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DEFEATING THE TERMINATOR: HOW REMASTERED ALBUMS MAY HELP RECORD COMPANIES AVOID COPYRIGHT TERMINATION

Abstract: Starting in 2013, copyright owners can begin terminating copyright grants made thirty-five years earlier. In the music industry, this termination right could harm the profits of record companies, which rely on valuable older recordings to drive profits. But all is not lost for these record companies, as termination is not guaranteed. Congress excluded certain types of work from termination, including derivative works. After outlining the standards courts use to determine what constitutes a derivative work and how remastered albums are made, this Note analyzes whether remastered albums will be considered derivative works and thus not subject to termination. The Note concludes that, generally, remastered albums should be considered derivative works. Finally, the Note argues that allowing record companies to continue to utilize these remastered recordings furthers the legislative purposes of both the termination provision and the derivative works exception.

INTRODUCTION

Record companies have something new to fear beginning in 2013: the terminator.¹ In passing the Copyright Act of 1976 (“1976 Act”),² Congress inserted a termination right for authors, allowing them to terminate grants of their copyrights to third parties and retake ownership thirty-five years after the grant began.³ This provision affects all post-1978 copyrights, meaning the first terminable works will be eligible for termination in 2013.⁴

In the music industry, termination could substantially reduce the profits of record companies, which rely on sales of recordings from older, established artists.⁵ Once one of these established artists termi-

¹ See *infra* notes 2–10 and accompanying text.

² Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2006)).

³ See 17 U.S.C. § 203(a)(3).

⁴ See *id.* § 203(a).

⁵ See Eriq Gardner, *Copyright Battle Comes Home*, LAW TECH. NEWS, Oct. 8, 2009, http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202434372952&Copyright_Battle_Comes_Home.

nates the copyright of their sound recordings, the record company will no longer be allowed to sell those potentially valuable recordings.⁶ Losing the right to sell these older recordings could cut deeply into these companies' profits, as market research shows that in 2008, close to half of U.S. teenagers did not buy a single compact disc (CD).⁷ Consumers aged thirty-six to fifty, who tend to prefer older artists, drove what CD sales existed.⁸ In addition, record companies earn a higher profit per record from sales of older recordings, because such sales require few additional costs.⁹ Thus, one practitioner stated that termination "is a life-threatening change for [record companies], the legal equivalent of Internet technology."¹⁰

Termination is not guaranteed, however.¹¹ Although authors can generally terminate grants of their copyrights after thirty-five years, Congress excluded certain works from the termination provision, including works made for hire and derivative works.¹² Works made for hire are works either (1) prepared by an employee within the scope of his or her employment, or (2) a specially commissioned work in one of nine statutory categories.¹³ A derivative work, meanwhile, is a work based upon one or more preexisting works in which the work is recast, transformed, or adapted.¹⁴

⁶ See 17 U.S.C. § 203(b).

⁷ See Gardner, *supra* note 5.

⁸ *Id.*

⁹ Randy S. Frisch & Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 COLUM.-VLA J.L. & ARTS 211, 215 (1993).

¹⁰ Larry Rohter, *Record Industry Braces for Artists' Battles over Song Rights*, N.Y. TIMES, Aug. 16, 2011, at C1.

¹¹ See *infra* notes 12–14 and accompanying text.

¹² See 17 U.S.C. § 203(a) (2006) (providing that there is no termination right in works made for hire); *id.* § 203(b)(1) (providing that a derivative work prepared prior to termination does not revert back to the original author but instead can be exploited by its creator). The term "author" has specific meaning in copyright law. See Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) ("As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection." (citing 17 U.S.C. § 102 (1994))).

¹³ 17 U.S.C. § 101. The nine categories are:

[A] work specially ordered or commissioned for use as [1] a contribution to a collective work, [2] as a part of a motion picture or other audiovisual work, [3] as a translation, [4] as a supplementary work, [5] as a compilation, [6] as an instructional text, [7] as a test, [8] as answer material for a test, or [9] as an atlas.

Id.

¹⁴ *Id.*

Other than hoping that recording artists do not terminate their copyrights, these exceptions are the record companies' best chance of retaining some way to exploit post-1978 sound recordings after thirty-five years.¹⁵ As a result, many in the industry expect litigation in this area to be extensive.¹⁶ As one practitioner stated, "We're going to see huge fights over this issue Litigation is going to get bloody, and record labels are legitimately very nervous over copyright termination."¹⁷

Scholars who have explored this question have primarily examined whether albums will be considered works made for hire and thus exempt from termination.¹⁸ If exempt from termination, record companies would be able to continue to sell the works without the artist regaining control.¹⁹ Although a clear answer has not surfaced, most scholars feel that, at best, the issue can only be answered on a case-by-case basis.²⁰ Therefore, recording companies will likely also attempt to utilize the derivative works exception to save their valuable recordings.²¹ In doing so, those companies might argue that remastered versions of the sound recordings are derivative works—especially in light of the "loudness wars."²² The "loudness wars" is a moniker given to the trend of music companies mastering sound recordings at the highest possible average volume to garner listeners' attention.²³

¹⁵ See generally Firsch & Fortnow, *supra* note 9 (exploring potential defenses for record companies against termination rights); Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375 (2002) (same); Daniel Gould, Note, *Time's Up: Copyright Termination, Work-for-Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91 (2007) (same).

¹⁶ See Gardner, *supra* note 5; Rohter, *supra* note 10.

¹⁷ Gardner, *supra* note 5.

¹⁸ See generally Frisch & Fortnow, *supra* note 9 (focusing primarily on whether a sound recording is a work made for hire); Mark H. Jaffe, *Defusing the Time Bomb Once Again—Determining Authorship in a Sound Recording*, 53 J. COPYRIGHT SOC'Y U.S.A. 139 (2006) (focusing exclusively on authorship and work-made-for-hire status); LaFrance, *supra* note 15 (focusing primarily on authorship and whether a sound recording is a work made for hire); David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y U.S.A. 387 (2002) (focusing exclusively on authorship and work-made-for-hire status); Gould, *supra* note 15 (focusing primarily on whether a sound recording is a work made for hire).

¹⁹ See 17 U.S.C. § 203(a) (2006).

²⁰ See Frisch & Fortnow, *supra* note 9, at 224; Jaffe, *supra* note 18, at 169; Nimmer & Menell, *supra* note 18, at 387.

²¹ See *infra* notes 103–120 and accompanying text.

²² See *infra* notes 147–171 and accompanying text.

²³ See Suhas Sreedhar, *The Future of Music, Part One: Tearing Down the Wall of Noise*, IEEE SPECTRUM (Aug. 2007), <http://spectrum.ieee.org/computing/software/the-future-of-music>.

This Note analyzes the termination provision of the 1976 Act and the derivative works exception, and argues that remastered versions of sound recordings should be considered derivative works.²⁴ If such recordings are derivative works, record companies can continue to sell them despite an artist's termination of the original copyright grant, creating a strange marketplace where two extremely similar versions of the same recording are available from different economic actors.²⁵ If they are not derivative works, however, record companies risk the possibility of the author terminating the original copyright grant and thereby preventing the record company from continuing to sell any versions of the recording.²⁶ Part I provides an introduction to copyright law governing sound recordings, termination, and derivative works and explores the process of remastering sound recordings.²⁷ Part II examines previous case law in analogous situations, such as derivative musical compositions, sped-up video games, and edited motion pictures.²⁸ Finally, Part III argues that remastered works generally will be considered derivative works under current law, and that such a finding will further the legislative purposes of both the termination provision and the derivative works exception.²⁹

I. OVERVIEW OF COPYRIGHT LAW COVERING SOUND RECORDINGS

Comprehending the relevance of copyright law to remastered sound recordings requires a nuanced understanding of the structure of copyright law in addition to a technical understanding of how remastered sound recordings are produced.³⁰ Section A offers a brief historical background of copyright law's protection of sound recordings.³¹ Section B examines the history of, and rationale behind, the termination right.³² Section C inspects the work-made-for-hire exception to termination.³³ Section D explores the derivative works exception to

²⁴ See *infra* notes 30–366 and accompanying text.

²⁵ See *infra* notes 321–350 and accompanying text.

²⁶ See *supra* notes 1–17 and accompanying text.

²⁷ See *infra* notes 30–174 and accompanying text.

²⁸ See *infra* notes 175–263 and accompanying text.

²⁹ See *infra* notes 264–366 and accompanying text.

³⁰ Cf. Gould, *supra* note 15, at 131 (stating that it is an open question how much a new sound recording would have to differ from an old sound recording in the context of termination); *infra* notes 36–174 and accompanying text.

³¹ See *infra* notes 36–49 and accompanying text.

³² See *infra* notes 50–77 and accompanying text.

³³ See *infra* notes 78–102 and accompanying text.

termination rights and its potential relevance to the music industry.³⁴ Finally, Section E examines how sound recordings are mastered and remastered to help shed light on whether they could be considered derivative works, with a focus on the loudness wars.³⁵

A. *Protection of Sound Recordings: A Brief History*

The U.S. Constitution expressly gives Congress the power to protect creative works by securing a limited monopoly in the work to its author.³⁶ Although both the Constitution and the first copyright law limited copyright protection to writings, the U.S. Supreme Court soon recognized that copyright protection could be construed broadly to include more than just a “writing” in a strict sense.³⁷ Following the Supreme Court’s lead, Congress passed the 1909 Copyright Act (“1909 Act”), which added express protection for musical compositions.³⁸ This right, however, protected only the underlying musical composition.³⁹ The recording of the song was not covered.⁴⁰ Instead, artists had to rely on state law for protection of sound recordings.⁴¹

Sound recordings were eventually granted federal copyright protection, but the protection was limited.⁴² In 1971, facing growing concerns about piracy and the revenue lost by the recording industry as a result, Congress passed the Sound Recordings Act of 1971 (“1971 Act”).⁴³ The 1971 Act amended the list of works expressly granted copyright protection, adding sound recordings.⁴⁴ But the protection granted to sound recordings was limited compared to other works—it afforded a claim of

³⁴ See *infra* notes 103–120 and accompanying text.

³⁵ See *infra* notes 121–174 and accompanying text.

³⁶ U.S. CONST. art. I, § 8, cl. 8.

³⁷ *Id.*; see Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1802); *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 58 (1884) (stating that a writing is “all forms of writing, printing, engraving, etching, &c. by which the ideas in the mind of the author are given visible expression”).

³⁸ Copyright Act of 1909, Pub. L. No. 60-349, § 5(e), 35 Stat. 1075, 1076 (repealed 1976).

³⁹ See *id.*; ALFRED C. YEN & JOSEPH P. LIU, *COPYRIGHT LAW: ESSENTIAL CASES AND MATERIALS* 313 (2d ed. 2011).

⁴⁰ See Copyright Act of 1909 § 1(e), 35 Stat. at 1075–76; YEN & LIU, *supra* note 39, at 305.

⁴¹ YEN & LIU, *supra* note 39, at 313 (“Before 1972, state law provided the only protection for sound recordings”).

⁴² See *id.*

⁴³ Pub. L. No. 92-140, 85 Stat. 391 (codified as amended in scattered sections of 17 U.S.C.).

⁴⁴ Sound Recordings Act of 1971 § 1(a), 85 Stat. at 391; see Jaffe, *supra* note 18, at 144.

infringement against only illegal distribution of physical reproductions of the works.⁴⁵

This limited protection for sound recordings was carried into in the 1976 Act, the successor to the 1909 Act.⁴⁶ The 1976 Act was over twenty years in the making.⁴⁷ It replaced the 1909 Act and expressly changed particular areas of copyright law.⁴⁸ These changes went into effect on January 1, 1978, meaning that all sound recordings created on or after that date are governed by the 1976 Act, whereas works created before 1978 are governed by the 1909 Act.⁴⁹

B. Termination Rights

Among the changes included in the 1976 Act was the addition of a termination right for authors.⁵⁰ The termination right allows authors to regain sole possession of their copyrights thirty-five years after granting them to a third party.⁵¹ This right cannot be contracted away, but is subject to two key exceptions.⁵² Works made for hire cannot be terminated.⁵³ Additionally, those that create derivative works during the time of the grant can continue to exploit those works post-termination.⁵⁴

Section 203 of the U.S. Code grants authors the right to terminate any “exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright” executed on or after January 1, 1978.⁵⁵ This right comes to fruition thirty-five years after the initial transfer of the copyright.⁵⁶ Thus, the first works covered by this termination right could begin to terminate on January 1, 2013.⁵⁷ In order to

⁴⁵ Sound Recordings Act § 1(a), 85 Stat. at 391. Notably, there was no claim of infringement if a sound recording was independently created by another—thus “covers” of an artist’s sound recording did not infringe on the artist’s sound recording copyright. *See id.* Also lacking was a right of public performance. *See id.* (limiting the rights to a sound recording to reproduction and distribution to the public).

⁴⁶ *See* 17 U.S.C. § 114 (2006).

⁴⁷ *See* Howard B. Abrams, *Who’s Sorry Now? Termination Rights and the Derivative Works Exception*, 62 U. DET. J. URB. L. 181, 206 (1985) (noting that, in 1955, Congress first appropriated the money necessary to study possible reform of the United States Copyright Act).

⁴⁸ *See* Jaffe, *supra* note 18, at 147.

⁴⁹ *See* 17 U.S.C. § 101, note prec.

⁵⁰ *Id.* § 203.

⁵¹ *See id.* § 203(a)(3).

⁵² 17 U.S.C. § 203(a)(5) (2006).

⁵³ *Id.* § 203(a).

⁵⁴ *Id.* § 203(b)(1).

⁵⁵ *Id.* § 203(a).

⁵⁶ *Id.* § 203(a)(3).

⁵⁷ *See id.*

terminate, an author must give advance notice to the grantee or the grantee's successor in title to the copyrighted work, stating the effective date of termination.⁵⁸ This advance notice must be served no less than two nor more than ten years prior to that date.⁵⁹

Importantly, the U.S. Code explicitly states that the termination right can be "effected notwithstanding any agreement to the contrary."⁶⁰ Thus, an author cannot assign away his or her right to terminate, and any contractual provision attempting to do so would be void.⁶¹

This was a marked change from previous copyright law.⁶² Before the 1976 Act, copyright protection lasted twenty-eight years, at which time an author had a right to renew his copyright.⁶³ The second term of copyright protection after renewal, known as the renewal term, automatically reverted to the original author even if he or she had transferred the rights in the copyright.⁶⁴ Because federal law did not recognize copyright in a sound recording until February 15, 1972, this renewal term is not particularly relevant for sound recordings.⁶⁵

The renewal system is important, however, because its failure was a major impetus behind the termination right inserted into the 1976 Act.⁶⁶ The purpose of the renewal term was to protect the author and his family from an unfavorable grant of his copyright by allowing the author to negotiate new contracts for the further exploitation of his

⁵⁸ 17 U.S.C. § 203(a)(4) (2006).

⁵⁹ *Id.* § 203(a)(4)(A). Thus, an author wishing to terminate a copyright grant on January 1, 2013, must have given notice to the owner of the copyright no later than January 1, 2011. *See id.*

⁶⁰ *Id.* § 203(a)(5).

⁶¹ Frisch & Fortnow, *supra* note 9, at 213. Two scholars have noted that

even if an author had contractually waived his right to terminate in his original grant, the author may still terminate thirty-five years later. For example, although standard record contracts often provide for artists to assign all rights in the copyrights in the recordings, including termination rights, for the term of the copyright, such language may not be binding.

Id.; *see* 17 U.S.C. § 203(a)(5).

⁶² *See* YEN & LIU, *supra* note 39, at 213 (stating that there are significant differences between termination and the renewal term that previously existed).

⁶³ *Id.* at 206.

⁶⁴ *Id.*

⁶⁵ *See supra* notes 42–45 and accompanying text. Congress amended the U.S. Code to provide for the creation of a limited copyright in sound recordings, effective February 15, 1972. Sound Recordings Act of 1971, Pub. L. No. 92-140, § 3, 85 Stat. 391, 392. The renewal term thus would only apply to sound recordings produced from February 15, 1972 to December 31, 1977. *See* 17 U.S.C. § 203(a) (2006).

⁶⁶ YEN & LIU, *supra* note 39, at 206; Abrams, *supra* note 47, at 209–11.

work once its value became better known.⁶⁷ This purpose was undercut by the Supreme Court, however, which allowed authors to contract away their renewal rights.⁶⁸ Thus, in a 1961 report by the Register of Copyrights exploring possible changes to be made to the copyright law (the “*Register’s Report*”), the Register stated that “in practice, this reversionary feature . . . has largely failed to accomplish its primary purpose.”⁶⁹

To address this failure, the Register of Copyrights offered two alternative forms of reversion in a preliminary draft of the 1976 Act.⁷⁰ The first provided that no transfer would be effective after twenty-five years with exceptions for derivative works and works made for hire.⁷¹ The second allowed the author to bring suit to terminate the transfer if the profits made by the transferee were “strikingly disproportionate to the compensation, consideration, or share received by the author.”⁷² These provisions were heavily debated.⁷³ Those opposed to reversionary rights argued that for publishers, who invest time, money, and effort upfront, it was unfair to deny them a financial reward after an arbitrary period of time.⁷⁴ Proponents of revisionary rights argued that authors lacked the bargaining power to obtain a fair price for the works they contracted away.⁷⁵ Eventually, the 1965 Revision Bill settled on a termination right that went into effect thirty-five years from the date of transfer.⁷⁶ This termination right remains in place.⁷⁷

⁶⁷ HOUSE COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION, REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 53 (Comm. Print 1961) [hereinafter REGISTER’S REPORT].

⁶⁸ See, e.g., *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 657 (1943) (holding that the 1909 Act did not nullify an agreement by an author to assign his renewal rights); see also YEN & LIU, *supra* note 39, at 211 (“After *Fred Fisher*, publishers routinely required authors to assign away their renewal rights at the same time they assigned away their initial copyrights. This had the effect of greatly reducing the efficacy of renewal as a means of giving authors a ‘second bite at the apple.’”).

⁶⁹ REGISTER’S REPORT, *supra* note 67, at 53.

⁷⁰ See Abrams, *supra* note 47, at 211, 214 (tracing the history of the 1976 Act and noting that the Register of Copyrights, in writing the draft, was influenced by the comments and discussion on the *Register’s Report*, which initially abolished reversionary rights).

⁷¹ *Id.* at 214 (citing Preliminary Draft for Revised U.S. Copyright Law § 16).

⁷² *Id.* at 214–15 (quoting Preliminary Draft for Revised U.S. Copyright Law § 16).

⁷³ *Id.* at 215.

⁷⁴ *Id.* at 216.

⁷⁵ *Id.* at 216–17.

⁷⁶ Abrams, *supra* note 47, at 221.

⁷⁷ See 17 U.S.C. § 203 (2006); Abrams, *supra* note 47, at 209.

C. Work-Made-for-Hire Exception to Termination Rights

This right to terminate, although it cannot be contractually waived, is not absolute.⁷⁸ Congress made clear that the termination right does not apply to a work made for hire.⁷⁹ In defining a work made for hire, the 1976 Act states such a work is either (1) a work prepared by an employee within the scope of his or her employment, or (2) a specially ordered work in one of nine statutory categories.⁸⁰

In light of this exception to the termination right, the recording industry lobbied in the late 1990s for an amendment to the Copyright Act to make sound recordings eligible for work-made-for-hire status.⁸¹ This amendment would have kept recording artists from exercising their termination rights.⁸² The amendment was included as a “technical amendment” to the unrelated Satellite Home Viewer Improvement Act of 1999.⁸³ The outcry over this amendment, which was not included in prior drafts of the bill, was intense.⁸⁴ As a result, the amendment was repealed in less than a year.⁸⁵

Because the repeal of the amendment specifically stated that no inference could be taken from the enactment and subsequent repeal of the amendment, it is unclear if sound recordings will be classified as works made for hire.⁸⁶ To determine if one is an employee for purposes of the work-made-for-hire doctrine, courts look to the common law of

⁷⁸ See 17 U.S.C. § 203(a) (providing that there is no termination right in works made for hire); *id.* § 203(b)(1) (providing that a derivative work prepared prior to termination does not revert back to the original author but instead can be exploited by its creator).

⁷⁹ *Id.* § 203(a).

⁸⁰ 17 U.S.C. § 101; see *supra* note 13 (listing the nine categories).

⁸¹ See LaFrance, *supra* note 15, at 375 (stating that the 1999 amendment was precipitated by a request from the Recording Industry Association of America); Nimmer & Menell, *supra* note 18, at 390–94 (detailing the amendment and its progress through Congress).

⁸² See 17 U.S.C. § 203(a). If sound recordings were explicitly deemed works made for hire, termination rights would no longer apply according to the language of the statute. See *id.*

⁸³ See Act of Nov. 29, 1999, Pub. L. No. 106-113, app. I § 1011(b)–(d), 113 Stat. 1501, app. I at 1501A-543 to -44. The Act amended the statutory licenses applicable to retransmission of television signals. *Id.* at app. I, 113 Stat. at 1501A-523.

⁸⁴ LaFrance, *supra* note 15, at 376 (“[T]he reaction was swift, loud, and overwhelmingly disapproving.”); Nimmer & Menell, *supra* note 18, at 392 (“When the lobbyists’ backroom handiwork became known, a firestorm of criticism ensued.”).

⁸⁵ See Nimmer & Menell, *supra* note 18, at 394–95. The act that included the amendment was passed on November, 29, 1999. *Id.* at 390. The Copyright Corrections Act of 2000, which deleted the amendment, was passed on October 27, 2000. Pub. L. No. 106-379, 114 Stat. 1444.

⁸⁶ See 17 U.S.C. § 101 (2006).

agency.⁸⁷ If the creator of a work is deemed an employee that created the work within the scope of his or her employment, that work is given work-made-for-hire status.⁸⁸ Therefore, if recording artists are deemed employees, their sound recordings are works made for hire, and thus not subject to termination.⁸⁹

This issue has been thoroughly explored in copyright scholarship.⁹⁰ The consensus is that artists will not qualify as “employees” of the record companies, thus foreclosing the first prong of the work-made-for-hire inquiry.⁹¹ Record companies, therefore, will have to argue that a sound recording is a specially commissioned work that fits within one of the nine statutory categories in order for a work to fall within the work-made-for-hire exception.⁹²

Of those nine categories, record companies are most likely to argue that individual sound recordings are specially commissioned works for a collective work: an album.⁹³ A collective work is defined in the 1976 Act as “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.”⁹⁴ In the eyes of some scholars, the termination controversy boils down to whether an album can be considered a collective work.⁹⁵

⁸⁷ *Cnty. for Creative Non-Violence*, 490 U.S. at 740–41. Factors to consider include:

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

Id. at 751–52.

⁸⁸ See 17 U.S.C. § 101.

⁸⁹ See *id.* § 203(a).

⁹⁰ See *supra* note 18 (collecting sources).

⁹¹ See, e.g., Jaffe, *supra* note 18, at 164 (stating that recording artists “cannot reasonably be determined to be employees”); LaFrance, *supra* note 15, at 379 (“Many, if not most, of the creative participants in a sound recording, however, are not record label employees. The most obvious examples are the featured vocalists and musicians . . .”).

⁹² See Jaffe, *supra* note 18, at 166; see also *supra* note 13 (listing the nine categories of eligible specially commissioned works); LaFrance, *supra* note 15, at 379.

⁹³ See Jaffe, *supra* note 18, at 167.

⁹⁴ 17 U.S.C. § 101 (2006).

⁹⁵ David Nimmer et al., *Pre-existing Confusion in Copyright’s Work-for-Hire Doctrine 2* (Univ. of Cal., Berkeley Pub. Law & Legal Theory Research Paper Series, Paper No. 109, 2002), available at <http://ssrn.com/abstract=359720>.

The case law illustrates that courts have not granted this specially commissioned status to sound recordings.⁹⁶ For example, in 1997, in *Lulirama Ltd. v. Axxess Broadcast Services, Inc.*, the U.S. Court of Appeals for the Fifth Circuit reversed a district court's finding that a jingle written for television and radio was a work for hire.⁹⁷ Furthermore, in 1999, in *Ballas v. Tedesco*, the U.S. District Court for the District of New Jersey ruled that the plaintiff's argument that the sound recordings at issue were works for hire was without merit.⁹⁸ The court looked to the definition of works for hire in the 1976 Act and concluded that a sound recording did not necessarily fit under that definition.⁹⁹

Similarly, scholars who have looked at the issue have concluded that, at best, such a claim can be decided only on a case-by-case basis.¹⁰⁰ Professor David Nimmer, a leading copyright scholar, in conjunction with two other scholars, concluded that to meet the standard for a collective work, a record company must make a creative contribution to the album separate from the recording artist, perhaps through the selection or arrangement of the songs or artists chosen.¹⁰¹ Thus, although record labels will surely argue in termination disputes that the terminated sound recordings qualify for work-made-for-hire status—allowing the labels to prevent termination entirely—the labels will likely consider other strategies to avoid termination.¹⁰²

D. *Derivative Works Exception to Termination Rights*

In addition to the work-made-for-hire exception, there is an exception to the termination right for derivative works.¹⁰³ Thus, one alternative strategy for a record company looking to avoid termination would be to argue that the record companies have created derivative works by either remixing or remastering previously recorded works.¹⁰⁴ A deriva-

⁹⁶ Nimmer & Menell, *supra* note 18, at 402.

⁹⁷ 128 F.3d 872, 878–79 (5th Cir. 1997).

⁹⁸ 41 F. Supp. 2d 531, 541 (D.N.J. 1999).

⁹⁹ *See id.*; *see also* Staggars v. Real Authentic Sound, 77 F. Supp. 2d 57, 63–64 (D.D.C. 1999) (holding that a sound recording is not a specially commissioned work for hire, *per se*).

¹⁰⁰ *See* Frisch & Fortnow, *supra* note 9, at 224; Jaffe, *supra* note 18, at 169; Nimmer & Menell, *supra* note 18, at 387.

¹⁰¹ Nimmer et al., *supra* note 95, at 3.

¹⁰² *See supra* notes 93–101 and accompanying text.

¹⁰³ 17 U.S.C. § 203(b)(1) (2006).

¹⁰⁴ *See id.* § 203(b)(1); *id.* § 101 (defining derivative work as “a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted”).

tive work consists of a contribution of original material to an already existing work which recasts, transforms, or adopts the previous work.¹⁰⁵ A derivative work based on the copyrighted work, created during the grant, may continue to be utilized under the original terms of the grant by the derivative work's creator.¹⁰⁶ In other words, although the original copyrighted work is returned to the author, the creator of the derivative work may continue to utilize that derivative work without infringing the original copyright.¹⁰⁷

The rationale for the derivative work exception was to avoid unfairness to motion picture producers.¹⁰⁸ This rationale stems from a comment on the *Register's Report*, which argued that it was unfair for producers to lose their rights to exploit finished works because they usually acquired their rights via an up-front, lump sum payment before investing talent and resources into the motion picture.¹⁰⁹ According to at least one scholar, it was this argument that provided the rationale for the derivative works exception, which first appeared in the Register of Copyrights' preliminary draft.¹¹⁰ In addition, these works are protected from termination, because otherwise the terminating authors might use their termination rights to extract prohibitive fees from owners of successful derivative works or to bring infringement actions against them.¹¹¹ By 1965, the drafters of the Revision Bill had agreed to language establishing the exception for derivative works, and the exception appeared in all subsequent bills up to and including the 1976 Act.¹¹²

Claiming a remixed or remastered album to be a derivative work would provide a lesser remedy than the work-made-for-hire defense, as the record company would be permitted to exploit only the derivative work—the remixed or remastered recordings—while the rights in original recordings would revert to the author.¹¹³ Although not optimal for

¹⁰⁵ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.03[A] (2010).

¹⁰⁶ 17 U.S.C. § 203(b)(1).

¹⁰⁷ See *id.*

¹⁰⁸ See Abrams, *supra* note 47, at 213.

¹⁰⁹ *Id.*; see HOUSE COMM. ON THE JUDICIARY, 88TH CONG., COPYRIGHT LAW REVISION PART 2, DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 264–65 (Comm. Print 1963).

¹¹⁰ Abrams, *supra* note 47, at 213.

¹¹¹ See *Woods v. Bourne*, 60 F.3d 978, 986 (2d Cir. 1995).

¹¹² See Abrams, *supra* note 47, at 221.

¹¹³ See 17 U.S.C. § 203(b)(1) (2006).

the record companies, this result is preferable to losing all rights to the valuable recordings of various artists.¹¹⁴

To qualify as a derivative work, a work must be independently copyrightable.¹¹⁵ To achieve separate copyright status, a derivative work's recasting, transformation, or adaptation of the original work must constitute more than a trivial contribution.¹¹⁶ The general standard used by courts is that a quantum of originality is necessary, one that constitutes a distinguishable variation from the original work in any meaningful manner that is more than merely trivial.¹¹⁷ This seemingly lenient standard is a result of the low bar for copyright, as courts will not take it upon themselves to be the judge of artistic value.¹¹⁸

The strategy of arguing that remastered albums are derivative works has been acknowledged by various scholars, but most have treated it minimally in favor of focusing on whether sound recordings can be considered works made for hire.¹¹⁹ Practitioners in the field, however, expect record companies to assert that remixed or remastered albums are indeed derivative works.¹²⁰

E. *Remastered Works as Derivative Works*

Determining whether a remastered sound recording can qualify as a derivative work requires not just a detailed understanding of the way the law has treated derivative sound recordings, but also a thorough knowledge of the mastering and remastering process.¹²¹ Guidance

¹¹⁴ See *id.* § 203(b); *supra* notes 5–10, 51–54 and accompanying text.

¹¹⁵ *Woods*, 60 F.3d at 990 (citing *Weissmann v. Freeman*, 868 F.2d 1313, 1320–21 (2d Cir. 1989)).

¹¹⁶ NIMMER & NIMMER, *supra* note 105, § 3.03[A].

¹¹⁷ NIMMER & NIMMER, *supra* note 105, § 3.03[A]. This standard has been proposed by Professor David Nimmer. *Id.* Courts have consistently cited this standard with approval. See *Montgomery v. Noga*, 168 F.3d 1282, 1290 n.12 (11th Cir. 1999) (quoting NIMMER & NIMMER); *Sherry Mfg. Co. v. Towel King of Fla., Inc.*, 753 F.2d 1565, 1568 (11th Cir. 1985) (citing NIMMER & NIMMER); *Siegel v. Time Warner Inc.*, 496 F. Supp. 2d 1111, 1152 (C.D. Cal. 2007) (quoting NIMMER & NIMMER).

¹¹⁸ See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (Holmes, J., dictum) (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.”).

¹¹⁹ See *Frisch & Fortnow*, *supra* note 9, at 225–26 (devoting fewer than two full pages out of a twenty-five page article to the topic); *Gould*, *supra* note 15, at 131–33 (devoting fewer than three full pages out of a forty-seven page note to the topic).

¹²⁰ See, e.g., *Eliot Van Buskirk, Copyright Time Bomb Set to Disrupt Music, Publishing Industries*, WIRED.COM (Nov. 13, 2009, 3:17 PM), <http://www.wired.com/epicenter/2009/11/copyright-time-bomb-set-to-disrupt-music-publishing-industries/>.

¹²¹ See *infra* notes 123–171 and accompanying text.

from statutory law is sparse.¹²² Regarding sound recordings, the U.S. Code states that a “derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality” is copyrightable.¹²³ Although it does not have the force of law, the *Compendium of Copyright Office Practices* (“*Compendium*”)—“the general guide on registration, recordation, and related practices consulted by Copyright Office staff and the public”—states that remixed versions of preexisting sound recordings are acceptable to receive a derivative copyright.¹²⁴ On the other hand, the *Compendium* indicates that just remastering a previous recording cannot be the sole basis of a claim for a derivative copyright.¹²⁵

Because of the lack of statutory guidance, it is helpful to examine the remastering process to determine if that process is sufficiently creative to warrant derivative copyright status.¹²⁶ Generally, when sound recordings are first created, they are mixed and mastered in addition to being recorded.¹²⁷ Remastering a work entails performing this mastering process to the recording again to achieve a different sound.¹²⁸ The “loudness wars,” a trend of music companies to master sound recordings at the highest possible average volume, has had an effect on the sound of remastered albums.¹²⁹ To some, these remastered albums sound noticeably worse than the original sound recordings.¹³⁰ Recognizing the ability of this process to affect a sound recording, one district court upheld a derivative copyright to a remixed and remastered sound recording, finding that the new recording was an improvement over the old recording and was thus sufficiently original under copyright

¹²² See *infra* notes 123–125 and accompanying text.

¹²³ 17 U.S.C. § 114(b) (2006).

¹²⁴ COMPENDIUM II OF COPYRIGHT OFFICE PRACTICES § 496.03(b)(1), http://ipmall.info/hosted_resources/CopyrightCompendium/chapter_0400.asp (last visited Nov. 7, 2012) [hereinafter COMPENDIUM II]; *Compendium II: Copyright Office Practices*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/compendium/> (last visited Nov. 7, 2012); cf. Schweiker v. Hansen, 450 U.S. 785, 789 (1981) (stating that the Social Security Administration’s Claims Manual has no legal force and therefore does not bind the Social Security Administration).

¹²⁵ COMPENDIUM II, *supra* note 124, § 496.03(b)(2).

¹²⁶ See *infra* notes 127–171 and accompanying text.

¹²⁷ See DAVID MILES HUBER & ROBERT E. RUNSTEIN, *MODERN RECORDING TECHNIQUES* 20–21 (7th ed. 2010).

¹²⁸ See Steve Guttenberg, *What’s the Difference? CD ‘Mastering’ vs. ‘Remastering,’* CNET (Feb. 8, 2008, 6:43 AM), http://news.cnet.com/8301-13645_3-9869772-47.html.

¹²⁹ See *infra* notes 162–166 and accompanying text (discussing how the loudness wars rationale has significantly altered remastered albums, resulting in noticeably different sound recordings).

¹³⁰ See *infra* notes 162–171 and accompanying text (summarizing negative reactions to some remastered sound recordings).

law.¹³¹ Whether this ruling will extend to all remastered albums requires one to explore the remastering process.¹³²

1. Mastering and Remastering Defined

Albums are usually handled by both a mixing engineer and a mastering engineer before they are finalized, and both engineers perform different functions.¹³³ These functions are often confused with one another and may sometimes blend together, but there are differences between the two.¹³⁴ When an album is “mixed,” the individually recorded parts of each song, such as the drums, guitars, and vocals, are adjusted by an engineer who blends the parts into one sound, adjusting the relative sounds of each individual track to create the best overall composition.¹³⁵

After the mixing process, an album is “mastered.”¹³⁶ Mastering is the last creative step in the audio production process, which is the final step before replication and distribution.¹³⁷ In general terms, mastering is when the sound of a recording is balanced, equalized, and enhanced.¹³⁸ The mastering engineer listens to the sound recording in a specialized environment and changes the levels, equalization, and dynamics of the recording so that the final version achieves its best possible sonic qualities.¹³⁹ Usually, the mastering process will be performed on the song after it has already been mixed for a stereo sound system.¹⁴⁰

Both mixing and mastering engineers were given a new medium with the introduction of the CD in the 1980s, which gave recording art-

¹³¹ See *Maljack Prods., Inc. v. UAV Corp.*, 964 F. Supp. 1416, 1428 (C.D. Cal. 1997), *aff'd sub nom. Batjac Prods. Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223 (9th Cir. 1998).

¹³² See *infra* notes 133–146 and accompanying text.

¹³³ See HUBER & RUNSTEIN, *supra* note 127, at 20–21.

¹³⁴ John Scott G, *Mastering Your Music: Why You Need It, Where to Get It, and How to Make the Most of It*, MUSICBIZACADEMY.COM, http://www.musicbizacademy.com/articles/gman_mastering.htm (last visited Nov. 7, 2012).

¹³⁵ See HUBER & RUNSTEIN, *supra* note 127, at 429.

¹³⁶ BOB KATZ, *MASTERING AUDIO: THE ART AND THE SCIENCE* 12 (2d ed. 2007).

¹³⁷ *Id.*

¹³⁸ *What Is Mastering?*, DISCMAKERS, http://www.discmakers.com/soundlab/whatis_mastering.asp (last visited Nov. 7, 2012).

¹³⁹ HUBER & RUNSTEIN, *supra* note 127, at 21.

¹⁴⁰ *What Is Mastering?*, VALVETONE, http://www.valvetone.com/index.php?option=com_content&view=article&id=57&Itemid=67 (last visited Nov. 7, 2012).

ists more acoustic possibility to record their sound.¹⁴¹ Eventually, record companies took advantage of this extra sonic potential by remastering previous albums and re-releasing them.¹⁴²

Remastering is, in essence, the process of mastering the original sound recordings again.¹⁴³ The remastering engineer uses the original tapes or files, listens to them again, and attempts to achieve a better sound on a newly mastered recording.¹⁴⁴ The process can be quite time intensive, as one remastering engineer stated that it can occasionally take forty hours to “remove all the clicks and pops from the original source.”¹⁴⁵ In contrast to mixing, which can affect individual tracks within a single song, the remastering process can affect only the already mixed recording.¹⁴⁶

2. The Loudness Wars: A Trend in Modern Remastering

Doubting the creativity needed to create a remastered sound recording, some have questioned whether the trend of releasing remastered versions of previous sound recordings is anything more than a cash grab by the record companies, pawning off an old work as something different and new.¹⁴⁷ But a specific group of consumers, artists,

¹⁴¹ Nick Southall, *Imperfect Sound Forever*, STYLUS MAG. (May 1, 2006), http://stylusmagazine.com/articles/weekly_article/imperfect-sound-forever.htm. Vinyl records allowed only for a dynamic range of seventy-five decibels (dB) in a sound recording; a CD has a range of approximately ninety dB. *Id.* For comparison, live music spans approximately 120dB. *Id.* Such a difference meant that music could be recorded on a CD with a larger differential between the quiet moments of a song and its loud moments to capture the sonic intent of the recording artist more accurately. *Id.*

¹⁴² Keith Hanlon, *The Myth of Remastering*, BLOGCRITICS (Sept. 23, 2003), <http://blogcritics.org/music/article/the-myth-of-remastering/>. In the 1980s, record companies did not utilize the extra sonic potential, as most CDs were just basic transfers of the original recording of the music, often with no changes made to realize the potential dynamics of the CD. *See id.* These transfers are referred to by sound engineers as “flat transfers.” *See id.* By the 1990s, however, record companies realized that by reissuing and remastering their back catalog, they could make more money. Patrick Flanary, *Musicians Split over Album Reissues*, ROLLING STONE (Aug. 3, 2011, 1:30 PM), <http://www.rollingstone.com/music/news/musicians-split-over-album-reissues-20110803>; Hanlon, *supra*.

¹⁴³ Guttenberg, *supra* note 128.

¹⁴⁴ *Id.*

¹⁴⁵ Andrew Harris, *Music's New Digital Frontier*, VINE (Aug. 7, 2011), <http://www.thevine.com.au/music/news/music%27s-new-digital-frontier20110807.aspx>.

¹⁴⁶ Harvey Reid, *About Re-Mastering*, WOODPECKER RECORDS, <http://www.woodpecker.com/writing/essays/remastering.html> (last visited Nov. 7, 2012).

¹⁴⁷ *See, e.g.*, Flanary, *supra* note 142; Christine Khalil, *Remastered Albums—A Brilliant Marketing Ploy or Loss of Authenticity for a New Generation?*, AU REV. (Nov. 4, 2011, 12:54 PM), <http://www.theaureview.com/features/remastered-albums-a-brilliant-marketing-ploy-or-loss-of-authenticity-for-a-new-generation>; *The Art of Re-Mastering*, BBC (Apr. 29, 2010), <http://>

and sound engineers alike claim there is a noticeable change in these remastered recordings, often for the worse.¹⁴⁸ These discerning listeners claim that music is being mastered and remastered too loud in recent years, ruining the dynamic range in the original recordings and sometimes making music unlistenable.¹⁴⁹

These listeners call their fight the “loudness wars,” their term for the relatively recent trend of mastering sound recordings at the highest possible average volume.¹⁵⁰ To create this “loudness,” sound engineers use a technique called dynamic range compression, which reduces the difference between the loudest and softest sounds in a song.¹⁵¹ Record companies push for this, believing it will make the sound recording stand out to the listener.¹⁵² As a result, some listeners claim that albums remastered according to this rationale sound noticeably different, making the remastering process arguably transformative.¹⁵³

Modern sound recordings on CDs are mastered in an extremely compressed way because some believe that louder music will stand out more to the listener on the radio.¹⁵⁴ Most modern CDs are mastered

www.bbc.co.uk/programmes/b00s3h40 (exploring whether digital re-mastering is just another way of selling music to consumers that they already own).

¹⁴⁸ See Robert Levine, *The Death of High Fidelity*, ROLLING STONE, Dec. 27, 2007, at 15, 18. As one *Rolling Stone Magazine* contributor notes:

It's not just new music that's too loud. Many remastered recordings suffer the same problem as engineers apply compression to bring them into line with modern tastes. The new Led Zeppelin collection, *Mothership*, is louder than the band's original albums, and [David] Bendeth, who mixed Elvis Presley's *30 #1 Hits*, says that the album was mastered too loud for his taste.

Id.

¹⁴⁹ See Tim Anderson, *How CDs Are Remastering the Art of Noise*, GUARDIAN, Jan. 17, 2007, <http://www.guardian.co.uk/technology/2007/jan/18/pop.music>.

¹⁵⁰ See Sreedhar, *supra* note 23.

¹⁵¹ Levine, *supra* note 148, at 15. Compression is not a new technique, as rock and pop music producers and engineers consistently used compression to balance out different instruments in a recording before the age of CDs. *Id.* at 18. Vinyl, however, physically limited how high bass levels could go, as the needle of the record player could skip off the groove. *Id.* CDs, with a larger dynamic range and digital technology, have no such physical limitation. See *id.*

¹⁵² See *id.* at 16. The idea behind this is rooted in science: because the inner ear automatically compresses high volume to protect itself, humans subconsciously associate compression with loudness. *Id.* And because humans have evolved to pay particular attention to loud noises, compressed sounds initially seem more exciting to the listener. *Id.*

¹⁵³ See *infra* notes 159–171 and accompanying text.

¹⁵⁴ Levine, *supra* note 148, at 16; Southall, *supra* note 141. There is research that suggests that such compressed music does not, in fact, stand out more to the listener on the radio. See Ian Shephard, *Loudness Means Nothing on the Radio—The Proof*, PRODUCTION ADVICE (Mar. 6, 2011), <http://productionadvice.co.uk/loudness-means-nothing-on-the-radio/>; Earl Vickers,

within only the top five loudest decibels (dB) of the CD.¹⁵⁵ The 1995 album (*What's the Story*) *Morning Glory* by rock band Oasis is often cited as the major impetus behind this ultra-compression.¹⁵⁶ On many songs, the difference between the loudest and quietest parts was merely eight dB, all at the highest range of the loudness spectrum.¹⁵⁷ The album was incredibly popular, and some believe its loudness was instrumental to its success.¹⁵⁸

Those opposed to loudness, however, claim that music sounds significantly different—in fact, worse—when its range is so compressed by this process.¹⁵⁹ Donald Fagen of the rock band Steely Dan told *Rolling Stone Magazine*, “With all the technical innovation, music sounds worse. God is in the details. But there are no details anymore.”¹⁶⁰ Sound engineer Steve Hoffman, who specializes in remastering old rock albums, said that, “When everything is loud, it doesn’t sound loud anymore. The only way that something can sound loud is if there’s something quiet that precedes it, or else there’s no frame of reference.”¹⁶¹

Following in the steps of these new releases, remastered versions of previously released albums soon became victims of the so-called loudness wars, resulting in the remastered versions sounding much different than the original recordings.¹⁶² For example, the song “Search and Destroy” on the 1997 remastered version of Iggy Pop and the Stooges’ album *Raw Power* was remastered within a loudness range of less than three dB.¹⁶³ For comparison, the version on the original 1990 CD re-

The Loudness War: Background, Speculation and Recommendations 19 (Nov. 4, 2010), http://www.sfxmachine.com/docs/loudnesswar/loudness_war.pdf.

¹⁵⁵ Southall, *supra* note 141.

¹⁵⁶ Levine *supra* note 148, at 18; Southall, *supra* note 141.

¹⁵⁷ Southall, *supra* note 141.

¹⁵⁸ *Id.* According to one commentator:

Audiophiles and people who work in audio engineering largely agree that this is too loud, but in the face of massive commercial impetus their say is often ignored. Arguably (*What's the Story*) *Morning Glory* became so successful in the UK precisely because it was so loud; its excessive volume and lack of dynamics meant it worked incredibly well in noisy environments like cars and crowded pubs, meaning it very easily became an ubiquitous and noticeable record in cultural terms.

Id.

¹⁵⁹ See *infra* notes 160–161 and accompanying text.

¹⁶⁰ Levine, *supra* note 148, at 16.

¹⁶¹ Anderson, *supra* note 149.

¹⁶² See *id.*; Southall, *supra* note 141.

¹⁶³ *Loudness*, CHI. MASTERING SERVICE, <http://www.chicagomasteringservice.com/loudness.html> (last visited Nov. 7, 2012). The loudness range is measured by root mean squared metering, which attempts to average the level of loudness of a recording over a

lease had an average loudness range of nearly fourteen dB.¹⁶⁴ In 2010, record company EMI Music faced outcry over the remastering of Duran Duran's music, not merely from fans but from the artist.¹⁶⁵ After the release, guitarist Andy Taylor stated on Twitter, the social networking website, that the album "[s]ounds like it was done down the pub I can express my utter disgust & the remastering's crap."¹⁶⁶

It is not just the artists that are noticing the difference either—portions of the music-consuming public believe that remastering albums can result in a noticeably different recording from the original work.¹⁶⁷ Fans of the rock band Metallica established an online petition after the release of the band's album *Death Magnetic* to have that album remixed or remastered after many were disappointed in the release, highlighting the ability of remixing or remastering to alter a sound recording.¹⁶⁸ The petition, published on September 10, 2008, has over 22,000 signatures.¹⁶⁹ The outcry intensified when both fans and the sound engineer himself proclaimed that the versions of the songs featured on the video game *Guitar Hero*, which were not compressed in the same way as the songs on the album, sounded better.¹⁷⁰ Meanwhile, or-

long period of time to more closely correspond to the human perception of loudness. *See id.*

¹⁶⁴ *Id.*

¹⁶⁵ Sean Michaels, *EMI Defends Duran Duran Remasters*, GUARDIAN, July 15, 2010, <http://www.guardian.co.uk/music/2010/jul/15/emi-defends-remastered-duran-albums>.

¹⁶⁶ *Id.* Despite these criticisms, remastered albums have also been praised for transforming the original by improving the sound. *See Levine, supra* note 148, at 16; *The Thirty Best Reissues Ever*, NME (Aug. 17, 2011), <http://www.nme.com/photos/the-30-best-reissues-ever/230625/1/1#4>. In the process of releasing a best-of collection of deceased recording artist Jeff Buckley, his mother listened to her son's original recordings and found that they sounded different than the 2004 remastered version. Levine, *supra* note 148, at 16. As such, she recruited an independent company to once again remaster the recordings from the original source, and claimed that in the newly-remastered version, "You can hear the distinct instruments and the sound of the room Compression smudges things together." *Id.* Additionally, NME Magazine, in compiling a list of the best thirty reissues ever, cited a remastered version of artist Sly & the Family Stone's *There's a Riot Going On*, listing it because the remastered work was a sonic improvement over the original CD. *The Thirty Best Reissues Ever, supra*.

¹⁶⁷ *See supra* notes 159–166 and accompanying text (showcasing negative artist reaction to remastered sound recordings); *infra* notes 168–171 and accompanying text (highlighting music consumers' beliefs that remastering sound recordings can make the sound recording either better or worse).

¹⁶⁸ *See Petition to Re-Mix or Remaster Death Magnetic!*, GOPETITION.COM (Sept. 10, 2008), <http://www.gopetition.com/petitions/re-mix-or-remaster-death-magnetic.html>.

¹⁶⁹ *Id.*

¹⁷⁰ Daniel Kreps, *Fans Complain After "Death Magnetic" Sounds Better on "Guitar Hero" Than CD*, ROLLING STONE (Sept. 18, 2008, 2:12 PM), <http://www.rollingstone.com/music/news/fans-complain-after-death-magnetic-sounds-better-on-guitar-hero-than-cd-20080918>.

ganizations such as Justice for Audio and Turn Me Up have been formed to attempt to combat the loudness wars by increasing public awareness and working with artists and recording professionals.¹⁷¹

Remastered works that were a part of the loudness wars thus raise an interesting question in relation to termination: whether or not this remastering process, which reactions show can noticeably alter a sound recording, is creative enough to warrant derivative work status.¹⁷² What qualifies as a derivative work is left to a difficult-to-predict assessment of what is, and what is not, sufficiently creative.¹⁷³ A thorough analysis is thus needed to determine whether, generally, these remastered recordings may be considered derivative works and thus exempt from termination.¹⁷⁴

II. A LITTLE HELP?: COURTS AND MUSICAL DERIVATIVE WORKS

It is unclear how courts will decide the issue of a work that is solely remastered without being remixed.¹⁷⁵ This is particularly true of remastered works that are part of the loudness wars.¹⁷⁶ These works are not mere reproductions of the original work in another medium, which would generally lack sufficient creativity to warrant a derivative copyright.¹⁷⁷ Instead, they contain some level of originality and are debatably distinguishable from the underlying work.¹⁷⁸ This level of originality is likely less than that of remixed works, which the *Compendium* finds are typically original enough to warrant copyright protection.¹⁷⁹ But the question remains whether remastering contributes sufficient origi-

¹⁷¹ See e.g., JUSTICE FOR AUDIO, <http://www.justiceforaudio.org/> (last visited Nov. 7, 2012); TURN ME UP, <http://turnmeup.org/> (last visited Nov. 7, 2012).

¹⁷² See *supra* notes 147–171 and accompanying text.

¹⁷³ See *supra* notes 115–118 and accompanying text.

¹⁷⁴ See *infra* notes 175–366 and accompanying text.

¹⁷⁵ See *infra* notes 176–261 and accompanying text.

¹⁷⁶ See *supra* notes 147–171 and accompanying text.

¹⁷⁷ See *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 492 (2d Cir. 1976) (en banc) (denying derivative copyright to a plastic “Uncle Sam” bank copied from a cast iron version in the public domain); *Hengst v. Early & Daniel Co.*, 59 F. Supp. 8, 9–10 (S.D. Ohio 1945) (denying copyright to hog gestation tables that merely changed the arrangement of data from vertical to horizontal). *But see* *Millworth Converting Corp. v. Slifka*, 276 F.2d 443, 445 (2d Cir. 1960) (granting derivative copyright to the adaptation of a public domain embroidery design to a print fabric design).

¹⁷⁸ See KATZ, *supra* note 136, at 12 (stating that the mastering process is the last creative step of the audio production process).

¹⁷⁹ See *id.*; COMPENDIUM II, *supra* note 124, § 496.03(b)(1).

nality to warrant copyright protection under the derivative works exception.¹⁸⁰

This Part examines the existing analogous case law related to the question of originality in derivative musical works.¹⁸¹ Section A establishes a model articulation of the standard of originality in derivative works.¹⁸² Section B explores cases that feature derivative musical works based on preexisting musical works.¹⁸³ Finally, Section C examines non-music cases where courts found valid derivative works within the same medium as the original.¹⁸⁴ This Part concludes that although these cases are helpful, they are not determinative, and thus a more custom framework is needed to address whether a remastered sound recording is sufficiently creative to warrant derivative work status.¹⁸⁵

A. Finding a Standard

Not every variation to a sound recording will result in a copyrightable derivative work, so courts must determine how much originality is necessary in the derivative work for it to qualify for copyright; this is a determination courts have struggled with.¹⁸⁶ Generally, courts fall in line with the U.S. Supreme Court's rejection of the "sweat of the brow" theory of copyright, which would grant copyright protection to works where the author merely expends significant effort making the finished product.¹⁸⁷ For example, copyright was denied to an author who made 40,000 changes to a book, consisting mostly of the punctuation corrections, spelling changes, and other typographical changes.¹⁸⁸

¹⁸⁰ See Gould, *supra* note 15, at 131–33.

¹⁸¹ See *infra* notes 186–263 and accompanying text.

¹⁸² See *infra* notes 186–199 and accompanying text.

¹⁸³ See *infra* notes 200–241 and accompanying text.

¹⁸⁴ See *infra* notes 242–263 and accompanying text.

¹⁸⁵ See *infra* notes 262–263 and accompanying text.

¹⁸⁶ See *infra* notes 187–195 and accompanying text.

¹⁸⁷ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359–60 (1991) (“[T]he 1976 revisions to the Copyright Act leave no doubt that originality, not ‘sweat of the brow,’ is the touchstone of copyright protection Nor is there any doubt that the same was true under the 1909 Act.”).

¹⁸⁸ *Grove Press, Inc. v. Collectors Publ'n, Inc.*, 264 F. Supp. 603, 605–06 (C.D. Cal. 1967). Seemingly contrary to this principle, however, the U.S. Court of Appeals for the Ninth Circuit has held that removing reproductions of artwork from a compilation and mounting those reproductions onto ceramic tile amounted to a derivative work. *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1342–43 (9th Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989). It should be noted, however, that the U.S. Court of Appeals for the Seventh Circuit has rejected this holding. See *Lee v. A.R.T. Co.*, 125 F.3d 580, 583 (7th Cir. 1997).

Originality, and not effort, as the Supreme Court stated in 1991 in *Feist Publications, Inc. v. Rural Telephone Service Co.*, is essential for copyright protection.¹⁸⁹ For a work to be original, it must be independently created and possess a minimal degree of creativity.¹⁹⁰ Thus a derivative work, like any work, need show only a modicum of creativity to receive copyright protection.¹⁹¹ Courts, however, have struggled to apply this modicum of creativity standard to derivative works, leading to much litigation.¹⁹² One scholar has highlighted the U.S. Court of Appeals for the Second Circuit's own inconsistent standards on this question, as it has stated that the originality requirement is essentially the same for all works but has later cited cases requiring "substantial variation" and a "sufficiently gross" difference for derivative works.¹⁹³ Similarly, the U.S. Court of Appeals for the Seventh Circuit has articulated a more stringent standard for derivative works, requiring substantial variation.¹⁹⁴ More recently, however, it appears to have moved away from this more stringent standard, ruling that the standard of originality for derivative works is no more demanding than the originality requirement for other works.¹⁹⁵

Professor David Nimmer has adapted the modicum of creativity standard into a workable originality standard for derivative works: "[I]n order to qualify for a separate copyright as a derivative . . . work, the additional matter injected in a prior work, or the manner of rearranging or otherwise transforming a prior work, must constitute more than

¹⁸⁹ 499 U.S. at 345.

¹⁹⁰ *Id.*

¹⁹¹ *See id.*

¹⁹² *See* Eric C. Surette, Annotation, *What Constitutes Derivative Work Under the Copyright Act of 1976*, 149 A.L.R. FED. 527 (1998) ("Although § 101 provides a definition of 'derivative work' the issue as to what constitutes a derivative work has often been litigated.").

¹⁹³ 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:53 (2012) (comparing *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674 (2d Cir. 1998), where the Second Circuit stated that the originality requirement is essentially the same for all works, with *Medallic Art Co. v. Wash. Mint*, 208 F.3d 203 (2d Cir. 2000) (unpublished table decision), where the Second Circuit cited a case requiring a sufficiently gross requirement for derivative works).

¹⁹⁴ *Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (7th Cir. 1983).

¹⁹⁵ *Schrock v. Learning Curve Int'l, Inc.* 586 F.3d 513, 521 (7th Cir. 2009). In addition, with regard to derivative works, the U.S. Court of Appeals for the Eleventh Circuit has held that "all that must be shown is that the work 'possesses at least some minimal degree of creativity. . . . To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.'" *Montgomery v. Noga*, 168 F.3d 1282, 1290 (11th Cir. 1999) (quoting *Feist*, 499 U.S. at 345). The quoted language, the court stated, clarified that a stringent standard, similar to the Seventh Circuit's standard, was inappropriate. *See id.* at 1290 & n.12.

a minimal contribution.”¹⁹⁶ Professor Nimmer explains that the necessary quantum of originality is any variation that meaningfully distinguishes the derivative work from the prior work.¹⁹⁷ Numerous courts have adopted Professor Nimmer’s standard.¹⁹⁸ Although this articulated standard is useful, it is helpful also to examine cases that are analogous to music remastering to see how courts have applied this standard to similar facts.¹⁹⁹

B. Derivative Musical Works

One analogous set of cases in which courts have applied the derivative work originality standard is that of cases involving derivative musical compositions.²⁰⁰ These comparisons are imperfect, however, as sound recording copyrights are separate from the copyright in the underlying musical composition.²⁰¹ Yet the reasoning in these cases, provides some guidance as to how courts determine what differences in musical works will satisfy the originality test.²⁰² Also helpful are the rare cases in which a court has applied the derivative work originality standard to derivative sound recordings.²⁰³

I. Musical Compositions

In 1995, in *Woods v. Bourne Co.*, the U.S. Court of Appeals for the Second Circuit addressed a derivative musical work in resolving a copyright termination dispute.²⁰⁴ There, the Second Circuit compared a “lead sheet” of a work to a piano-vocal arrangement.²⁰⁵ A lead sheet is a handwritten rendering of the lyrics and melody of the work without harmonies or other embellishments.²⁰⁶ The defendant claimed that the piano-vocal arrangement added harmonies and other elements, creating a commercially viable derivative work.²⁰⁷ The Second Circuit up-

¹⁹⁶ NIMMER & NIMMER, *supra* note 105, § 3.03[A].

¹⁹⁷ *Id.* § 3.03[A], at 3–10.

¹⁹⁸ *See supra* note 116 (collecting cases).

¹⁹⁹ *See infra* notes 200–261 and accompanying text.

²⁰⁰ *See Woods v. Bourne Co.*, 60 F.3d 978, 981 (2d Cir. 1995); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 73 F. Supp. 165, 167 (S.D.N.Y. 1947); *Norden v. Oliver Ditson Co.*, 13 F. Supp. 415, 418 (D. Mass. 1936); *Cooper v. James*, 213 F. 871, 873 (N.D. Ga. 1914).

²⁰¹ *See* 17 U.S.C. § 102(a) (2006).

²⁰² *See infra* notes 204–219 and accompanying text.

²⁰³ *See infra* notes 220–241 and accompanying text.

²⁰⁴ *See* 60 F.3d at 981.

²⁰⁵ *Id.* at 992.

²⁰⁶ *Id.* at 989.

²⁰⁷ *Id.*

held the lower court's decision that the changes were not substantial enough to warrant a derivative copyright.²⁰⁸ Rather, the changes were trivial and dictated by conventional rules of harmony.²⁰⁹

Similarly, a series of older cases reject derivative copyrights in musical compositions comprised of minimal changes from the original.²¹⁰ One notable case is the 1947 decision of the U.S. District Court for the Southern District of New York in *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*²¹¹ In *Shapiro*, the court refused to grant a derivative copyright to a piece of music that changed the rhythm and name of a preexisting song and added a slight variation in the base of the accompaniment.²¹² The court stated that such a copyright would be valid only if the derivative work was a "new work," and that without a change in the tune or lyrics of the song, this requirement could not be met.²¹³

Other courts have reached similar results.²¹⁴ In a 1936 decision, the U.S. District Court for the District of Massachusetts held in *Norden v. Oliver Ditson Co.* that occasional rhythmic changes in the musical composition were insufficient to warrant a derivative copyright.²¹⁵ The court reasoned that the changes were too simple to warrant copyright protection, stating that "a composition, to be the subject of a copyright, must have sufficient originality to make it a new work rather than a copy of the old, with minor changes which any skilled musician might make."²¹⁶

Although these cases demonstrate courts' hesitancy to grant derivative copyrights to slightly altered musical works, they are not deter-

²⁰⁸ *Id.* at 992.

²⁰⁹ *Id.* The Second Circuit's articulation of the originality requirement may reasonably confound lower courts. *See id.* at 990. At least one scholar has noted that the Second Circuit has issued wildly different standards regarding originality in derivative works. PATRY, *supra* note 193, § 3:53. The court in *Bourne* cited approvingly the Seventh Circuit's decision in *Gracen v. Bradford Exchange*, requiring substantial variation in derivative works. *Bourne*, 69 F.3d at 990 (citing *Gracen*, 698 F.2d 300); PATRY, *supra* note 193, § 3:53. That decision, however, has since been questioned by the Seventh Circuit itself. *See Noga*, 168 F.3d at 1290 & n.12. Additionally, the Second Circuit has since held that the originality requirement is "essentially the same for all works," including derivative works. *Matthew Bender*, 158 F.3d at 680. Thus, although *Bourne* has not been expressly overruled by the Second Circuit, it is unlikely that its holding extends beyond its facts. *See id.*; *Bourne*, 69 F.3d at 990.

²¹⁰ *Shapiro*, 73 F. Supp. at 167; *Norden*, 13 F. Supp. at 418; *Cooper*, 213 F. at 873.

²¹¹ 73 F. Supp. at 167.

²¹² *Id.*

²¹³ *See id.*

²¹⁴ *See Norden*, 13 F. Supp. at 418; *Cooper*, 213 F. at 873.

²¹⁵ 13 F. Supp. at 418.

²¹⁶ *Id.*; *see also Cooper*, 213 F. at 873 (holding that the addition of alto parts to a previously published songbook was not sufficient to create a derivative work).

minative, as each concerned a derivative musical composition and not a derivative sound recording.²¹⁷ Conceivably, one could make changes to a work that make it sound sufficiently different from the previous sound recording but do little to alter the underlying musical composition.²¹⁸ For example, if a sound engineer stereoized a monaural recording, she may do little to the musical composition, but her work would greatly change the sound recording.²¹⁹

2. Sound Recordings

Perhaps in recognition of the differences in sound quality between an original recording and a re-engineered version, some record companies have filed for and received a copyright for re-engineered albums.²²⁰ Sire Record Company claimed a separate copyright in a CD/DVD release of the “deluxe edition” of the 1986 album *Black Celebration* by Depeche Mode.²²¹ As the basis for its separate copyright, Sire claimed “remixed and remastered versions of all sound recordings listed . . . [that were] remixed from original source for new fixation.”²²² Omega Record Group filed a similar claim for a version of a Christmas album, claiming new matter as the basis of copyright because the sound recording was “remixed & remastered to utilize fully the sonic potential of the compact disc medium.”²²³

Although copyright in re-engineered sound recordings has not been fully litigated, one federal district court upheld a copyright in such a recording from a public domain work.²²⁴ In *Maljack Productions, Inc. v. UAV Corp.*, decided in 1997, the U.S. District Court for the Central District of California held that the defendant added copyrightable elements to a film soundtrack after the defendant digitized, remixed, stereoized, and upgraded the sound quality of a public domain movie

²¹⁷ See 17 U.S.C. § 102(a) (2006); *supra* notes 204–216 and accompanying text.

²¹⁸ See *supra* notes 133–171 and accompanying text.

²¹⁹ See *Maljack Prods., Inc. v. UAV Corp.*, 964 F. Supp. 1416, 1428 (C.D. Cal. 1997), *aff’d sub nom.* *Batjac Prods. Inc. v. GoodTimes Home Video Corp.*, 160 F.3d 1223 (9th Cir. 1998).

²²⁰ See *infra* notes 221–223 and accompanying text.

²²¹ See Copyright Registration No. SR0000616038 (registered Sept. 9, 2007), available at <http://cocatalog.loc.gov> (enter “SR0000616038” in “Search for” field, and select “Registration Number” in “Search by” field).

²²² *Id.*

²²³ See Copyright Registration No. SR0000145434 (registered July 20, 1992), available at <http://cocatalog.loc.gov> (enter “SR0000145434” in “Search for” field, and select “Registration Number” in “Search by” field).

²²⁴ See *Maljack*, 964 F. Supp. at 1428.

soundtrack.²²⁵ The plaintiff Batjac's copyright claim involved two works to which it added copyrightable elements.²²⁶ Batjac created a "panned and scanned" version of a public domain motion picture for videocassettes and edited the picture's public domain monaural soundtrack by remixing, resequencing, sweetening, equalizing, balancing, and stereoizing it, and also adding entirely new sound material.²²⁷ The defendant claimed that Batjac did not have a valid derivative copyright in the new soundtrack.²²⁸

The court, in upholding the copyright, found that the process of re-engineering the soundtrack required a "creative mixing and balancing of sounds" and that the defendant's version of the soundtrack was a "noticeable improvement" over the previous version.²²⁹ The court was persuaded by both the Copyright Office's stated standards for copyright protection and its own impression of the differences between the two soundtracks.²³⁰ The court cited 17 U.S.C. § 114(b), but it first looked to the *Compendium*.²³¹ The court was swayed by the fact that the *Compendium* accepts alterations, such as remixing and stereoizing, as sufficiently original to constitute a derivative work.²³² In addition, the court rejected the testimony of the defendant's expert witness, who opined that the two different soundtracks were audibly indistinguishable.²³³ The court listened to both and found the 1993 version to be a "noticeable improvement."²³⁴

Although the soundtrack in *Maljack* was re-engineered much like a remastered album, the court's reasoning may not control in litigation over remastered albums.²³⁵ Notably, the soundtrack in *Maljack* was remixed in addition to being otherwise re-engineered.²³⁶ A remixed al-

²²⁵ *Id.* By remixing and stereoizing the sound recording, the sound engineer likely did more to alter the recording than one would typically do in remastering a recording. See *supra* notes 133–146 and accompanying text (examining the differences between mixing, mastering, remixing, and remastering a sound recording).

²²⁶ See *Maljack*, 964 F. Supp. at 1426–28.

²²⁷ *Id.* at 1418.

²²⁸ *Id.* at 1428.

²²⁹ *Id.* On appeal, the Ninth Circuit did not consider this issue. See *Batjac*, 160 F.3d 1223. It should be noted, however, that because the defendant, UAV Corp., already had a registered copyright in its remixed and remastered version of the album, the court applied a presumption of validity. *Maljack*, 964 F. Supp. at 1428; see 17 U.S.C. § 410(c) (2006).

²³⁰ See *Maljack*, 964 F. Supp. at 1428.

²³¹ *Id.*

²³² *Id.* (citing COMPENDIUM II, *supra* note 124, § 496.03(b)(1)).

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See *infra* notes 236–241 and accompanying text.

²³⁶ See *Maljack*, 964 F. Supp. at 1428.

bum can sound noticeably different from the original, as the mixing engineer can adjust the particular levels for the various tracks of the recording.²³⁷ Perhaps recognizing the amount of creativity required by this practice, the *Compendium* notes that remixing is sufficient for copyright protection.²³⁸

Moreover, the engineer in *Maljack* stereoized the monaural soundtrack.²³⁹ Record labels generally stopped releasing monaural records in the late 1960s.²⁴⁰ Because termination rights apply only to works created on or after January 1, 1978, it is highly unlikely that a remastered version of these post-1978 works would be stereoized, because all of the works likely will have been originally recorded in stereo sound.²⁴¹

C. Non-Musical Derivative Works

Non-music cases involving derivative works in the same medium as the original also show how courts may apply the originality requirement to remastered sound recordings.²⁴² These cases can help determine how substantial the differences between the two works must be for the derivative work to be deemed original.²⁴³

In 1983, the U.S. Court of Appeals for the Seventh Circuit held in *Midway Manufacturing Co. v. Artic International, Inc.* that a sped-up version of a video game was a derivative work.²⁴⁴ The court's conclusion implies that the existence of demand for a remastered sound recording separate from demand for the original sound recording is important in answering whether remastered sound recordings are derivative works.²⁴⁵ The defendants in *Midway* sold circuit boards for use inside video game machines including one, created under the plaintiff's license, that sped up the rate of play—that is, how fast the sounds and images changed—of the plaintiff's video game “Galaxian.”²⁴⁶ The court acknowledged that a sped-up version of a record is likely not a derivative work, but it distinguished that from a sped-up video game because of the separate

²³⁷ See *supra* note 135 and accompanying text.

²³⁸ See COMPENDIUM II, *supra* note 124, § 493.03(b)(1).

²³⁹ *Maljack*, 964 F. Supp. at 1428.

²⁴⁰ *Stereophonic Sound*, IEEE GLOBAL HIST. NETWORK, http://www.ieeeeghn.org/wiki/index.php/Stereophonic_Sound (last visited Nov. 10, 2012).

²⁴¹ See 17 U.S.C. § 203(a) (2006); *Stereophonic Sound*, *supra* note 240.

²⁴² See *infra* notes 244–261 and accompanying text.

²⁴³ See *infra* notes 244–261 and accompanying text.

²⁴⁴ 704 F.2d 1009, 1013 (7th Cir. 1983).

²⁴⁵ See *id.* at 1013–14.

²⁴⁶ See *id.* at 1010–11.

demand for the sped-up game.²⁴⁷ The court went on to say that a sped-up video game is a “substantially different” work than the original game, one that required “some creative effort to produce.”²⁴⁸

Maljack, discussed earlier, is also helpful in this regard for its holding regarding the plaintiff’s derivative copyright of a “pan-and-scan” version of a movie.²⁴⁹ A pan-and-scan version of a movie is a more narrowly formatted version that better fits on a standard television screen.²⁵⁰ In *Maljack*, after the movie was reformatted, the ensuing derivative work used only fifty-six percent of each frame compared to the original picture.²⁵¹ The court first established that the panning-and-scanning process is capable of creating a copyrightable derivative work, rejecting the defendants’ argument that the process was merely mechanical and thus lacked necessary creativity.²⁵² Then, in determining whether the plaintiff’s specific panned-and-scanned work was a derivative work, the court did not credit two editing expert declarations, which stated that the two works were visually indistinguishable.²⁵³ Instead, the court credited the creator’s statement, in which he attested to making his cutting selections to enhance the storytelling, characters, and interplay of characters.²⁵⁴ The judge also compared the two works and found sufficient changes.²⁵⁵ The court then ruled that the plaintiff’s panned-and-scanned work was itself copyrightable as a derivative work.²⁵⁶

²⁴⁷ See *id.* at 1013–14. The court concluded that “not many people want to hear 33 RPM records played at 45 and 78 RPM’s so that record licensors would not care if their licensees play them at that speed.” *Id.* at 1013. On the other hand, the court observed that

there is a big demand for [sped-up] video games. Speeding up a video game’s action makes the game more challenging and exciting and increases the licensee’s revenue per game. . . . [I]f players are willing to pay an additional price-per-minute in exchange for the challenge and excitement of a faster game, licensees will take in greater total revenues.

Id.

²⁴⁸ *Id.* at 1013–14.

²⁴⁹ See *Maljack*, 964 F. Supp. at 1426–28.

²⁵⁰ *Id.* at 1418. The theatre version had an aspect ratio (the ratio of screen length to screen height) of 2.35-to-1; the plaintiff in *Maljack* reduced that ratio to 1.33-to-1 for the television version. *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 1426–27.

²⁵³ *Id.* at 1427.

²⁵⁴ *Id.* at 1427–28.

²⁵⁵ *Maljack*, 964 F. Supp. at 1428.

²⁵⁶ *Id.*

Although both cases provide useful analogies, they do not explicitly answer the question at hand.²⁵⁷ Of foremost importance, both analyses do not involve sound recordings.²⁵⁸ Additionally, in *Maljack*, because the Copyright Office granted the plaintiff a copyright in the pan-and-scan version of the film, the court applied a presumption of validity.²⁵⁹ A fair reading of *Maljack*, then, shows only that the defendants failed to overcome this presumption of validity.²⁶⁰ Although record labels are beginning to seek and receive copyrights for remastered works, it is not clear that all such remastered works will be separately copyrighted when litigation over the termination of sound recordings begins.²⁶¹ These cases provide some guidance, but they are not determinative.²⁶² A unique legal analysis that distinguishes between remastered sound recordings and other derivative works is thus required.²⁶³

III. REMASTERED ALBUMS ARE DERIVATIVE WORKS

Remastered sound recordings present a difficult case for the pre-existing derivative work originality framework.²⁶⁴ Commentators have examined the issue but have failed to reach a consensus.²⁶⁵ It is not possible to provide a definitive answer covering all possible remastered sound recordings and their status as derivative works considering the spectrum of creativity and originality possible in all works regarded as “remastered.”²⁶⁶ Taking into account the effect of the loudness wars on the mastering of music and its sound, however, it is plausible that many remastered sound recordings have a noticeably different sound from the original recordings.²⁶⁷ Drawing to some extent on the existing framework outlined in Part II, this Part argues that, as a general rule,

²⁵⁷ See *infra* notes 258–261 and accompanying text.

²⁵⁸ See *Midway*, 704 F.2d at 1013; *Maljack*, 964 F. Supp. at 1426–28.

²⁵⁹ *Maljack*, 964 F. Supp. at 1426; see 17 U.S.C. § 410(c) (2006). This presumption of validity puts the burden on the party challenging the copyright to prove the copyrighted work does not meet the appropriate originality standard. 3 NIMMER & NIMMER, *supra* note 105, § 12.11[B][1][a].

²⁶⁰ See 17 U.S.C. § 410(c); *Maljack*, 964 F. Supp. at 1426.

²⁶¹ See *supra* notes 220–223 and accompanying text; see also *Copyright Catalog* U.S. COPYRIGHT OFF., <http://cocatalog.loc.gov> (last visited Nov. 7, 2012) (enter “remaster” in “Search for” field, and select “Keyword” in “Search by” field) (listing only 179 entries for copyrights sought for remastered recordings).

²⁶² See *supra* notes 200–261 and accompanying text.

²⁶³ See *infra* notes 264–366 and accompanying text.

²⁶⁴ See *supra* notes 175–261 and accompanying text.

²⁶⁵ See Frisch & Fortnow, *supra* note 9, at 225–26; Gould, *supra* note 15, at 131–33.

²⁶⁶ See *supra* notes 133–146 and accompanying text.

²⁶⁷ See *supra* notes 147–174 and accompanying text.

remastered works, particularly those that were affected by the loudness wars, meet the standard of originality and thus qualify as derivative works.²⁶⁸ Accordingly, record companies should be able to continue to exploit these remastered recordings post-termination.²⁶⁹

A. *Remastered Sound Recordings Fit Within the Existing Legal Standard*

Remastered albums fit into the standard articulated by judges and commentators of a copyrightable derivative work.²⁷⁰ Although courts occasionally ask for substantial differences between the derivative work and the original, the generally accepted standard is merely that something more than a minimal contribution is required to create a derivative work.²⁷¹ This contribution need only distinguish the derivative work from the prior work in a meaningful manner.²⁷² As one scholar has noted, this source of originality in a sound recording can emanate from not just the artist, but also the producer, who processes, compiles, and edits the sound.²⁷³ A remastered sound recording generally distinguishes the derivative work from the prior work in a meaningful manner, particularly if it was mastered according to the so-called “loudness wars” rationale.²⁷⁴

As the reactions to the loudness wars demonstrate, there is a noticeable difference between original recordings and their remastered counterparts.²⁷⁵ Artists, such as Duran Duran guitarist Andy Taylor, have claimed a marked difference between their original sound recordings and the remastered ones.²⁷⁶ Music reviewers have referred to some remastered recordings as “much better” than the original recordings.²⁷⁷ Similarly, consumers can detect meaningful differences, and many have called for the remastering of certain recordings.²⁷⁸ For example, over 22,000 fans of the band Metallica have signed an online petition to have the album *Death Magnetic* remastered because of their

²⁶⁸ See *infra* notes 270–366 and accompanying text.

²⁶⁹ See 17 U.S.C. § 203(b)(1) (2006).

²⁷⁰ See *infra* notes 271–320 and accompanying text.

²⁷¹ See *supra* notes 186–199 and accompanying text.

²⁷² See *Mass. Museum of Contemporary Art Found., Inc. v. Büchel*, 593 F.3d 38, 64–65 (1st Cir. 2010); NIMMER & NIMMER, *supra* note 105, § 3.03[A].

²⁷³ MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 138 (5th ed. 2010).

²⁷⁴ See *infra* notes 275–320 and accompanying text.

²⁷⁵ See *supra* notes 147–174 and accompanying text.

²⁷⁶ Michaels, *supra* note 165.

²⁷⁷ *The Thirty Best Reissues Ever*, *supra* note 166.

²⁷⁸ See *Petition to Re-Mix or Remaster Death Magnetic!*, *supra* note 168.

disappointment with the original sound recording.²⁷⁹ When sonic engineers remaster recordings to change the product, consumers and artists notice.²⁸⁰

Remastered sound recordings also fit comfortably within the definition of derivative works found in the case law.²⁸¹ A persuasive analogy can be drawn between remastered sound recordings and the pan-and-scan movie from the U.S. District Court for the Central District of California's opinion in *Maljack Productions, Inc. v. UAV Corp.*²⁸² Despite the fact that the story of the movie did not change, and that no new footage was added in the derivative pan-and-scan movie, the court in *Maljack* nonetheless found that the process of editing the film to meet a new aspect ratio was sufficiently creative to warrant derivative copyright protection.²⁸³ Similarly, one could argue that a remastered version of a sound recording warrants derivative copyright protection, even though it does not change the underlying melody or lyrics of a sound recording.²⁸⁴ The lack of such changes is not significant to copyright law.²⁸⁵ The sound engineer, much like the editor of the pan-and-scan movie, makes artistic decisions; for example, how to best reach the sonic potential of a song through balancing, equalizing, and enhancing certain aspects.²⁸⁶

To be sure, the analogy is not perfect.²⁸⁷ The producer of the pan-and-scan movie deleted forty-four percent of the film.²⁸⁸ By contrast, a remastering engineer changes only what already exists without deleting any preexisting material.²⁸⁹ It does not appear, however, that copyright law takes note of such a distinction.²⁹⁰ For example, in *Midway Manu-*

²⁷⁹ See *id.*

²⁸⁰ See *supra* notes 160–171 and accompanying text.

²⁸¹ See *infra* notes 282–320 and accompanying text.

²⁸² See 964 F. Supp. 1416, 1426–28 (C.D. Cal. 1997), *aff'd sub nom.* Batjac Prods. Inc. v. GoodTimes Home Video Corp., 160 F.3d 1223 (9th Cir. 1998).

²⁸³ *Id.*

²⁸⁴ See *id.* at 1427; *supra* notes 133–146 and accompanying text.

²⁸⁵ See *Maljack*, 964 F. Supp. at 1427.

²⁸⁶ HUBER & RUNSTEIN, *supra* note 127, at 21; *What Is Mastering?*, VALVETONE, *supra* note 140.

²⁸⁷ See *Maljack*, 964 F. Supp. at 1426–28; *infra* notes 288–290 and accompanying text.

²⁸⁸ *Maljack*, 964 F. Supp. at 1427.

²⁸⁹ See KATZ, *supra* note 136, at 12; Guttenberg, *supra* note 128; Reid, *supra* note 146.

²⁹⁰ *Compare* Grove Press, Inc. v. Collectors Publ'n, Inc., 264 F. Supp. 603, 605–06 (C.D. Cal. 1967) (denying copyright to a new edition of a public domain book despite 40,000 changes consisting almost entirely of elimination and addition of punctuation and other errors), *with* Midway Mfg. Co. v. Artic Int'l, Inc., 704 F.2d 1009, 1012–13 (7th Cir. 1983) (holding that a sped-up version of the “Galaxian” videogame was a derivative work of the original videogame).

facturing Co. v. Artic International, Inc., the U.S. Court of Appeals for the Seventh Circuit found that a sped-up version of the “Galaxian” video game was a derivative work, despite the fact that the creator merely sped up what already existed without deleting anything from the game.²⁹¹ The two works were so similar that the district court found that of approximately 10,000 bytes (i.e., computer words of source code) in the two works, only approximately 488 were different, meaning that just less than five percent of the code for the derivative game differed from the original.²⁹² Regardless, the court concluded that the sped-up version of the video game was a derivative work because of its value as a separate work to consumers.²⁹³ The previously noted consumer demand for remastered sound recordings provides a similar rationale.²⁹⁴

Despite this compelling justification for viewing some remastered sound recordings as valid derivative works, artists may argue that a remastered sound recording does not meet the requisite level of creativity necessary to receive a copyright.²⁹⁵ This argument is unlikely to hold water.²⁹⁶ As the U.S. Supreme Court held in 1991 in *Feist Publication, Inc. v. Rural Telephone Service Co.*, creativity is a component of originality.²⁹⁷ Professor David Nimmer’s originality standard for derivative works encapsulates a test for creativity, requiring more than a minimal contribution that renders the work meaningfully distinguishable from the original work.²⁹⁸ If remastered works satisfy this test, which this Note argues they do, then they are sufficiently creative to warrant copyright protection.²⁹⁹ Additionally, in *Feist* the Supreme Court held that the level of creativity required for copyright protection is quite low—the vast majority of works meet the standard quite easily, no matter how “crude, humble or obvious” the creativity may seem.³⁰⁰ As such, the act

²⁹¹ *Midway*, 704 F.2d at 1010–13.

²⁹² See *Midway Mfg. Co. v. Artic Int’l, Inc.*, 547 F. Supp. 999, 1004 (N.D. Ill. 1982), *aff’d*, 704 F.2d 1009 (7th Cir. 1983).

²⁹³ *Midway*, 704 F.2d at 1013–14.

²⁹⁴ See *supra* notes 167–171 and accompanying text.

²⁹⁵ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (stating that creativity is a requirement for copyright protection).

²⁹⁶ See *infra* notes 297–301 and accompanying text.

²⁹⁷ See *Feist*, 499 U.S. at 345.

²⁹⁸ See NIMMER & NIMMER, *supra* note 105, § 3.03[A].

²⁹⁹ See *id.*; *supra* notes 270–294 and accompanying text.

³⁰⁰ *Feist*, 499 U.S. at 345.

of choosing which parts of a song to accentuate and alter through the remastering process almost certainly meets this standard.³⁰¹

Furthermore, a policy argument against this result—that it will be too easy for record labels to mass-produce derivative works in order to avoid termination—can be resolved by reference to *Maljack's* treatment of the pan-and-scan movie.³⁰² There, the court stated that panning-and-scanning had the “potential” to create a derivative work, implying that panned-and-scanned versions of motion pictures are not given per se derivative work treatment.³⁰³ The court went on to rule that this particular panned-and-scanned movie was copyrightable, citing the declaration of its creator, who claimed to make artistic decisions about the composition of each frame.³⁰⁴ For example, if two characters in a motion picture have a conversation at a distance too wide to keep both from fitting within the television's dimensions, the editor must make a creative decision whether to focus on just one character during the conversation or to pan between the two.³⁰⁵ It seems unlikely that a computer program that automatically cut off the outer forty-four percent of the frame, or a creator doing the same, would contribute enough creativity to warrant a copyright.³⁰⁶

Similarly, attempts to produce remastered albums cheaply by upping the average volume would also likely lack sufficient creativity.³⁰⁷ Instead, the record label would have to show that creative decisions were made regarding which parts of the sound recordings to edit soni-

³⁰¹ See *supra* notes 136–140, 143–146 and accompanying text (examining the process of mastering and remastering a recording); see also *CDN Inc. v. Kapes*, 197 F.3d 1256, 1260 (9th Cir. 1999) (holding that a publisher's price listings for collectible coins was creative and thus copyrightable); *Kregos v. Associated Press*, 937 F.2d 700, 709 (2d Cir. 1991) (holding that a form compiling statistics on baseball pitchers was creative and thus copyrightable); cf. Margit Livingston, *Inspiration or Imitation: Copyright Protection for Stage Directions*, 50 B.C. L. REV. 427, 442–43 (2009) (arguing that stage directions to a play are sufficiently creative to warrant protection as a derivative work).

³⁰² See *Maljack*, 964 F. Supp. at 1427; Frisch & Fortnow *supra* note 9, at 225–26 (highlighting how easy it could be for record labels to create derivative works cheaply and continue to exploit valuable recordings); Gould, *supra* note 15, at 132 (arguing that if simple remastering qualifies for the derivative works exception, the entire termination scheme for sound recordings would be vitiated).

³⁰³ See *Maljack*, 964 F. Supp. at 1427.

³⁰⁴ *Id.* at 1427–28.

³⁰⁵ 3 ALEXANDER LINDEY & MICHAEL LANDAU, *LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS* § 6:14, at 6–33 (3d ed. 2012).

³⁰⁶ See *Maljack*, 964 F. Supp. at 1427; LINDEY & LANDAU, *supra* note 305, § 6:14, at 6–33.

³⁰⁷ See *Maljack*, 964 F. Supp. at 1427; LINDEY & LANDAU, *supra* note 305, § 6:14, at 6–33.

cally to best effect the overall enjoyment of the song or to improve its quality.³⁰⁸

Furthermore, *Maljack*'s treatment of the remixed and remastered soundtrack provides better guidance for courts handling remastered sound recordings than the cases rejecting derivative copyright in altered musical compositions.³⁰⁹ Those cases focus on the composition of the work and not the sound recording.³¹⁰ Therefore, these courts articulate rules that do not withstand scrutiny when applied to sound recordings.³¹¹ For example, in 1947, in *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, the U.S. District Court for the Southern District of New York stated that without a change in the tune or lyrics of a song, there could not be a new work.³¹² This may be true regarding a musical composition, but it is clearly not true for a sound recording.³¹³ The 1976 Act itself urges against extending such a standard to sound recordings, explicitly recognizing that a "derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality" is protectable.³¹⁴ As previously argued, remastering a sound recording certainly has the potential to alter its quality, even if it is for the worse.³¹⁵

Maljack thus provides a better model for how a court should decide the issue because the *Maljack* court addresses sound recordings, rather than arrangements.³¹⁶ Crucially, the court used its own judgment by actually listening to the two different sound recordings and rejected expert testimony regarding the two works' similarities.³¹⁷ This reliance on notable auditory differences may lead to remastered works

³⁰⁸ See *supra* notes 304–306 and accompanying text.

³⁰⁹ See *Maljack*, 964 F. Supp. at 1428; *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 73 F. Supp. 165, 167 (S.D.N.Y. 1947); *Norden v. Oliver Ditson Co.*, 13 F. Supp. 415, 418 (D. Mass. 1936); *Cooper v. James*, 213 F. 871, 873 (N.D. Ga. 1914).

³¹⁰ See *Shapiro*, 73 F. Supp. at 167 (stating that there would only be a valid derivative work if the new composition was a new work); *Norden*, 13 F. Supp. at 418 (same); *Cooper*, 213 F. at 873 (same).

³¹¹ See *Shapiro*, 73 F. Supp. at 167; *Norden*, 13 F. Supp. at 418; *Cooper*, 213 F. at 873; *infra* notes 312–315 and accompanying text.

³¹² *Shapiro*, 73 F. Supp. at 167.

³¹³ See *Maljack*, 964 F. Supp. at 1427 (stating that stereoizing a monaural sound recording can meet the level of creativity necessary for a valid derivative work); COMPENDIUM II, *supra* note 124, § 496.03(b)(1) (same). Editing a sound recording to make it stereo instead of mono does not change the underlying musical composition. See *Jaffe, supra* note 18, at 146 (explaining the difference between sound recordings and musical compositions).

³¹⁴ 17 U.S.C. § 114(b) (2006).

³¹⁵ See *supra* notes 160–171 and accompanying text.

³¹⁶ See *Maljack*, 964 F. Supp. at 1428.

³¹⁷ *Id.*

receiving derivative copyright protection, as artists, sound technicians, and consumers alike claim that there is often a noticeable difference between the original sound recording and its remastered version.³¹⁸ The *Maljack* court's distrust of expert testimony, however, could disadvantage litigants seeking to receive a derivative copyright in remastered works.³¹⁹ Although an expert would likely testify to technical sonic differences in a remastered sound recording, a judge with an undiscerning ear could disregard that testimony if she does not hear a significant difference between the two recordings herself.³²⁰

B. *The Economic Implications of Remastered Albums Surviving Termination*

Artists may argue that even if remastered works are derivative works, such a result does not effectuate the purpose of the termination provision of the 1976 Act, and thus that a court should avoid a finding that undermines legislative intent.³²¹ As the remainder of this Note explains, however, such a finding not only effectuates the purpose of the termination provision, but also furthers the purpose of the derivative works exception to termination.³²² To understand why, some economic analysis is necessary.³²³

If remastered sound recordings are found to be derivative works, the recording artist could still terminate the grant to the original recordings, and the record label could keep the remastered version of the songs.³²⁴ The record company can continue to utilize those remastered versions, and the recording artist is free to seek a new contract with the original recordings in hand.³²⁵ Thus, as a result of termina-

³¹⁸ See *supra* notes 160–171 and accompanying text.

³¹⁹ See *Maljack*, 964 F. Supp. at 1428.

³²⁰ See *id.* It should be noted, however, that the expert testimony disregarded by the court in *Maljack* claimed that a stereoized version of a previously monaural sound recording was not in fact in stereo. *Id.* This testimony was so easily refuted by listening to the recordings in question that the court may have discredited the totality of the expert's testimony and not actually weighed its subjective opinion over that of a credible expert. See *id.*

³²¹ See *Malat v. Riddell*, 383 U.S. 569, 571–72 (1966) (“Departure from a literal reading of statutory language may, on occasion, be indicated by relevant internal evidence of the statute itself and necessary in order to effect the legislative purpose.”).

³²² See *infra* notes 324–366 and accompanying text; see also REGISTER’S REPORT, *supra* note 67, at 53. (“The primary purpose of this provision was to protect the author and his family against his unprofitable or improvident disposition of the copyright.”); *supra* notes 108–111 and accompanying text (explaining the purpose of the derivative works exception to the termination provision).

³²³ See *infra* notes 324–350 and accompanying text.

³²⁴ See 17 U.S.C. § 203(b)(1) (2006).

³²⁵ See *id.* The statute regarding termination rights is not explicit, as it could be argued that “utilize” in the context of the statute would not allow a record company to make addi-

tion, both the record label and the artist will have copyrights in separate sound recordings of the same underlying song.³²⁶ Although the two sound recordings may be technically different in the eyes of copyright law (much like the two versions of the movie in *Maljack*), for many they will be substitute goods.³²⁷

These separate copyrights are bad, economically, for both the record company and the recording artist.³²⁸ Copyright normally grants an artificial monopoly to its holder, allowing the copyright holder to charge a higher price than would prevail under normal market conditions.³²⁹ This monopoly no longer exists if most consumers view the two versions of the song as substitute goods.³³⁰ Simple economic theory posits that if there is competition in the marketplace, prices will eventually fall to the marginal cost—the cost of producing and distributing one additional copy.³³¹ For an already produced sound recording, where the cost of production is extremely low, the marginal cost is also quite low.³³²

One could argue that, with just two competing sellers, there is not perfect competition.³³³ Instead, it is an oligopoly: a market structure featuring few producers who can influence price by their decisions regarding how much to produce, but who cannot unilaterally dictate

tional copies of its derivative work. See 3 NIMMER & NIMMER, *supra* note 105, § 11.02[C][1]. It is the opinion of Professor Nimmer, however, that a fair reading of the statute would allow the grant holder to make more copies of the derivative work; otherwise it would be difficult to truly utilize the work in any practical sense. See *id.*

³²⁶ See 17 U.S.C. § 203(b)(1); Frisch & Fortnow, *supra* note 9, at 226.

³²⁷ See Frisch & Fortnow, *supra* note 9, at 226. If, for example, a movie producer wants to use a particular song in his movie, both versions of that song, the original and the remastered version, may suit his purpose. See *supra* notes 284–286 and accompanying text (noting that a remastered version of a song will have the same lyrics and melody as the original work).

³²⁸ See Frisch & Fortnow, *supra* note 9, at 226; Nimmer & Menell, *supra* note 18, at 415–16; see also MARK SEIDENFELD, MICROECONOMIC PREDICATES TO LAW AND ECONOMICS 39–42 (1996) (explaining the economic advantages of a monopoly market for the producer).

³²⁹ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326, 328 (1989).

³³⁰ See SEIDENFELD, *supra* note 328, at 12–14 (explaining the effect of product substitution on a market); Frisch & Fortnow, *supra* note 9, at 226; Nimmer & Menell, *supra* note 18, at 415–16.

³³¹ See SEIDENFELD, *supra* note 328, at 38; Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 995 (1997).

³³² See Landes & Posner, *supra* note 329, at 328; Lemley, *supra* note 331, at 995.

³³³ See *infra* notes 334–337 and accompanying text.

price.³³⁴ There is reduced incentive to price-compete in an oligopoly because if one seller lowers its price all others will have to do the same to compete.³³⁵ It is thus advantageous for the group not to compete on price to keep prices from falling to marginal cost.³³⁶ If the post-termination market for a sound recording is an oligopolistic market, the competitors would not vigorously price-compete, lessening the threat to both parties of losing the ability to monopoly price.³³⁷

For multiple reasons, however, this does not affect the preceding economic analysis.³³⁸ For instance, it is not clear that a market of multiple sound recordings would fit a traditional economic definition of an oligopoly.³³⁹ Copyrighted works are public goods, meaning copies are easy to make and essentially unlimited.³⁴⁰ Thus, neither competitor can influence price by choosing how much to produce, as the actual quantity of units produced will have little effect on price.³⁴¹ Additionally, even if the market can be classified as an oligopoly, economic theory posits that a good's price in an oligopoly, although greater than marginal cost, will be less than the same good's price in a monopoly.³⁴² As such, both competitors may find it advantageous to split the profits of the higher monopoly price by coming to an agreement rather than risking competition.³⁴³

The result is that, despite keeping possession of part of a recording artist's catalog, the record company's profitability will decrease.³⁴⁴ Additionally, the artist will not receive the full benefit of his or her termination rights.³⁴⁵ Other record labels will be reluctant to purchase the rights to the terminated sound recordings because of potential competition in the market.³⁴⁶ If the artists decided to exploit their copyrights on their own without a record label, they would still suffer because, facing competition, the artist could sell their work only at its low marginal

³³⁴ SEIDENFELD, *supra* note 328, at 85.

³³⁵ See E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 23 (5th ed. 2008).

³³⁶ *Id.*

³³⁷ See *id.*

³³⁸ See *infra* notes 339–343 and accompanying text.

³³⁹ See *infra* notes 340–341 and accompanying text.

³⁴⁰ See Landes & Posner, *supra* note 329, at 326.

³⁴¹ See *id.* at 326–27.

³⁴² See Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9, 17 (2004).

³⁴³ See *id.*

³⁴⁴ See Nimmer & Menell, *supra* note 18, at 415; Piraino, *supra* note 342, at 17.

³⁴⁵ Gould, *supra* note 15, at 132; see 17 U.S.C. § 203(b)(1) (2006).

³⁴⁶ Frisch & Fortnow, *supra* note 9, at 226.

cost or, alternatively only at the oligopolistic price instead of the monopoly price.³⁴⁷

Facing this economic situation, both parties will likely choose to renegotiate with one another to maintain the copyright monopoly.³⁴⁸ Now, however, the recording artist has the ability, by terminating, to reduce the record company's profits.³⁴⁹ Thus, when the two parties renegotiate, the likely result is that the artist will get a higher percentage cut of the profits and a more definitive voice in the exploitation of the work than he or she had in the original contract.³⁵⁰

C. *Excepting Remastered Albums from Termination as Derivative Works Is an Equitable Result*

This end result, excepting remastered albums from termination as derivative works, realizes the underlying goal of the termination provision of the 1976 Act.³⁵¹ It allows recording artists to receive more fortuitous contracts once the true value of their work is better known.³⁵² When artists first sign with a record label, they usually receive somewhere between nine percent and thirteen percent in royalties.³⁵³ Meanwhile, artists whose albums sell more than 750,000 copies generally earn between eighteen percent and twenty percent in royalties.³⁵⁴ In addition, sound recordings can fetch prices from as low as \$5000 to as high as \$25,000 if they are used in motion pictures.³⁵⁵ Artists will be paid only half of this amount under normal recording contracts.³⁵⁶

³⁴⁷ See *supra* notes 328–343 and accompanying text. At least one major artist is planning on establishing a website to distribute its recordings on its own, digitally. See Van Buskirk, *supra* note 119 (“Just think of what the Eagles are doing when they get back their whole catalog. They don’t need a record company now. . . . You’ll be able to go to Eaglesband.com . . . and get all their songs.”).

³⁴⁸ See Frisch & Fortnow, *supra* note 9, at 226; Nimmer & Menell, *supra* note 18, at 415–16. This decision may raise antitrust concerns, which is beyond the scope of this Note. See 15 U.S.C. § 1 (2006) (proscribing contracts and combinations in restraint of trade); *id.* § 2 (proscribing monopolization, attempted monopolization, conspiracy to monopolize, and related attempts).

³⁴⁹ See Nimmer & Menell, *supra* note 18, at 415–16.

³⁵⁰ See *id.*

³⁵¹ See Abrams, *supra* note 47, at 209–11; Nimmer & Menell, *supra* note 18, at 416; *infra* notes 352–366 and accompanying text.

³⁵² See Nimmer & Menell, *supra* note 18, at 416.

³⁵³ DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS: REVISED AND UPDATED FOR THE 21ST CENTURY 109 (4th ed. 2000).

³⁵⁴ *Id.* at 108–09.

³⁵⁵ *Id.* at 242, 424.

³⁵⁶ DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES 723 (5th ed. 2007); PASSMAN, *supra* note 353, at 426.

Thus, artists possessing the ability independently to distribute their work post-termination, will likely demand higher royalty rates.³⁵⁷ Record labels, which have high costs and rely on valuable artists to drive revenue, will likely concede some percentage of profits to maintain their ability to monopoly price.³⁵⁸

At the same time, by essentially forcing negotiations with the original record label, this solution equitably allows recording companies to retain value after their investment in the artist and their catalogue.³⁵⁹ When a record label signs a new artist, it takes a substantial risk.³⁶⁰ The record label often advances a large, up-front sum to the artist and usually agrees to subsidize music-video production; a promotional tour; and all promotional, manufacturing, and distribution costs.³⁶¹ If the artist never achieves commercial success, the label does not require the artist to repay the investment, and thereby assumes the risk of financial loss.³⁶² Indeed, more often than not, labels take that loss, as few signed artists ever become commercially successful.³⁶³ Therefore, record labels share the same concern about termination that motion picture producers do: they need to recoup costly up-front investment.³⁶⁴ Congress seemingly found this argument persuasive when it carved out exceptions to the termination right.³⁶⁵ This result thus also furthers the purpose of the derivative works exception by promoting investment in risky artistic ventures.³⁶⁶

CONCLUSION

Record labels are scared of the terminator, and with good reason. When artists begin to terminate, litigation will likely be intense as recording companies desperately try to hold onto the rights of valuable sound recordings. Luckily for the record companies, there are two ma-

³⁵⁷ See Nimmer & Menell, *supra* note 18, at 415–16.

³⁵⁸ See BIEDERMAN ET AL., *supra* note 356, at 704–10; PASSMAN, *supra* note 353, at 81–83.

³⁵⁹ Cf. Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 247 (1983) (arguing that the termination provision is inequitable because a producer contributed some value, such as production and marketing costs, to the value of an author's copyright).

³⁶⁰ See *infra* notes 361–363 and accompanying text.

³⁶¹ BIEDERMAN ET AL., *supra* note 356, at 709; PASSMAN, *supra* note 353, at 110–11.

³⁶² BIEDERMAN ET AL., *supra* note 356, at 709; PASSMAN, *supra* note 353, at 102.

³⁶³ BIEDERMAN ET AL., *supra* note 356, at 709 (stating that perhaps only one in twenty newly signed artists will ever break even for the record label).

³⁶⁴ See BIEDERMAN ET AL., *supra* note 356, at 709; PASSMAN, *supra* note 353, at 102; Goldstein, *supra* note 359, at 247; *supra* notes 108–110 and accompanying text.

³⁶⁵ See *supra* notes 108–110 and accompanying text.

³⁶⁶ See Abrams, *supra* note 47, at 213.

major carve-outs to termination rights included in the Copyright Act of 1976: the work-made-for-hire exception and the derivative works exception. Although record companies will surely argue that the valuable albums in their vaults are works made for hire, and thus nonterminable, they will likely also argue that all remastered sound recordings made by the label are derivative works that do not revert back to the original artist. Considering the applicable law, this claim has a relatively strong likelihood of success for the record labels, especially in light of the “loudness wars” and its effect on the sound of remastered albums. But recording artists need not despair, as they will likely still enter into post-termination contracts that are more valuable than their pre-termination counterparts. In that way, the intent behind both the termination provision and the derivative works exception is effectuated.

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