* § 203(a); H.R. REP. NO. 94-1476, at 126.

addresses two important dates: the effective date of termination, and the date by which the author must serve advance notice.¹¹⁸

Section 203(a)(3) specifies that termination becomes effective, meaning the grant may be terminated, during the five years following the period of thirty-five years from the contract date.¹¹⁹ Essentially, the date of termination, the effective date, will fall within the five-year window after the grant's thirty-five year period. However, the statute requires advance notice that must be served much earlier—"not less than two or more than ten years" before the effective date.¹²⁰ The legislature gives no explanation for why such a vast amount of notice is desirable and required.¹²¹

2. Effect

If the author fails to exercise his termination right, the grant will continue and be entirely unaffected, and the author will lose the right to terminate.¹²² On the other hand, if the author properly exercises his right to terminate, termination means that ownership of the rights covered by the terminated grant reverts to the author.¹²³

If everything goes smoothly and the author properly terminates, both parties, at the time of termination, have the benefit of hindsight to properly value the work and possibly renegotiate a more appropriate contract, at least in terms of compensation. Terminating is a chance for the author to recapture some of the value for the work, specifically for which he was potentially initially undercompensated, by placing the artist in a better position to negotiate a more appropriate and fair deal.

118. 17 U.S.C. § 203(a).

119. *Id.* § 203(a)(3).

120. H.R. REP. NO. 94-1476, at 126. The legislative history contains examples illustrating the use of such requirements. *See id.* ("Contract for theatrical production signed on September 2, 1987. Termination of grant can be made to take effect between September 2, 2022 (35 years from execution) and September 1, 2027 (end of 5 year termination period). Assuming that the author decides to terminate on September 1, 2022 (the earliest possible date) the advance notice must be filed between September 1, 2012 and September 1, 2020.").

121. *See* H.R. REP. NO. 94-1476.

122. 17 U.S.C. § 203(b)(6) (establishing that unless the agreement provides otherwise, the agreement continues for the term of the copyright).

123. H.R. REP. NO. 94-1476, at 127. In cases of jointly authored works, the terminated grant would revert to everyone who owns termination interests, whether they joined in signing the notice or not. *Id.* Essentially, each author is bound by the action of the majority of authors whether or not each has signed the notice of termination. *Id.* *See also* Scorpio Music S.A. v. Willis, No. 11cv1557 BTM(RBB), 2012 WL 1598043 (S.D. Ca. May 7, 2012) (addressing the multiple-author situation).

The author, however, does not necessarily have to renegotiate with the same party. The author can try to shop around and find a better deal with someone else or even attempt to publish the work on his own. Termination gives the author options, but there is no guarantee that the author will be in a better position after termination. Additionally, the author certainly cannot ignore the very real costs associated with termination and the litigation that will likely follow from the industry challenging such termination, at least initially.

III. THE IMPACTS OF TERMINATION

Given today's economic environment in these copyright-based industries,¹²⁴ if the industry still profits from an older work, it will likely oppose an author's termination.¹²⁵ The industry is struggling and the effects of termination will have major implications¹²⁶—especially since the older, successful works that the industry is now much more dependent on are the same works that the industry is going to lose through termination.¹²⁷ The reality of the industry's circumstances and need to retain these copyright interests cannot be overlooked, and, therefore, the industry is much more likely to challenge an author's termination.¹²⁸ Whether the parties settle or make it all the way through the court system, one thing is for sure—it is going to cost everyone involved a lot of money.¹²⁹ With the vast array of copyrighted works, it is predicted that there will be a “hailstorm of litigation.”¹³⁰

124. *See supra* Part I.

125. Abdullahi, *supra* note 37, at 472.

126. *See supra* note 34 and accompanying text.

127. *See supra* Part I.

128. This is at least a major concern initially. As these relatively new issues make it through the court system, these issues will become clearer. It is more an argument for clarity, and once that is resolved, it is less of a consideration.

129. *See, e.g.*, Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2280 (2013) (stating the cost of litigating a copyright infringement case was estimated between just under \$400,000 to \$2 million, generally due to the fact-intensive nature of copyright cases).

130. John P. Strohm, *Writings in the Margin (of Error): The Authorship Status of Sound Recordings Under United States Copyright Law*, 34 CUMB. L. REV. 127, 130 (2003) (writing in 2003—the first year artists could give notice under Section 203—as the issue becomes ripe, there will inevitably be extensive litigation); *see also* Kevin Parks, *From Ray Charles to “Y.M.C.A.”—Section 203 Copyright Terminations in 2013 and Beyond*, THE LICENSING J., Mar. 2013, at 5 (“[T]hese artists . . . are among the nearly 10,000 authors who have filed notices of termination with respect to specific songs, recordings, or other copyrighted works.”).

*Scorpio Music v. Willis*¹³¹ is the first case in which a court has given authors and the industry some guidance as to its interpretation and application of Section 203.¹³² *Scorpio* dealt with a dispute over multiple musical compositions by the Village People, including the hit song *YMCA*.¹³³ The defendant, a songwriter and original lead singer of the group, transferred his copyright interests concerning the multiple musical compositions to the plaintiffs, music publishers.¹³⁴ In 2011, the artist served the publisher with a notice of termination covering thirty-three compositions.¹³⁵ Approximately six months later, the publisher brought suit challenging the validity of the artist's termination, arguing that the artist had no right to the compositions.¹³⁶ The court held in favor of the artist, dismissed the publisher's complaint, and allowed the termination.¹³⁷

Now that the industry has seen authors win the battle of termination, the reality is that the industry will look for ways to prevent the termination of its more successful copyrighted materials, especially given that the industry has become disproportionately dependent on sales of these works to compensate for changes to the industry.¹³⁸ As one commentator has noted, "[t]o say this decision will send shock waves through the record industry [as] artists [are] seeking to take back their copyrights is an understatement."¹³⁹

It is important to understand what types of action the industry will take in these termination situations and what impacts it will have on doing business in copyright-based industries in the future. The industry is unlikely to stand idly by as it loses its copyright interest in profitable

131. *Scorpio Music S.A. v. Willis*, No. 11cv1557 BTM(RBB), 2012 WL 1598043 (S.D.Ca. May 7, 2012).

132. It is important to note that this is only a district court decision and would not be binding on most courts.

133. *Scorpio Music*, 2012 WL 1598043, at *1.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at *1, *5. A major component of the analysis in *Scorpio* was on the issue of termination in the context of joint authors. This, however, is beyond the scope of this Note. Ultimately, the court held that each co-owner of a joint work is an owner of an undivided interest in the whole, and, therefore, defendant, as a joint author, was able to effectively terminate under Section 203. *Id.* at *3. Plaintiffs withdrew their made-for-hire argument in this case. *Id.* at *5; see also *infra* note 147 and accompanying text.

138. See *supra* Part I.

139. Eriq Gardner, *Village People Songwriter Victor Willis Wins Case over Termination of 'Y.M.C.A.' Rights*, HOLLYWOOD REP. (May 8, 2012 10:32 AM), <http://www.hollywoodreporter.com/thr-esq/village-people-ymca-lawsuit-victor-willis-321576> [<http://perma.cc/7WUX-MS42>] (quoting publicist Linda Smythe).

works. It might instead choose to take things into its own hands and voluntarily cancel the contract in hopes of renegotiating with the author and avoiding Section 203 entirely. The industry might also choose to think long term and take steps to ensure that the work qualifies as made-for-hire and is, therefore, exempt from the reach of the termination provision. Finally, the industry can make strategic use of derivative works to ensure that it retains at least some piece of the copyright even after the author has effectively terminated, or the industry may simply attempt to, or threaten to, devalue the copyright by making it widely available prior to termination.

A. Voluntary Cancellation and Renegotiation

Let us assume a musical artist enters into a contract with a record label. The artist transfers his copyright interest to the label in exchange for the record label fronting all the costs associated with the recording, distribution, and promotion of the artist's album. There is no timeframe contemplated in the contract—absent the termination provision, it would be for the life of the copyright. The record label is, however, aware of Section 203 and knows that it is likely to lose its grant after thirty-five years if the artist exercises his right to terminate. The artist's work ends up being quite successful, enough so that the impact of the loss of the copyright interest would be substantial to the record label's bottom line. In anticipation of this loss, the record label decides to cancel the contract prematurely and take matters into its own hands rather than sit around and wait for the artist to terminate.¹⁴⁰ The record label can cancel the contract at any time prior to thirty-five years¹⁴¹ and that would effectively eliminate the artist's termination right—he would never even be afforded the termination right in the first place.¹⁴²

At this point, you may be wondering, “But the contract is still terminated; does it really make any difference who does the terminating?” The answer is “Yes.” As long as the record label cancels the contract in less than thirty-five years and the parties reinstate it or renegotiate, it can be to the record label's strategic benefit. For instance, if the record label cancelled the contract at the thirty-year mark and the parties renegotiated a contract for another thirty-year term, the record label would have effectively received a sixty-year grant that was not subject to the termination provision at any time because Section 203 does not apply to grants made for less than thirty-five years.

140. See Melville B. Nimmer, *Termination of Transfers Under the Copyright Act of 1976*, 125 U. PA. L. REV. 947, 983 (1977).

141. However, if there was a specific term contemplated in the contract, the industry would have to worry about paying damages in a breach of contract action.

142. Similarly, the record label could also sign agreements of less than thirty-five years to begin with in an effort to avoid termination.

In fact, the legislature explicitly recognized that there is nothing in Section 203 that would prevent the parties from voluntarily agreeing to cancel and renegotiate a new grant.¹⁴³ That does not, however, resolve the looming termination—it merely restarts the clock—causing another termination period of thirty-five years to begin to run.¹⁴⁴ Consequently, the record label avoids the termination, but would have to do so in perpetuity for this to be an effective strategy to circumvent termination entirely. Furthermore, the effectiveness of this strategy is completely contingent on the artist actually entering into another (or several more) contracts with the same record label. Overall, such a strategy would be very risky for the record label and might only be able to delay the inevitable loss of the copyright—not avoid it entirely. Such a strategy might work a few times if the artist is uninformed of his rights, but eventually an artist is not going to renegotiate, and it will have the same effect as if the artist had terminated the contract himself.

Additionally, the further into the contract term the cancellation occurs, the more the author will likely demand in the renegotiation—as the value of the work is more easily judged—thereby defeating the usefulness of this course of action.¹⁴⁵ And similarly, if the action is taken earlier in the contract term, although the author is more likely to be persuaded to renegotiate for substantially less consideration, the benefit to the industry will be much less because it would postpone termination, but only in a relatively minor way.¹⁴⁶

This may be a more effective strategy for works that are not particularly successful, such as for works that the industry would not classify as “hits” but still achieve a relatively steady amount of sales revenue. Additionally, it may also be effective for works that have been, up to this point, fairly unsuccessful, but which the industry anticipates the value is going to change considerably. For instance, if the record label is negotiating with a more successful artist to cover the author’s song or the label is going to allow the song’s use in a Super Bowl commercial, it is clear that the commercial value of the work will likely increase as a result. Additionally, in these situations, the author is likely unaware that these negotiations are taking place. If the industry strategically terminates the contract and renegotiates with the author before such changes take effect, the industry can avoid termination and retain a valuable work for much less than it would after the fact.

143. H.R. REP. NO. 94-1476, at 127 (1976).

144. *Id.*; Nimmer, *supra* note 140, at 983.

145. Nimmer, *supra* note 140, at 983.

146. *Id.*

B. Made-for-Hire

Let us assume the same musical artist and record label situation as in the above example, but this time the musical artist properly files his notice of termination by meeting all of the statutory requirements of Section 203 and does so within the proper time period. The record label then brings suit against the artist seeking a declaratory judgment that termination is not proper because the work at issue qualifies as a work made-for-hire and is, therefore, explicitly exempt from termination under Section 203.¹⁴⁷

Several scholars have noted that “[t]he work made-for-hire exception is arguably the most important and least clear element of the Section 203 termination right.”¹⁴⁸ The difficulty in a discussion of made-for-hire is that authors, at least most of the time, have characteristics of both employees and independent contractors.¹⁴⁹ As a result, the analysis under Section 101 is much less straightforward.¹⁵⁰ But, at the same time, the analysis is highly important, as it will determine who the author of the work is and, thus, who has a termination right.

The made-for-hire exception may influence a change in the course of business in these industries. If the bargaining power is so unbalanced, as the legislature contends,¹⁵¹ the industry may insist that the work be a work made-for-hire, thereby avoiding termination.¹⁵² The industry could do this either by: (1) reframing the relationship in which the work is produced by making the author a formal employee and having the work completed within his scope of employment; or (2) insuring that the work satisfies the conditions for being a specially ordered or commissioned work. The work would qualify as made-for-hire when specially ordered or commissioned only if the work falls within one of the

147. This is essentially what happened in *Scorpio*, although made-for-hire was not addressed by the court because the publishers withdrew the made-for-hire claim based on the evidence that “the publishers likely realized that it would be extremely difficult to establish that Willis’s contributions . . . were made for hire.” Brian D. Caplan & Jonathan J. Ross, *United States Copyright Termination Rights: What Does the Future Have in Store?*, 5 *LANDSLIDE* 14, 17 (2013).

148. Jorge L. Contreras & Andrew T. Hernacki, *Copyright Termination and Technical Standards*, 43 *U. BALT. L. REV.* 221, 243 (2014).

149. Kling, *supra* note 88, at 619.

150. See *supra* Part II.C.1.

151. See H.R. REP. NO. 94-1476 at 124 (1976); *supra* Part II.B.

152. Robert A. Kreiss, *Abandoning Copyrights to Try to Cut Off Termination Rights*, 58 *MO. L. REV.* 85, 89 n.8 (1993).

enumerated categories,¹⁵³ for example, for use as part of a motion picture or audio visual work, and both parties agree in writing to its status as a work made-for-hire.¹⁵⁴

If the industry did this, it would eliminate the author's bargaining power completely.¹⁵⁵ To accomplish this, the industry could simply not work with any author that is unwilling to work within these made-for-hire boundaries.¹⁵⁶ Taking into account the large number of authors looking to be published, musicians looking for their "big break," and screen-writers looking to have their work produced, this is not an entirely unrealistic scenario, especially when they may have few alternatives. If an author is faced with a choice of a made-for-hire deal versus no deal, it may be worth accepting from perspective. In the end, this only ends up hurting authors and society's access to works because the work is either simply not produced if the authors do not agree or the work is produced under these circumstances and authors lose all their rights to the work because it is made-for-hire and they are not considered the author for statutory purposes.¹⁵⁷

Additionally, the industry might feel compelled to exercise more creative control over the work in order to ensure that it falls under the made-for-hire exception. This excessive influence from the industry may harm both quality and creativity of the work, as the industry may require authors to change their novel endings to "Hollywood endings," which are more marketable, for example.

With works that are one of the enumerated categories under Section 101,¹⁵⁸ such as motion pictures, all that this would really entail is for the industry to have the author agree, in writing, that the work is made-for-hire. However, in other contexts in which the work is not one of the Section 101 enumerated categories, such as the music industry in which sound recordings are not, the industry must, instead, establish employment status and scope of employment under agency principles for the work to be made-for-hire.¹⁵⁹ They could accomplish this either by entirely changing the parties' relationship, making the author a formal

153. See *supra* note 90 and accompanying text.

154. Kreiss, *supra* note 152, at 89 n.8; 17 U.S.C. § 101 (2012).

155. Bragg, *supra* note 54, at 801.

156. *Id.* at 801 n.328 (noting, in the context of the motion picture industry, that "[if] a screenplay is purchased, it is always rewritten by the studio writers so that it becomes a work for hire").

157. See *supra* Part II.C.1.

158. See *supra* note 90 and accompanying text.

159. See *supra* Part II.C.1.

employee,¹⁶⁰ or by attempting to argue that the current relationship favors the made-for-hire conclusion.

For example, in the music context, the record label has several persuasive arguments for the court to consider in a made-for-hire analysis.¹⁶¹ The record label typically advances all the costs associated with the creation of the work, has the right to accept or reject the work submitted by the artist, selects the studio and producers used to create the work, and includes in its agreement with the artist that the work is made-for-hire.¹⁶² Other factors may also be taken into account, depending on the circumstances, regarding the underlying elements of the sound recording; for instance, if the recording artist did not write the lyrics, but instead a songwriter employed by the label did.¹⁶³ Also, the employees of the label or producers that have a similar agreement with the label may have developed or composed the underlying music to the song.¹⁶⁴

On the other hand, artists also have several persuasive arguments that weigh in their favor in a made-for-hire analysis.¹⁶⁵ Artists add a large amount of skill and creativity to sound recordings, some engage their own producers, some write their own music and lyrics, they are typically not treated as employees with respect to taxes or other benefits, and all of the expenses fronted by the label “are fully recoupable by the record company from the artist’s royalties.”¹⁶⁶

Under these principles, the more control the industry takes over the manner and means by which the work is produced, the more likely the work will qualify as made-for-hire.¹⁶⁷ And, as a result, the artist would be barred from terminating under Section 203. This seems to be a key focus for the industry to avoid termination rights, although it is still unclear how the courts will balance these factors. Nevertheless, the industry will likely exert more control from the beginning in these situations in the hopes that the factors will weigh in its favor or restructure the relationship in a more formal employment manner.

160. *See supra* Part II.C.1 (quoting the Supreme Court’s factors in determining whether a hired party is an employee).

161. Caplan & Ross, *supra* note 147, at 18.

162. *Id.*

163. *Id.*

164. *See id.* (explaining that record companies often “engage[] outside writers on . . . projects to create . . . underlying musical compositions” instead of artists writing or composing their own songs).

165. *Id.*

166. *Id.*

167. *See supra* Part II.C.1.

C. Derivative Works

Let us assume, again, the same musical artist and record label situation as described in the above example, but this time the artist transferred his copyright interest to the record label in 1980. The artist properly files his advance notice of termination “not less than two or more than ten years” before the effective termination date.¹⁶⁸ That means that the termination period would be between 2015 and 2020.¹⁶⁹ Therefore, the earliest time the artist could notify the record label of termination is 2005, the latest being 2018. The time period after notification and before termination affords the record label plenty of time to make derivative works in an effort to retain a piece of the copyright.¹⁷⁰ As long as the derivative works are completed prior to the termination, the record label can design works that will compete with the copyrighted work that was terminated.¹⁷¹ As a result, the industry can continue to profit from such derivative works after termination.¹⁷²

For example, in the motion picture industry, both critics and audiences seem to prefer derivative works to original concepts, as is suggested by their better performance at the box office, their positive reviews, and their receipt of more Academy Awards nominations than original ideas.¹⁷³ As discussed in Part II, remakes, sequels, and adaptations are derivative works. And the motion picture industry, in recent years, has heavily relied on such works, as the majority of releases are not original, but instead sequels, remakes, and adaptations.¹⁷⁴

If the motion picture industry decides to make a remake, sequel, or adaptation of a movie—again, think Spider-Man, Batman, or Superman—thirty-five years down the line, it is playing to a much different

168. 17 U.S.C. § 203(a)(4)(A) (2012).

169. *Id.* § 203(a)(3).

170. *See supra* Part II.

171. Dori Ann Hanswirth, “*I’ll Be Back*”: *Termination Rights Under Section 203 of the Copyright Act*, INTELLECTUAL PROP. MAG. (July/August 2012).

172. *See Rohauer v. Killiam Shows, Inc.*, 551 F.2d 484, 494 n.11 (2d Cir. 1977) (citing S. REP. NO. 94-473, at 111 (1975)) (describing a termination example involving derivative works in the motion picture context).

173. Jason Dietz, *Are Original Movies Really Better than Derivative Works?*, METACRITIC (Apr. 21, 2011), <http://www.metacritic.com/feature/movie-sequels-remakes-and-adaptations> [<http://perma.cc/7BQX-CXSL>] (reporting that “the average derivative work grossed \$67 million to just \$49 million for a movie based on an original concept,” and in terms of awards, over the last five years, book adaptations have accounted for the most nominations and nominated films).

174. *Id.* (explaining that there have been “seven *Saw* movies, [twenty-three] *Bond* films, even five *Pokemon* movies” and others are “rebooted,” such as *Spider-Man*, *Superman*, and *Batman*).

audience, an audience that may very well be unfamiliar with the original or even prior versions of the movie. This enables the derivatives to gain popularity, concerning their ability to be further exploited in the future. This is evidenced by the fact that derivatives make more money¹⁷⁵ and that most people do not even realize that certain works are derivatives.¹⁷⁶ Derivatives are also favored by the industry because it is generally harder to market a completely new idea to an audience than a derivative of an existing idea.¹⁷⁷ As such, the industry, particularly the motion picture industry, is more willing to spend money on derivative works for these reasons.¹⁷⁸

Take, for instance, Superman. Even within the short time frame of just six years between Brandon Routh's *Superman Returns* in 2006¹⁷⁹ and Henry Cavill's *Man of Steel* in 2013,¹⁸⁰ the derivative was able to capture the Superman audience and devalue the prior version.¹⁸¹ *Man of Steel* has devalued *Superman Returns* as *Man of Steel* has completely taken over the franchise.¹⁸² *Man of Steel* has an entirely new cast that returned to the screen in *Batman V Superman: Dawn of Justice* (2016)¹⁸³ and will also be returning in multiple future Superman franchise movies such as *The Justice League Part One* (2017),¹⁸⁴ and *The*

175. *Id.*

176. This may be a generational statement. The idea is that, if the audience was unfamiliar with the original work, which odds are they would be because of the thirty-five-year gap, then the audience is not even aware that the derivative work is a derivative.

177. Dietz, *supra* note 173.

178. *Id.*

179. SUPERMAN RETURNS (Warner Bros. 2006). *Superman Returns* is clearly not the original work, it is also a derivative—just as discussed in Part II.C.2 with Spider-Man—of the comic books and other prior films. But for this example, let us simplify the situation and imagine it as the original work.

180. MAN OF STEEL (Warner Bros. 2013).

181. Looking simply at the strict figures from the domestic box office opening weekend of each film, *Superman Returns* made just above \$52.5 million, while *Man of Steel* raked in over \$116.6 million. *Box Office History for Superman Movies*, THE NUMBERS, <http://www.the-numbers.com/movies/franchise/Superman> [<http://perma.cc/DD87-TPGU>] (last visited Mar. 6, 2016).

182. Instead of continuing with the unsuccessful version, the motion picture studio cancelled the *planned* sequel and instead rebooted the franchise. Anthony J. Casey & Andres Sawicki, *Copyright in Teams*, 80 U. CHI. L. REV. 1683, 1731–32 (2013); *Id.* at 1732 n.175.

183. BATMAN V SUPERMAN: DAWN OF JUSTICE (Warner Bros. 2016).

184. THE JUSTICE LEAGUE PART ONE (Warner Bros. Forthcoming 2017).

Justice League Part Two (2019).¹⁸⁵ This makes *Superman Returns* essentially irrelevant to the future of the Superman franchise.¹⁸⁶ This use of a derivative work has devalued the prior work and has done so in a very short time frame. We can imagine the greater differential in value we would see in thirty-five years when termination actually could occur.

The work's popularity speaks to the availability of future exploitation of the work. In this case, the derivative will continue to make money for the industry after the authors have terminated their copyright grant of the original work. This is not always the case but derivatives generally bring in a lot of money for the movie industry—even if they are not more successful than the original work. And termination has no effect on the continued distribution and profits from such derivative works.

D. Availability

In addition to creating derivative works, the industry could make, or threaten to make, the copyrighted work widely available and leave little value to be regained upon termination by the author.¹⁸⁷ Allowing a movie to be viewable online for free, making a song downloadable for free, or making a book available for free as an e-book are all examples of how the industry can widely disseminate the work, thereby effectively devaluing the work post-termination. Even if the industry simply made the work available at a significantly reduced price, it would likely have a similar effect.

Admittedly, this type of tactic cannot do damage forever because this availability will be severed by the author's termination, but damage certainly can be done when taking into account the Internet's vast audience. Thus, while such a tactic would not entirely dissuade audiences from paying for the work in the future and the author from recouping some portion of the value of the work after termination, if a percentage of people that would have been willing to purchase the work have already acquired it for free, the author will lose out on those sales.

185. THE JUSTICE LEAGUE PART TWO (Warner Bros. Forthcoming 2019). See Guy A. Rub, *Stronger than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49, 61 n.41 (2013).

186. Admittedly, you may be thinking, "What about the fact that *Superman Returns* was just simply not a good movie?" And that is a fair point. Market response is always a factor in the copyright-based industry and needs to be taken into account in these situations, as it is largely what determines the value of the work. It is important to keep in mind that these derivatives cannot be used to block the author; they just deny the author a monopoly over such works and compete with the original even after termination, effectively allowing the industry to retain a piece of the copyright interest.

187. See Bolanos, *supra* note 35, at 403 (citing Carrie Casselman, *Counseling Statutory Successors Regarding Copyright Termination*, 23 N.Y. ST. B. ASS'N ENT. ARTS & SPORTS L.J. 26, 31 (2012)).

Consequently, after termination, the author would recoup only a diminished amount of what he might have otherwise gained, as some percentage of people would no longer be interested in paying for the work—just as has been an effect of piracy, which has also diminished the value of the copyright interest for both parties.

As a result, this tactic harms the value of the copyright interest after termination, while in no way benefitting the industry. This tactic is heavily dependent on the relationship between the parties, as it seems to be more of a preemptory revenge tactic to be used if the industry is certain that the author will not renegotiate with it after termination, as such arguably petty behavior would not be taken if it wanted to have any chance of renegotiating with the author to enter into another contract. This may be a more effective tactic if it is merely threatened in the hopes of a more likely renegotiation, even if the industry does not ultimately follow through.

IV. PROPOSED REVISION OF THE TERMINATION PROVISION

“[T]he nature of the industry has outgrown the effectiveness of the 1976 Copyright Act,”¹⁸⁸ as it could neither have adequately foreseen nor contemplated the reality of issues facing the copyright-based industry today.¹⁸⁹ This is not to say that the termination provision is not needed, but rather that the current form of the statute has unintended and unforeseen negative effects on authors, the industry, and society and, thus, a revision is necessary. This determination also aligns with the objectives of the legislature, as discussed in the House of Representatives Report, that: “Section 203 reflect[] a practical compromise that will further the objectives of copyright law while recognizing the problems and legitimate needs of all interests involved.”¹⁹⁰ The problems have been recognized, and the legitimate needs of the industry, authors, and society would be accounted for and furthered by such a revision.

To address some of the issues discussed, some have proposed amending Section 203 to not apply to sound recordings or that sound recordings should be their own category of works made-for-hire and, therefore,

188. Bragg, *supra* note 54, at 802; *see also* Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013) (arguing for a comprehensive revision to the Act).

189. *See supra* Part I.

190. H.R. REP. NO. 94-1476, at 124 (1976).

be exempt from termination.¹⁹¹ There are also similar proposals to exempt motion pictures from the termination provision.¹⁹² However, such a drastic solution in the these two contexts is unnecessary and would not be effective in aligning with the objectives of the termination provision—to remedy unequal bargaining power resulting from the inherent valuation problem—but would instead grant the music and motion picture industries a windfall and damage authors’ incentives to create new works in these two contexts, while leaving substantially similar problems in other copyright-based industries unresolved. The problems facing the termination of sound recordings and motion pictures are not narrowly confined to the music and motion picture industries, but generally affect all copyright-based industries in some way—as these industries operate in a similar manner and the impacts of termination have similar detrimental effects, regardless of the manner of composition of the copyrighted work.¹⁹³

As previously discussed, the termination provision “is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work’s value until it has been exploited.”¹⁹⁴ Nearly all copyrighted work, whether a book, film, song, play, painting, or photograph, suffers from this premature valuation problem.¹⁹⁵ This is due to the fact that determining the commercial value of works of this nature is so heavily dependent on consumer response.¹⁹⁶

While exempting sound recordings and motion pictures from the termination provision might be easier than revising the provision as a whole, it would be an inefficient way to approach the issues that arise under the statute and it would not address the widespread problems

191. See, e.g., Bolanos *supra* note 35, at 406–07; Jessica Johnson, *Application of the Copyright Termination Provision to the Music Industry: Sound Recordings Should Constitute Works Made for Hire*, 67 U. MIAMI L. REV. 661 (2013) (arguing that sound recordings should be considered works made-for-hire under the second alternative in of the definition in 17 U.S.C. § 101 and should, therefore, be excluded from the copyright termination right).

192. See, e.g., Bragg, *supra* note 54, at 804 (arguing that motion pictures should be exempted from the termination provision “[a]s a concession to the great risk the studio takes in the investment of a derivative motion picture” and because it is the studio’s talent choices that often determine whether the motion picture is successful).

193. See *supra* Part I.

194. H.R. REP. NO. 94-1476, at 124.

195. See *id.*

196. Consumer behavior can be estimated by engaging in costly market research, but it is just a prediction as to how the work might do in the market, not a tangible basis to determine the value of a contract. The value simply cannot be determined until after it has been subjected to the market.

apparent throughout the industry. Further, it would not resolve the driving force behind the provision—unequal bargaining power—in any sense. The provision is important and should be maintained, but it is not perfect and, thus, should be revised. The following revisions will attempt to uphold the objectives of the provision while addressing the practical considerations regarding the present nature of the industry and the unintended effects of the current law.

A. Right to Contract

Freedom of contract is an important value in society. Generally speaking, “the very essence of freedom of contract is the right of the parties to strike good bargains and bad bargains.”¹⁹⁷ However, the legislature chose to make the termination provision in Section 203 inalienable, meaning it cannot be contracted around or waived.¹⁹⁸ The industry is not so skewed against author’s rights that such a severe statute—entirely eliminating freedom of contract—is necessary.

If anything, bargaining power has become significantly less “unequal” today given the fact that there are more options than ever before for authors to distribute their works via the Internet. The Internet might not be an exact substitute; however, it is an element to these situations that previously had not been factored into the bargaining-power equation. Especially if the author has had prior success and already has a developed fan base, this might be more of an adequate alternative to the industry. For example, in the musical context, Macklemore and Ryan Lewis have had great success without a record label.¹⁹⁹ These technological developments, as discussed in Part I, have “significantly undercut” the industry’s competitive position in these deals, especially considering that it previously held the power as being the only option for the production and distribution of physical copies of an author’s work.²⁰⁰

Both parties are taking risks by entering into these types of contracts prior to possessing the knowledge to properly value the work.²⁰¹ In this regard, the industry, too, may have entered into a bad contract—not just the author. It is also important to take into account the economic incentives at issue for both parties when determining if copyright law is accomplishing its fundamental goals. If a goal of copyright

197. *Gray v. Am. Express Co.*, 743 F.2d 10, 17 (D.C. Cir. 1984).

198. 17 U.S.C. § 203(a)(5) (2012); *see supra* Part II.C.3.

199. *See Scott, supra* note 49, at 30 (noting that Macklemore has “reached the top of the Billboard charts without major label support”).

200. Day, *supra* note 53, at 63–64 (“If labels are no longer necessary to sustain a healthy music market, the fundamentals of music authorship and copyright ownership in the U.S. may undergo significant transformation.”).

201. *See supra* Part I.

law is to provide incentives for the creation of works, then it is important that it provides some of those incentives to those that are willing to pay to have these works created. In the end, they are the ones making the financial investment that enables these works to be created, and it is important to society that they continue to invest or we will end up with fewer works produced. A provision like this should not be so strict as to discourage the taking of these initial risks. This provision cannot be so narrowly focused on encouraging authors to take these risks, while ignoring the adverse effect on the other party to the agreement and the subsequent implications for society. Allowing for freedom of contract strikes a better balance in addressing the various motivations involved in these situations. If the parties wish to contract for the entire term of the copyright, they should be able to do so.

Additionally, if the concern is the initial difference in bargaining power, being able to use the termination right as an additional bargaining tool from the outset will enable authors to get a better deal if the provision can be contracted around. The fear is that, with the reality that the courts have found favorably for the author's right to terminate,²⁰² the result will be that the industry will attempt to get the most out of its investments, if it is going to lose them in thirty-five years, by giving the authors even worse initial deals.²⁰³ With termination, the thirty-five year time frame becomes an element of the calculus made by the industry in the compensation offered to the author—and it is by all means an element that could do nothing but detract from the initial deal offered to the author.²⁰⁴

Furthermore, in light of authors successfully exercising their termination rights, the employment relationships between authors and the industry will likely see dramatic changes.²⁰⁵ It would not be constructive if the industry took more control of the creative process from the beginning with the knowledge that a court will “consider the [industry]’s right to control the manner and means by which the [work] is accomplished” for purposes of determining whether the work is a work made-

202. *E.g.*, *Scorpio Music S.A. v. Willis*, No. 11cv1557 BTM(RBB), 2012 WL 1598043 (S.D. Cal. May 7, 2012).

203. *See Brown*, *supra* note 21, at 147 (suggesting the possibility that publishers and labels will offer deals with “lower-paying royalties and less favorable deal points”).

204. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749–50 (1989) (“In a ‘copyright marketplace,’ the parties negotiate with an expectation that one of them will own the copyright in the completed work. With that expectation, the parties at the outset can settle on relevant contractual terms, such as the price for the work and the ownership of reproduction rights.”) (citation omitted).

205. Abdullahi, *supra* note 37, at 473.

for-hire and exempt from termination.²⁰⁶ Nor would it be positive to authors or to society if the industry essentially forced the work into made-for-hire status in these situations.²⁰⁷

If the industry is successful in making these situations into made-for-hire relationships, effectively barring authors from exercising their termination rights, the whole purpose of having a termination provision and the policy reasons that led to its creation are fundamentally unfulfilled.²⁰⁸ Admittedly, the same problem might result if allowing freedom of contract essentially has the effect of eliminating termination because the industry will force authors to surrender their right to terminate as a condition of the contract. This was the initial reason why the legislature made the provision inalienable in the first place,²⁰⁹ and such a result would not satisfy the intent of this proposed revision either.

However, the bargaining power imbalance is only a persuasive argument in support of inalienability if we assume that authors have very little, if any bargaining power. This is just not accurate.²¹⁰ For instance, “[a]ny author that has already had a marginal success, now has a literary agent and attorneys negotiating contracts on his behalf for any future works the author may write.”²¹¹ This, coupled with the other available avenues of distribution via the Internet, results in this important element in the argument in support of inalienability—unequal bargaining power—to lose its force. In such a situation, the author is no longer “at the mercy” of the industry.²¹² Instead, the power to terminate provides the author with more power than the legislature intended.²¹³

As a compromise, instead of having the provision remain inalienable or completely eliminating its inalienability, it should rather be amended to redefine who is considered to be an author under the provision, and

206. *Reid*, 490 U.S. at 751; *see supra* Part III.B.

207. *See supra* Part III.B.

208. Abdullahi, *supra* note 37, at 473.

209. *See* Nimmer, *supra* note 140, at 982 (describing that the holding in *Fred Fisher Music Co. v. Witmark & Sons*, 318 U.S. 643 (1943), which held that renewal rights may be assigned prior to their vesting, undermined the effectiveness of the renewal structure of the 1909 Copyright Act, and, therefore, the legislature made the Act of 1976 inalienable).

210. Bragg, *supra* note 54, at 802.

211. *Id.*

212. *Id.* at 770.

213. *See id.* at 770 (providing an example of such a case in the motion picture context in which “an author contributing a bare story line may hold hostage the entire studio that developed his story line into a blockbuster movie once the termination of transfer occurs”).

thereby who is afforded the power to terminate, in light of actual bargaining power.²¹⁴ As such, only authors who have truly unequal bargaining power will have the inalienable power to terminate—as they are the authors the legislature intended to protect with such a provision.²¹⁵ “Once an author is published for the first time, the success of his work and his potential for future success in additional works becomes apparent through sales of the work.”²¹⁶ And once an author has reached a certain level of success, the need for such expansive bargaining protection—and the argument supporting the policy behind the termination provision—is greatly diminished.²¹⁷

As such, the provision should only be inalienable in regard to first-time authors, unknown musical artists, or the equivalent in which an author has truly very little bargaining power,²¹⁸ as determined by a fact-specific analysis from the courts, just as in a work made-for-hire determination.²¹⁹ In other situations, authors will still have the right to terminate, but it will not be inalienable—meaning that they will have the benefit of freedom of contract to do with as they wish.

Consider, for instance, in the opening example of this Note, it was clear that as an unknown author, eager to be published, J.K. Rowling would have needed the protection of the termination provision in her first Harry Potter novel. There is no way that Rowling or her publisher

214. *Id.* at 803.

215. *Id.*

216. *Id.* at 803.

217. *Id.*

218. *See id.* at 803–04 (suggesting that in the movie context “screenwriters receiving \$750,000 or less for a script would provide an easily distinguishable dividing line between writers needing protection and those that do not”). This Note’s suggestion regarding redefining the definition of “author” based on bargaining power is similar to that which Bragg sets forth. *See id.* at 803. However, her discussion is tailored narrowly toward the motion picture industry in which the underlying valuation issue is not as severe due to the fact that most motion pictures are based on books that have already proven to be highly successful and their value more easily established. *See id.* Additionally, Bragg goes as far as suggesting that motion pictures should be entirely exempt from the termination provision altogether. *Id.* at 804.

219. This test for bargaining power is not much of a bright-line test. Since we should be concerned about the expensive litigation that will ensue from the termination provision, a fact-intensive inquiry, which invites court involvement, may likely increase litigation even further. Instead, it may be more beneficial for the legislature to establish an easily distinguishable dividing line specific to each industry (similar to that which Bragg suggests for the motion picture industry). *See id.* at 803–04 (suggesting that \$750,000 or less for a script would be the dividing line.). This may entail substantial research upfront into each industry’s operations to determine a fair dividing line, but once that is determined, it will make the provision much more easily operational.

could have even minimally accounted for the extraordinary success that the book would have. However, from that point on, she likely had literary agents and attorneys negotiating the remainder of her contracts for her. She likewise had developed a fan base to which, if she had wanted to, she could have distributed her future works via the Internet, no longer constrained to her publishing company. At that point, she had considerable bargaining power and the policy objectives of the termination provision would no longer be furthered in her situation. This same logic can be applied throughout the copyright-based industry. In these situations the tables have turned in terms of bargaining power. If the industry is now faced with a choice of a deal under the author's terms versus no deal, it may be worth accepting from their perspective—as the author has many more options in terms of producing and distributing their work.

Overall, completely barring freedom of contract is just an inefficient way of doing things. With such a large number of creative works entering the notice period every year, there will be a huge, seemingly unending, burden on the courts.²²⁰ The burden on the authors may also be immense after factoring in court costs.²²¹ Consequently, some authors might decide that it is simply not worth it to terminate a copyright—as some artists will not be able to afford the expense of the likely court battle that will follow.²²² As such, it only makes sense to allow the authors to negotiate for a larger amount initially.

Whether the industry wins or loses, defending copyrights will be expensive. Even though the industry is in a better position to absorb the costs than the authors, it still encompasses a substantial financial burden. If they lose, they lose big, at the expense of paying for the court battle as well as losing revenue on a profitable work. Likewise, another all too real consequence surrounding these termination issues is that

220. See *supra* notes 128, 130 and accompanying text.

221. See *supra* note 129 and accompanying text.

222. See 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?_r=0 [<http://perma.cc/85N7-BA2M>] (noting that it took Willis, the defendant in *Scorpio*, “six years of legal wrangling” to get his copyright victory). Admittedly, however, it is likely that only the successful, profitable works will face such a battle over termination.

these costs will eventually make their way to the consumers²²³ and the economy.²²⁴

In the end, freedom of contract is a substantial public policy and fundamental principle²²⁵ that should not be entirely taken away from both parties, especially in light of these undesirable effects. Only in extreme instances should the law interfere with such freedom²²⁶—and this is not one of those situations. Instead, freedom of contract should only be restricted in cases in which such limitation is vital to the furtherance of the provision’s goals—not globally restrictive.

B. Notice

Another area of the statute that needs to be revised is the section governing notice. After the industry receives notice, it will have “not less than two or more than ten years” before termination²²⁷—plenty of time to make derivative works or make the work widely available.²²⁸ The legislature gives no explanation for why such a vast amount of notice is desirable.²²⁹

The argument could be made that notice is good for the industry as it allows it to plan accordingly for termination. However, such exceedingly advanced notice instead enables preemptive harms to the interest in the copyright and is much longer than necessary in any reasonable sense. If the industry is using the notice to plan ahead, it surely does not need multiple *years* to do such planning. The purpose of providing notice should be just that—to inform the industry that the

223. See Bolanos, *supra* note 35, at 402 (explaining that currently the consumer is in the best position given the availability of copyrighted music through free Internet services such as Spotify and Pandora. If, after termination, these services now have to spend much more money negotiating with a number of individual artists instead of simply a few major labels, “[s]uch individualized negotiations will require much more resources, and Spotify, Pandora, and the like will likely have to pay higher licensing fees, which will inevitably be passed on to the consumer”).

224. See *supra* note 44 and accompanying text. Additionally, if the industry raises its prices, fewer people will be willing to pay those prices, which will result in even fewer profits, likely increased piracy, and the industry’s survival will be in an even more troublesome position.

225. See *Baltimore & Ohio Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 505 (1900) (“[I]t must not be forgotten that the right of private contract is no small part of the liberty of the citizen . . . [I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting . . .”).

226. See *id.* at 505–06 (“[C]ourts have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.”).

227. 17 U.S.C. § 203(a)(4)(A) (2012).

228. See *supra* Parts III.C, D.

229. H.R. REP. NO. 94-1476, at 126 (1976).

author has decided to exercise his right to terminate the transfer of the copyright. The effect of such notice should not be to enable the industry to devalue the copyright. It is not as if the industry is entirely unaware of Section 203 and, thus, should reasonably anticipate that the copyright may be terminated in thirty-five years, and can effectively plan, regardless of actual notice from the author. In any event, the industry definitely does not need years and years for notice to be reasonable.

An analogy can be drawn to that of notice in the context of a bankruptcy proceeding. The moment a party files a bankruptcy petition, an automatic stay goes into effect, which essentially stops everything by suspending the action to collect on the claim.²³⁰ Notice should be reasonable—meaning enough time for the industry “to take meaningful action in response to the impending deprivation of its rights.”²³¹ Responsive meaningful action is not action that would result in the devaluing of the copyright. In actuality, 17 U.S.C. § 203 represents adequate notice to the industry that it may be deprived of its rights in thirty-five years. Ignorance of the law is never a defense, nor should it be here. While providing no additional notice to the industry, other than the law, would likely be arguably too strict a rule, notice should, at most, only be required to be provided six months in advance of the termination date. Such an amount of time should be enough time to get things in order without being enough time to significantly damage the author’s interest in the copyrighted work.

Additionally, to address the issues discussed, derivative works should not be permitted to be made after notice is given. Not allowing the production of derivatives for six months from the end of a thirty-five-year grant would not harm the industry to any meaningful degree. The only exception would be to allow any derivatives that are in progress to be completed, as long as they are completed prior to the termination date.

CONCLUSION

This Note recognizes and appreciates the importance of the termination provision in theory. It is a unique protection afforded to authors, especially given that the majority of copyright law protects the holder of the copyright, not the author of the work. However, in practice, as currently written, it contributes to unintended negative impacts on both the author and the industry, which in turn impacts society. The

230. See 11 U.S.C. § 362 (2012). The purpose of a stay in the context of bankruptcy is to protect both the debtor and the creditors. William Bassin, *Why Courts Should Refuse to Enforce Pre-Petition Agreements That Waive Bankruptcy’s Automatic Stay Provision*, 28 IND. L. REV. 1, 2 (1994) (citing H.R. REP. NO. 95-595, at 340 (1977)).

231. *In re Walker*, 149 B.R. 511, 514 (Bankr. N.D. Ill. 1992) (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 13 (1978)).

combination of the legislature's intent behind the provision and the fundamental changes in technology since the provision's enactment favor a revision to the statute, as the law needs to respond to these practical considerations.

This Note proposes a revision to Section 203 aligned with the current law's objectives, while nevertheless recognizing the problems and legitimate impacts of the provision on the parties involved. The proposed revision provides solutions to the current negative effects through a better understanding of how copyright-based industries operate in today's market, while still remaining sensitive to copyright law's historical and fundamental objectives and the importance of such a provision.

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