Defeating the Terminator: How Remastered Albums May Help Record Companies Avoid Termination

Introduction

Record companies have something new to fear beginning in 2013: the terminator.[1] In passing the 1976 Copyright Act, Congress inserted a termination right for authors, allowing them to terminate grants of their copyrights to third parties and retake ownership 35 years after the grant began.[2] This provision affects all post-1978 copyrights, meaning the first terminable works will be eligible for termination in 2013.[3]

In the music industry, termination could have a great effect on the profits of record companies.[4] In 2008, market research shows that close to half of U.S. teenagers did not buy a single compact disc ("CD").[5] Consumers aged thirty-six to fifty, who tend to prefer older artists, drove what CD sales there were.[6] In addition, record companies earn a higher profit per record from sales of older recordings, because such sales require few additional costs.[7] One practitioner stated that termination "is a life-threatening change for [record companies], the legal equivalent of Internet technology."[8]

Termination is not guaranteed, however.[9] While authors can generally terminate grants of their copyrights after 35 years, Congress excluded certain works from the termination provision, including works made for hire and derivative works.[10] Works made for hire are works either (1) prepared by an employee within the scope of his or

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[1] *See infra* notes 2–8 and accompanying text.

[2] *See* 17 U.S.C §203(a)(3).

[3] *See id.* at §203(a).

[4] *See* Eriq Gardner, *Copyright Battle Comes Home*, Law and Technology News, available at LexisNexis.

[5] *Id.*

[6] *Id.*

[7] 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).

[8] Larry Rohter, *Record Industry Braces for Artists' Battles Over Song Rights*, N.Y. Times, Aug. 16, 2011, at C1.

[9] *See infra* notes 10–12 and accompanying text.

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

her employment or (2) a specially commissioned work in one of nine statutory categories.[11] A derivative work, meanwhile, is a work based upon one or more preexisting works in which the work is recast, transformed, or adapted.[12]

Other than hoping that recording artists do not terminate their copyrights, these exceptions are the record companies' best hope of retaining some way to exploit post-1978 sound recordings after 35 years.[13] As a result, many in the industry expect litigation in this area to be extensive.[14] 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."[15]

Scholars that have explored this question have primarily examined whether albums will be considered works made for hire and thus exempt from termination.[16] While a clear answer has not surfaced, most scholars seem to feel that, at best, this answer can only be answered on a case-by-case basis.[17] Therefore, recording companies will likely also attempt to utilize the derivative works exception to save their valuable recordings in case a work-made-for-hire argument fails.[18] In doing so, those companies might well point to remastered versions of the sound recordings as derivative works; especially in light

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[11] 17 USC § 101. The statute applies to:

> 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.

[12] 17 U.S.C. § 101.

[13] *See generally* Firsch & Fortnow, *supra* note 7 (exploring potential defenses for record companies against termination rights); Daniel Gould, note, *Time's Up: Copyright Termination, Work-For-Hire and the Recording Industry,* 31 COLUM. J.L. & ARTS 91 (2007) (same); Mary LaFrance, *Authorship and Termination Rights in Sound Recordings,* 75 S. CAL. L. REV. 375 (2002) (same).

[14] *See* Gardner, *supra* note 4; Rohter, *supra* note 8.

[15] Gardner, *supra* note 4.

[16] *See generally* Frisch & Fortnow, *supra* note 7; Gould, *supra* note 13; 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); LaFrance, *supra* note 13; 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).

[17] *See* Jaffe, *supra* note 13, at 169; Nimmer & Menell, *supra* note 16 at 387; Frisch & Fortnow, *supra* note 7, at 224.

[18] *See infra* notes 90–105 and accompanying text.

of the "loudness wars".[19] The "loudness wars" is a moniker given to the trend of music companies to master sound recordings at the highest possible average volume to garner listeners' attention.[20]

This Note analyzes the termination provision of the 1976 Copyright Act and the derivative works exception, arguing that generally, remastered versions of sound recordings should be considered derivative works.[21] Part I provides an introduction to copyright law governing sound recordings, termination, and derivative works while exploring the process of remastering sound recordings.[22] Part II examines previous case law in analogous situations.[23] Finally, Part III argues that remastered works generally will be considered derivative works under current law, and that such a finding will best meet the legislative intent behind both the termination provision and the derivative works exception.[24]

I. Overview of Copyright Law in Sound Recordings

Understanding the relevance of remastered sound recordings to copyright law requires a nuanced understanding of the structure of copyright law in addition to a technical understanding of how remastered sound recordings are produced.[25] Section I.A offers a brief historical background of copyright law's protection of sound recordings.[26] Section I.B examines the history of the termination right and how it will affect record labels and owners of sound recordings.[27] Section I.C examines the level of originality necessary to create a legally recognized derivative work under copyright law.[28] Finally, Section I.D examines the creation of remastered works with a specific emphasis on the effect of the "loudness wars."[29]

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[19] *See infra* notes 150–160 and accompanying text.

[20] *See* Suhas Sreedhar, *The Future of Music, Part One: Tearing Down the Wall of Noise*, IEEE Spectrum (August 2007), http://spectrum.ieee.org/computing/software/the-future-of-music.

[21] *See infra* notes 25–361 and accompanying text.

[22] *See infra* notes 25–183 and accompanying text.

[23] *See infra* notes 184–258 and accompanying text.

[24] *See infra* notes 259–361 and accompanying text.

[25] *See* Gould, *supra* note 13 at 131 (stating that the extent a new work would have to differ from an old work in the context of sound recordings and termination is an open question); *see also infra* notes 30–183 and accompanying text.

[26] *See infra* notes 30–44 and accompanying text.

[27] *See infra* notes 45–107 and accompanying text.

[28] *See infra* notes 108–130 and accompanying text.

[29] *See infra* notes 131–183 and accompanying text.

A. Protection of Sound Recordings: A Brief History

The Constitution expressly gives Congress the power to protect creative works by securing a limited monopoly in the work to its author.[30] Although both the Constitution and the first copyright law limited copyright protection to writings, the Supreme Court soon recognized that copyright protection could be construed broadly to include more than just a "writing" in a strict sense.[31] Following the Supreme Court's lead, Congress passed the 1909 Copyright Act ("1909 Act"), which added express protection for musical compositions.[32] This right, however, only protected the underlying musical composition.[33] The recording of the song was not covered.[34] Instead, artists had to rely on state law for protection of sound recordings.[35]

Sound recordings were eventually granted federal copyright protection, but the protection itself was limited.[36] 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").[37] The 1971 Act amended the list of works expressly granted copyright protection in the 1909 Act, adding sound recordings.[38] The protection granted to sound recordings was limited compared to other works, affording a claim of infringement only against illegal distribution of physical reproductions of the works.[39]

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[30] U.S. Const. art. I, §8 cl. 8.

[31] *Id.*; *see* Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1802); Burrow-Giles Lithographic Co. v. Sarony, 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").

[32] Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976).

[33] *Id.*, *see* Alfred C. Yen & Joseph P. Liu, Copyright Law: Essential Cases and Materials 305.

[34] *See* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976); Yen & Liu *supra* note 33, at 305.

[35] Yen & Liu, *supra* note 33, at 305 ("Before 1972, state law provided the only protection for sound recordings").

[36] *See id.*

[37] Pub. L. No. 92-140, 85 Stat. 391 (1971) (codified as amended in scattered sections of 17 U.S.C.); Jaffe, *supra* note 16 at 144.

[38] Jaffe, *supra* note 16 at 144.

[39] Pub. L. No. 92-140, 85 Stat. 391 (1971). 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).

This limited protection for sound recordings was carried into in the Copyright Act of 1976 (1976 Act), the successor to the 1909 Act.[40] The 1976 Act was over twenty years in the making.[41] It overruled the 1909 Act while expressly changing particular areas of copyright law.[42] These changes went into effect on January 1, 1978, meaning 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.[43] Amongst the changes included in the 1976 Act was the addition of a termination right for authors.[44]

B. Termination Rights

The termination right allows authors to regain sole possession of their copyrights 35 years after contracting them away.[45] This right cannot be contracted away, but is subject to a select few exceptions.[46] Works made for hire cannot be terminated.[47] Additionally, those that create derivative works during the time of the grant can continue to exploit those works post-termination.[48]

Section 203 of the 1976 Act 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.[49] This right comes to fruition thirty-five years after the initial transfer of the copyright.[50] Thus, the first works granted this termination right can begin to terminate on January 1, 2013.[51] In order to 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.[52] This advance notice must be served no less than two nor more than ten years prior to that date.[53]

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[40] *See* 17 U.S.C. §114 (2006)..

[41] *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 Congress first appropriated the money necessary to study possible reform of the United States Copyright Act in 1955).

[42] *See* Jaffe, *supra* note 13, at 147.

[43] *See* 17 U.S.C. §101, note prec.

[44] 17 U.S.C §203.

[45] *See id.* at §203(a)(3).

[46] *Id.* at §203(a)(5).

[47] *Id.* at §203(a).

[48] *Id.* at §203(b)(1).

[49] *Id.* at §203(a).

[50] 17 U.S.C. §203(a)(3).

[51] *See id.*

[52] *Id.* at §203(a)(4).

[53] *Id.* at §203(a)(4)(A).

Importantly, the 1976 Act explicitly states that the termination right can be "effected notwithstanding any agreement to the contrary."[54] Thus, an author cannot assign away his or her right to terminate, and any contractual provision attempting to do so is void.[55]

This was a marked change from previous copyright law.[56] Before the 1976 Act, copyright protection lasted 28 years upon which an author had a right to renew his copyright.[57] 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.[58] 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.[59]

The renewal system is important, however, because its failure was a major impetus behind the termination right inserted into the 1976 Act.[60] 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 work once its value became better known.[61] This purpose was undercut by the judiciary, however, which allowed authors to contract away their renewal rights.[62] Thus, in a 1961 report exploring possible

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[54] *Id.* at §203(a)(5).

[55] Frisch & Fortnow, *supra* note 7 at 213.

> ([E]ven 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.);

see 17 U.S.C. §203(a)(5).

[56] *See* Yen & Liu, *supra* note 33, at 206 (stating that there are significant differences between termination compared to the renewal term that previously existed).

[57] *Id.* at 199.

[58] *Id.*

[59] *See* Pub. L. No. 92-140, 85 Stat. 391 (1971); *supra* notes 36–39 and accompanying text. 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).

[60] Abrams, *supra* note 41, at 209–11; Yen & Liu, *supra* note 33, at 199.

[61] House Comm. On the Judiciary, 87th Cong., 1st Sess., Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 53 (Comm. Print 1961).

[62] *See, e.g.,* Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 657 (1943)(holding that the Copyright Act of 1909 did not nullify an agreement by an author to assign his renewal rights); *see also* Yen & Liu, *supra* note 33, at 204-05 ("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.'").

changes to be made to the copyright law, the Register of Copyrights stated that "in practice, this reversionary feature . . . has largely failed to accomplish its primary purpose."[63]

Considering this failure of the renewal system, the Register of Copyrights offered two alternative forms of reversion in a preliminary draft of the 1976 Act.[64] The first provided that no transfer would be effective after twenty-five years with exceptions for derivative works and works made for hire.[65] 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."[66] These provisions were heavily debated.[67] Eventually, the 1965 Revision Bill settled on a termination right that went into effect 35 years from the date of transfer.[68] This termination right survived into the law as it stands today.[69]

1. Termination Exceptions

This right to terminate, however, is not absolute.[70] Congress explicitly provided that the termination right does not apply to a work made for hire.[71] In defining 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.[72]

In addition, there is an exception to the termination right for derivative works.[73] A derivative work consists of a contribution of original material to an already existing work which recasts, transforms or

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[63] House Comm. On the Judiciary, 87th Cong., 1st Sess., Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 53 (Comm. Print 1961).

[64] Abrams, *supra* note 41, at 214.

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

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

[67] *Id.* at 215.

[68] *Id.* at 221.

[69] *Id.* at 209; *see* 17 U.S.C. §203.

[70] *See* 17 U.S.C. § 203(a) (2006) (stating that there is no termination right in works made for hire); *id.* at § 203(b)(1)(stating that a derivative work prepared prior to termination does not revert back to the original author but instead can be exploited by its creator).

[71] 17 U.S.C. § 203(a).

[72] 17 U.S.C. § 101.

[73] 17 U.S.C. § 203(b)(1).

adopts the previous work.[74] 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.[75]

The rationale behind the derivative work exception was to avoid unfairness to motion picture producers.[76] This rationale stems from a comment on the Register's Report, who thought it 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.[77] It was this argument that provided the rationale for the derivative works exception — which first appeared in the Register's preliminary draft — according to at least one scholar.[78] By the 1965 Revision Bill, the language providing the exception for derivative works was settled upon, and the exception appeared in all subsequent bills up to and including the 1976 Act.[79]

In light of 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.[80] This amendment would have kept recording artists from exercising their termination rights.[81] The amendment was included as a "technical amendment" to the unrelated Satellite Home Viewer Improvement Act of 1999.[82] The outcry over this amendment, which was not in-

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[74] 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §3.03[A] at 3-7 (2010) [hereinafter Nimmer].

[75] 17 U.S.C. 203(b)(1).

[76] *See* Abrams, *supra* note 41, at 213.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 221.

[80] *See* LaFrance, *supra* note 13, at 375 (stating that the 1999 amendment was precipitated by a request from the Recording Industry Association of America); Nimmer & Menell, *supra* note 16, at 390–94 (2001)(detailing the amendment and its process through Congress).

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

[82] Nimmer & Menell, *supra* note 16, at 390–91. The Act amended the statutory licenses applicable to retransmission of television signals. *Id.* at 390.

cluded in prior drafts of the bill, was intense.[83] As a result, the amendment was repealed in less than a year.[84]

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.[85] 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.[86] To determine if one is an employee for purposes of the work made for hire doctrine, courts look to the general common law of 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 will be considered works made for hire and thus not subject to termination.[89]

This issue has been thoroughly explored in copyright scholarship.[90] It is generally agreed upon that artists will not be considered as "employees" of the record companies, thus foreclosing the first prong of work-made-for-hire status.[91] Record companies, therefore,

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[83] *Id.* at 392 ("When the lobbyists' backroom handiwork became known, a firestorm of criticism ensued."); LaFrance, *supra* note 13, at 376 ("[T]he reaction was swift, loud, and overwhelmingly disapproving.").

[84] *See* Nimmer & Menell, *supra* note 16, at 394–395. 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. *Id.* at 394.

[85] *See* 17 U.S.C. § 101, notes.

[86] 17 USC § 101. For a list of the eligible specially commissioned works, see *supra* note 11.

[87] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740-41, (1989). 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 USC § 101.

[89] *See* 17 U.S.C. §203(a).

[90] *See generally* Frisch & Fortnow, *supra* note 7; Gould, *supra* note 13; Jaffe, *supra* note 16; LaFrance, *supra* note 13; Nimmer & Menell, *supra* note 16.

[91] *See, e.g.*, Jaffe, *supra* note 16, at 164 (stating recordings artists "cannot reasonably be determined to be employees"); LaFrance, *supra* note 13, at 379 ("Many, if not most, of the

will have to argue that a sound recording is a specially commissioned work that fits within one of the nine categories listed in the statute.[92]

Of those nine categories, the record companies will likely 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 controversy over termination boils down to whether an album can be considered a collective work.[95]

The case law illustrates that courts have not granted this specially commissioned status to sound recordings.[96] The United States Court of Appeals for the Fifth Circuit reversed a district court's finding for summary judgment that a jingle written for television and radio was statutorily a work for hire in the 1997 case of *Lulirama Ltd., Inc. v. Axcess Broadcast Services, Inc.*[97] Furthermore, the United States District Court for the District of New Jersey ruled in the 1999 case *Ballas v. Tedesco* 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 that have looked at the issue have concluded that, at best, such a claim can only be decided on a case-by-case basis.[100] David Nimmer, one of the leading copyright scholars in the country, in conjunction with two other scholars, concluded that to meet the standard for a collective work, a record company would have to make a creative contribution to the album separate from the re-

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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 16, at 166; LaFrance, *supra* note 13, at 379. For a list of the eligible specially commissioned works, see *supra* note 11.

[93] *See* Jaffe, *supra* note 16, at 167.

[94] 17 U.S.C § 101.

[95] David Nimmer, Peter S. Menell, & Diane McGimsey, *Pre-existing Confusion in Copyright's Work-for-Hire Doctrine* 2 (U. Cal. Berkley Public Law & Legal Theory Research Paper Series, Paper No. 109; UCLA School of Law Research Paper No. 02-33), *available at* http://ssrn.com/abstract_id=359720.

[96] Nimmer & Menell, *supra* note 16, 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* Staggers v. Real Authentic Sound, 77 F. Supp. 2d 57, 63–64 (D.D.C. 1999) (finding a sound recording is not a specially commissioned work for hire, per se).

[100] *See* Frisch & Fortnow, *supra* note 7, at 224; Jafee, *supra* note 37, at 169; Nimmer & Menell, *supra* note 16 at 387.

cording artist, perhaps through the selection or arrangement of the songs or artists chosen.[101] Thus, while the record labels will surely argue 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]

One such strategy would be to argue that the record companies have created derivative works by either remixing or remastering previously recorded works.[103] 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 only be permitted to exploit the derivative work—the remixed or remastered recordings—while the original recordings would be rendered back to the author.[104] While not optimal, this result is preferable to the record companies compared to losing all rights to the valuable recordings of various artists.[105]

This strategy 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.[106] Practitioners in the field, however, expect record companies to assert that remixed or remastered albums are indeed derivative works.[107]

C. Derivative Works

A derivative work is a work consisting of original material added to an already existing work which recasts, transforms or adapts the previous work.[108] A common example is a movie based on a novel.[109]

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[101] Nimmer, Menell & McGimsey, *supra* note 95, at 3.

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

[103] *See* 17 U.S.C. §203(b)(1); 17 U.S.C. § 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").

[104] *See* 17 U.S.C. § 203(b)(1).

[105] *See supra* notes 4–7 and accompanying text; *supra* notes 45–48 and accompanying text; 17 U.S.C. §203(b).

[106] *See* Gould, *supra* note 13, at 131–33 (devoting less than three full pages out of a 47 page note); Frisch & Fortnow, *supra* note 7, at 225–26 (devoting less than two full pages out of a 25 page article).

[107] *See* Eliot Van Buskirk, *Copyright Time Bomb Set to Disrupt Music, Publishing Industries*, WIRED.COM, (Nov. 13, 2009, 3:17 p.m.), http://www.wired.com/epicenter/2009/11/copyright-time-bomb-set-to-disrupt-music-publishing-industries/.

[108] NIMMER, *supra* note 74, §3.03, at 3-7.

[109] *See, e.g.*, *id.* § 11.02[C], at 11-19.

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.[110]

In copyright law, a work must be independently copyrightable to qualify as a derivative work.[111] To achieve separate copyright status, a derivative work's recasting, transformation or adaption of the original work must constitute more than a trivial contribution.[112] The general standard used by courts is that a quantum of originality is necessary, one that constitutes a distinguishable variation from the original work that is more than merely trivial.[113] Not every variation will result in a copyrightable derivative work for its creator, only one that is sufficient to render the derivative work distinguishable from the prior work in any meaningful matter is deemed sufficient.[114] This is because the bar for copyright is low, as courts will not take it upon themselves to be the judge of artistic value.[115]

The question facing courts is how much originality is necessary in the derivative work for it to qualify for copyright: a question courts have struggled with.[116] Of note is the case of *L. Batlin & Son, Inc. v. Snyder*, where the U.S. Court of Appeals for the Second Circuit held in 1976 that a maker of a plastic Uncle Sam bank based on cast iron versions in the public domain was not entitled to a copyright.[117] The court held that a change in the expressive medium of the bank was not enough to warrant a new copyright.[118] The court stated that there must be "some substantial variation, not merely a trivial variation such as might occur in the translation to a different medium."[119]

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

[111] *Id.* at 990 (*citing* Weissmann v. Freeman, 868 F.2d 1313, 1320–21 (2d Cir.), *cert. denied*, 493 U.S. 883 (1989)).

[112] NIMMER, *supra* note 74 §3.03[A], at 3-8.

[113] *Id.* at 3-10.

[114] *Id.*

[115] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903) ("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.") (Holmes, J., dictum).

[116] *See infra* notes 117–127 and accompanying text.

[117] 536 F.2d 486, 487–88, 492 (2d Cir. 1976); *but see* Doran v. Sunset House Distrib. Corp., 197 F. Supp. 940, 945 (S.D. Cal. 1961) (finding that Plaintiff's conversion of public domain image of Santa Claus into three-dimensional plastic form was sufficient originality to sustain a copyright).

[118] *L. Batlin & Son*, 536 F.2d at 491–92.

[119] *Id.* at 491.

In 1980 the U.S. Court of Appeals for the Second Circuit extended this ruling to the transformation of a two-dimensional image into a three–dimensional figurine sculpture in *Durham Industries, Inc., v. Tomy Corp.*[120] In deciding that the figurines were not protectable derivative works, the court noted that while the adaptation "undoubtedly involved some degree of manufacturing skill," there could be no copyright in the mere reproduction.[121]

In general, these decisions are in line with the Supreme Court's rejection of the "sweat of the brow" theory of copyright, which would grant copyright protection to works where the author put a large amount of work into the finished product.[122] Instead, courts require originality, which entails some minimal degree of creativity.[123] Thus, cases where the author puts in reasonable effort, but does not contribute meaningful and creative variation, usually result in a denial of derivative work protection.[124] For example, copyright was denied to an author making 40,000 changes to a book consisting mostly of the punctuation corrections, spelling changes and other typographical changes.[125]

As illustrated, courts have struggled to define the level of variation and required artistic contribution to meet the derivative work standard, leading to much litigation.[126] One scholar went so far as to claim that the U.S. Court of Appeals for the Second Circuit is not paying attention to the inconsistent standards it has articulated, as it has stated that the originality requirement is essentially the same for all

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[120] 630 F.2d 905, 909–10 (2d Cir. 1980).

[121] *Id.*

[122] *See* Feist Publ'ns, Inc. v. Rural Tele. 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.").

[123] *Id.* at 345.

[124] *See id.* at 359–60.

[125] 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 Ninth Circuit 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 Seventh Circuit has rejected this holding. *See* Lee v. A.R.T. Co., 125 F. 3d 580, 583 (7th Cir. 1997).

[126] *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.").

works but later cited cases requiring "substantial variation" and a "sufficiently gross" difference.[127]

Regarding sound recordings, the statute 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.[128] 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" — holds that remixed versions of preexisting sound recordings are acceptable to receive a derivative copyright.[129] On the other hand, the Compendium states that just remastering a previous recording cannot be the sole basis of a claim for a derivative copyright.[130]

D. Remastered Works

Generally, when sound recordings are first created, they are mixed and mastered in addition to being recorded. [131] Remastering a work entails performing this mastering process again to the recording to achieve a different sound.[132] 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.[133] To some, these remastered albums sound noticeably worse than the original sound recordings.[134] Recognizing the ability of this process to effect a sound recording, one district court granted a derivative copyright to a remixed and remastered sound recording.[135]

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[127] 2 Patry on Copyright § 3:53 (2010).

[128] 17 U.S.C. § 114(b).

[129] Compendium II of Copyright Office Practices, §496.03(b)(1), *available at* http://ipmall.info/hosted_resources/CopyrightCompendium/chapter_0400.asp; *Compendium II: Copyright Office Practices*, U.S. Copyright Office, http://www.copyright.gov/compendium/; *cf.* Schweiker v. Hansen, 450 U.S. 785, 789 (1981).

[130] Compendium, *supra* note 129, at §496.03(b)(2).

[131] *See* David Miles Huber & Robert E. Runstein, Modern Recording Techniques 20–21 (7th ed. 2010).

[132] *See* Steve Guttenberg, *What's the Difference? CD 'mastering' vs. 'remastering,'* CNET, http://news.cnet.com/8301-13645_3-9869772-47.html (last visited Mar. 23, 2012).

[133] *See infra* notes 150–160 and accompanying text.

[134] *See infra* notes 164–169 and accompanying text.

[135] 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).

1. Mastering and Remastering

Albums are usually handled by both a mixing engineer and a mastering engineer before they are finalized, and both perform different functions.[136] These functions are often confused with one another and may sometimes blend together, but there are differences between the two.[137] 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 best compose a song as a whole.[138]

After the mixing process, an album is "mastered."[139] Mastering is the last creative step in the audio production process, the final step before replication and distribution.[140] In general terms, mastering is when the sound of a recording is balanced, equalized and enhanced.[141] 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.[142] Usually, the mastering process will be performed on the stereo mixes, where the mastering engineer will listen to and evaluate the stereo mixes of each song as a whole, and then sculpt and process each song with highly technical programs to best reach their sonic potential.[143]

Both mixing and mastering engineers were given a new medium with the introduction of the CD in the 1980s, which gave recording artists more acoustic possibility to record their sound.[144] Eventually,

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[136] *See* Miles & Runstein, *supra* note 131, at 20–21.

[137] 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 Mar. 23, 2012).

[138] *See* Miles & Runstein, *supra* note 131, at 429.

[139] Bob Katz, Mastering Audio: The Art and the Science, 12 (2d ed. 2007).

[140] *Id.*

[141] *What is Mastering?*, DiscMakers http://www.discmakers.com/soundlab/whatismastering.asp (last visited Mar. 23, 2012).

[142] Miles & Runstein, *supra* note 104, at 21.

[143] *What is Mastering?*, Valvetone http://www.valvetone.com/index.php?option=com_content&view=article&id=57&Itemid=67 (last visited Mar. 23, 2012).

[144] Nick Southall, *Imperfect Sound Forever*, Stylus Magazine, (May 1, 2006), http://stylusmagazine.com/articles/weekly_article/imperfect-sound-forever.htm. Vinyl records allowed only for a dynamic range of 75 decibels ("dB") in a sound recording while a CD ranges for approximately 90dB — for comparison, live music spans approximately 120dB. *Id.* Such a difference meant that music could be recorded on a CD with a larger

record companies took advantage of this extra sonic potential, remastering previous albums and rereleasing them.[145]

Remastering is, in essence, the process of mastering the original sound recordings again.[146] The remastering engineer uses the original tapes or files, listens to them again, and attempts to achieve a better sound on a new master.[147] 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."[148] In contrast to mixing, which can affect individual tracks within a single song, the remastering process can only effect the already mixed recording.[149]

2. The Loudness Wars

Some have questioned if the trend of releasing remastered versions of previous sound recordings is anything more than a cash grab by the record companies.[150] But a specific group of consumers, artists and sound engineers alike, claim there is a noticeable difference in these remastered recordings, and often one for the worse.[151] These

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differential between the quiet moments of a song and its loud moments to more accurately capture the sonic intent of the recording artist. *Id.*

[145] 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 compact disc, 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. *Id.*; Patrick Flanary, *Musicians Split Over Album Reissues*, Rolling Stone, (Aug. 3, 2011), http://www.rollingstone.com/music/news/musicians-split-over-album-reissues-20110803#ixzz1dcR4PwYw.

[146] Guttenberg, *supra* note 132.

[147] *Id.*

[148] Andrew Harris, *Music's New Digital Frontier*, The Vine, (Aug. 7, 2011), http://www.thevine.com.au/music/news/music%27s-new-digital-frontier20110807.aspx.

[149] Havery Reid, *About Re-Mastering*, Woodpecker Records, http://www.woodpecker.com/writing/essays/remastering.html (last visited Mar. 23, 2012).

[150] *See, e.g.*, Flanary, *supra* note 145; *The Art of Re-Mastering*, BBC, http://www.bbc.co.uk/programmes/b00s3h40 (exploring whether digital re-mastering is just another way of selling music to consumers that they already own); Christine Khalil, *Remastered Albums – a brilliant marketing ploy or loss of authenticity for a new generation?*, The AU Review, (November 4, 2011), http://www.theaureview.com/features/remastered-albums-a-brilliant-marketing-ploy-or-loss-of-authenticity-for-a-new-generation.

[151] *See* Robert Levine, *The Death of High Fidelity*, 1042–1043 Rolling Stone 15, 18 (2007)

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.[152]

It is a battle against what has been termed the "loudness wars," the relatively recent trend of mastering sound recordings at the highest possible average volume.[153] In order 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.[154] Record companies push for this, believing it will make the sound recording stand out to the listener.[155]

Modern sound recordings on compact discs are mastered in an extremely compressed way under the idea that louder music will stand out more to the listener on the radio.[156] Most modern CDs are mastered only within the top five loudest dB of the CD.[157] The 1995 release *What's the Story Morning Glory* by rock band Oasis is often cited as the major impetus behind this ultra-compression.[158] On many songs, the difference between the loudest and quietest parts was merely 8dB,

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> 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.*

[152] *See* Tim Anderson, *How CDs are Remastering the Art of Noise*, The Guardian, Jan. 17, 2007, *available at* http://www.guardian.co.uk/technology/2007/jan/18/pop.music#article.

[153] *See* Sreedhar, *supra* note 20.

[154] Levine, *supra* note 151, 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 compact discs. *Id.* at 18. Vinyl, however, physically limited how high bass levels could go, as the needle of the record player could skip off the grove. *Id.* CDs, with a larger dynamic range and digital technology, have no such physical limitation. *See id.*

[155] *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.*

[156] *Id.*; Southall, *supra* note 144. 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*, http://productionadvice.co.uk/loudness-means-nothing-on-the-radio/ (last visited Mar. 23, 2012); Earl Vickers, *The Loudness War: Background, Speculation and Recommendations*, SFXMachine, 19, available at http://www.sfxmachine.com/docs/loudnesswar/loudness_war.pdf (last visited Mar. 23, 2012).

[157] Southall, *supra* note 144.

[158] Levine *supra* note 151, at 18.; Southall, *supra* note 144.

all at the highest range of the loudness spectrum.[159] The album was incredibly popular, and some believe its loudness was a big reason why.[160]

Those opposed to loudness, however, claim that music sounds significantly worse when its range is so compressed.[161] 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."[162] Sound engineer Steve Hoffman, who specializes in remastering old rock albums, said that "When everything is loud, it doesn't sound loud any more. 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."[163]

Following in the steps of these new releases, remastered versions of previously released albums soon became victims of the so-called loudness wars.[164] Iggy Pop and the Stooges' album "Raw Power" was remastered in 1997 with a loudness range of just 4dB, making it one of the loudest rock records of all time.[165] One particular song on the album, "Search and Destroy," is mastered at a range of less than three decibels.[166] For comparison, the version on the original 1990 CD release had an average loudness range of nearly 14 decibels.[167] In 2010, record company EMI Music faced outcry over the remastering of Duran Duran's music, not merely from fans but from the artist.[168] Duran

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[159] Southall, *supra* note 144.

[160] *Id.*

> 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.*

[161] *See infra* notes 162–163 and accompanying text.

[162] Levine, *supra* note 151 at 16.

[163] Anderson, *supra* note 152.

[164] *Id.*; Southall, *supra* note 144.

[165] *Id.* This is measured by Root Mean Squared metering, which attempts to average the level of loudness of a recording over a long period of time to more closely correspond to the human perception of loudness. *See LOUDNESS*, Chicago Mastering Service, http://www.chicagomasteringservice.com/loudness.html (last visited April 12, 2012).

[166] *LOUDNESS*, *supra* note 165.

[167] *Id.*

[168] Sean Michaels, *EMI Defends Duran Duran Remasters*, The Guardian, July 15, 2010, *available at* http://www.guardian.co.uk/music/2010/jul/15/emi-defends-remastered-duran-albums.

Duran guitarist Andy Taylor stated on the social networking website Twitter.com after the release that the album "[s]ounds like it was done down the pub … I can express my utter disgust & the remastering's crap."[169]

For portions of the music–consuming public, these re–engineered albums are capable of sounding noticeably different from the original works.[170] Fans of the popular rock band Metallica established an online petition after the release of the band's album *Death Magnetic* to have that album re-mixed or remastered after many were disappointed in the release, highlighting the ability of remixing or remastering to alter a sound recording.[171] The petition, published on September 10, 2008, has over 22,000 signatures.[172] The outcry was furthered 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.[173] Meanwhile, organizations such as Turn Me Up and Justice for Audio have been formed to attempt to combat the loudness wars.[174]

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[169] *Id.* Remastered albums have also been praised for improving the sound of the original release. *See* Levine, *supra* note 151 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 they sounded different than the 2004 remastered version. Levine, *supra* note 151. 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 30 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*, NME, (Aug. 17, 2011) http://www.nme.com/photos/the-30-best-reissues-ever/230625/1/1#4).

[170] *See supra* notes 161–169 and accompanying text; *infra* notes 170–174 and accompanying text.

[171] *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.

[172] *Id.*

[173] Daniel Kreps, *Fans Complain After "Death Magnetic" Sounds Better on "Guitar Hero" Than CD*, Rolling Stone, Sept. 18, 2008, available at http://www.rollingstone.com/music/news/fans-complain-after-death-magnetic-sounds-better-on-guitar-hero-than-cd-20080918 (last visited Mar. 23, 2012).

[174] *See e.g.*, Turn Me Up, http://turnmeup.org/ (last visited Mar. 23, 2012); Justice for Audio, http://www.justiceforaudio.org/ (last visited Mar. 23, 2012).

3. Current legal framework

Perhaps in recognition of the differences in sound quality between an original recording and a re-engineered version, some record companies have filed and received a copyright for re-engineered albums.[175] Sire Record Company claimed a separate copyright in CD/DVD release of the "deluxe edition" of the 1986 album Black Celebration by Depeche Mode.[176] As the basis for its claim, Sire claimed "remixed and remastered versions of all sound recordings listed … remixed from original source for new fixation."[177] 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 fully utilize the sonic potential of the compact disc medium."[178]

While copyright in reengineered sound recordings has not been fully litigated, one federal district court upheld a copyright in such a recording from a public domain work.[179] In *Maljack Productions, Inc. v. UAV Corp.*, a 1997 case from the U.S. District Court for the Central District of California, the court held that defendant added copyrightable elements to a film soundtrack after defendant digitized, remixed, stereoized, and upgraded the sound quality of a public domain movie soundtrack.[180] The court found that this 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.[181] The U.S. Court of Appeals for the Ninth Circuit did not consider this issue on appeal.[182] In a somewhat related string of cases,

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[175] *See infra* notes 176–178 and accompanying text.

[176] *See* Copyright Registration No. SR0000616038 (registered September 9, 2007), *available at* http://cocatalog.loc.gov (enter "SR0000616038" in "Search for:" field, and select "Registration Number" in "Search by:" field).

[177] *Id.*

[178] *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).

[179] 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).

[180] *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 infra* notes 136–149 and accompanying text (examining the differences between mixing, mastering, remixing, and remastering a sound recording).

[181] *Maljack*, 964 F. Supp. at 1428. It should be noted, however, that because defendant UAV Corp. already had a registered copyright in its remixed and remastered version of the album, the copyright was given a presumption of validity. *Id.*; *see* 17 U.S.C. § 410(c).

[182] *See* Batjac Productions Inc. v. GoodTimes Home Video Corp., 160 F.3d 1223 (9th Cir. 1998).

however, courts refused to grant a derivative copyright to new arrangements of songs after minimal alterations were made to the original.[183]

II. A Little Help?: Courts and Musical Derivative Works

Although previous derivative copyright cases provide some guidance, it remains unclear how courts will decide the issue of a work that is only remastered without being remixed.[184] This is particularly true of remastered works that were part of the loudness wars.[185] These works are not mere reproductions of the original work in another medium; which generally lack sufficient creativity to warrant a derivative copyright.[186] Instead, they contain some level of originality and are debatably distinguishable from the underlying work.[187] This level of originality is likely less than that of a remixed work, which the Compendium finds to be original enough to warrant copyright protection.[188] But questions remain as to whether it is nonetheless enough to meet the relatively low threshold for originality.[189]

This Part of the Note examines the existing analogous case law related to the question of originality in derivative musical works, finding that while these cases are helpful, they are not determinative.[190] Section II.A establishes a model articulation of the standard of originality in derivative works.[191] Section II.B explores cases that feature derivative musical works based on pre-existing musical works.[192] Finally, Section II.C examines non-music cases where courts found valid derivative works within the same medium as the original.[193]

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[183] 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).

[184] *See infra* notes 222–258 and accompanying text.

[185] *See supra* notes 150–174 and accompanying text.

[186] *See* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 492 (2d Cir. 1976), (en banc.) *cert denied*, 429 U.S. 857, (1976); Hengst v. Early & Daniel Co., 59 F. Supp. 8, 9–10 (S.D. Ohio 1945) (denying copyright from the changing of a factual table from vertical to horizontal); *but see* Millworth Converting Corp. v. Slifka, 276 F.2d 443, 445 (2d Cir. 1960) (granting derivative copyright to the adaption of a public domain embroidery design to a print fabric design).

[187] *See* Katz, *supra* note 139, at 12 (stating that the mastering process is the last creative step of the audio production process).

[188] *See id.*; Compendium, *supra* note 129, at §496.03(b)(1).

[189] *See* Gould, *supra* note 13, at 131–33.

[190] *See infra* notes 194–258 and accompanying text.

[191] *See infra* notes 194–202 and accompanying text.

[192] *See infra* notes 203–238 and accompanying text.

[193] *See infra* notes 239–258 and accompanying text.

A. Finding a Standard

These questions persist in part because courts generally struggle to articulate the standard of originality necessary for a derivative work to be copyrightable.[194] In most circuits, a derivative work, like any work, need only show a modicum of creativity for it to receive copyright protection.[195] The U.S. Court of Appeals for the Seventh Circuit articulated a more stringent standard, requiring substantial variation in a derivative work.[196] That circuit, however, appears to have moved away from that more stringent standard, ruling since that the standard of originality for derivative works is no more demanding than the originality requirement for other works.[197]

Originality, as the Supreme Court stated in the 1991 case *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, is essential for copyright protection.[198] For a work to be original, the work must be independently created and possess at least a minimal degree of creativity.[199] Applying that articulation to derivative works, Professor Nimmer provides an originality standard that many courts attempt to adopt, stating that "in 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 a minimal contribution."[200] Professor Nimmer explains that the necessary quantum of originality necessary is that of a distinguishable variation that is more than trivial; a variation that renders the derivative work distinguishable from its prior work in any meaningful manner.[201] While an articulated standard is useful, it is helpful to examine analogous cases to music remastering to see how courts have applied this standard to similar facts.[202]

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[194] *See supra* notes 111–127 and accompanying text.

[195] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345(1991).

[196] Gracen v. Bradford Exch., 698 F.2d 300, 305 (7th Cir. 1983).

[197] Schrock v. Learning Curve International, Inc. 586 F.3d 513, 521 (7th Cir. 2009). In addition, the 11th Circuit has held that the 1991 U.S. Supreme Court case Feist Publications, Inc. v. Rural Telephone Service Co., Inc. clarified a similar standard it once held. *See* Montgomery v. Noga, 168 F.3d 1282, 1290 & n.12 (11th Cir. 1999).

[198] 499 U.S. 340, 345 (1991).

[199] *Id.*

[200] NIMMER, *supra* note 74 §3.03[A], at 3-8. Courts have consistently cited to NIMMER with approval, see Sherry Mfg. Co., Inc. v. Towel King of Fla., Inc., 753 F.2d 1565, 1568 (11th Cir. 1985) (citing Nimmer Treatise); *Noga*, 168 F.3d at 1290 n.12 (11th Cir. 1999) (quoting Nimmer Treatise); Siegel v. Time Warner Inc., 496 F. Supp. 2d 1111, 1152 (C.D. Cal. 2007) (quoting Nimmer Treatise).

[201] NIMMER, *supra* note 74 §3.03[A], at 3-10.

[202] *See infra* notes 222–258 and accompanying text.

B. Derivative Musical Works

One similar family of cases in which courts have applied the derivative work originality standard is cases involving derivative musical compositions.[203] These comparisons are not perfect, as sound recording copyrights are separate from the copyright in the underlying musical composition.[204] The reasoning in these cases, however, provides some guidance as to how courts determine what differences in musical works are substantial enough to meet the originality test.[205]

1. Musical Compositions

Woods v. Bourne Co. is a 1995 case from the U.S. Court of Appeals for the Second Circuit regarding a derivative musical work and termination rights.[206] There, the Second Circuit compared a "lead sheet" of a work to a piano-vocal arrangement.[207] A lead sheet is a handwritten rendering of the lyrics and melody of the work without harmonies or other embellishments.[208] The defendant claimed that the piano-vocal arrangement added harmonies and other elements to make a commercially viable derivative work.[209] The court upheld the district court's decision that the changes between the two works were not substantial enough to warrant a derivative copyright.[210] The district court held, and the Second Circuit agreed, that the changes were trivial and dictated by conventional rules of harmony.[211]

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[203] *See* Woods v. Bourne Co., 60F.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).

[204] *See* 17 U.S.C. § 102(a).

[205] *See infra* notes 206–221 and accompanying text.

[206] *See* 60 F.3d at 981.

[207] *Id*. at 992.

[208] *Id*. at 989.

[209] *Id*.

[210] *Id*. at 992.

[211] *Id*. The Second Circuit's articulation of the originality requirement in this case makes its usefulness questionable. *See id*. at 990. At least one scholar has stated that the Second Circuit has issued wildly different standards regarding originality in derivative works. PATRY, *supra* note 127 at § 3:53. The court in *Bourne Co.* cited as particularly relevant the Seventh Circuit's decision in *Bradford v. Gracen Exchange* requiring substantial variation in derivative works. *Bourne Co.*, 69 F.3d at 990; PATRY, *supra* note 127 at §3:53. That decision, however, has since been questioned by the Seventh Circuit itself. *See Noga*, 168 F.3d at 1290 & n.12. In addition, the Second Circuit has since held that the originality requirement is "essentially the same for all works," including derivative works. Matthew Bender & Co., Inc. v. West Pub. Co., 158 F.3d 674, 680 (2d Cir. 1998). Thus, while *Bourne Co.* has not been expressly overruled by the Second Circuit, it is questionable whether its holding extends beyond its facts. *See id.*; *Bourne Co.*, 69 F.3d at 990.

Similarly, a series of older cases reject derivative copyrights in musical compositions comprising of minimal changes from the original.[212] Of note is the 1947 decision by the U.S. District Court for the Southern District of New York in *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*[213] 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.[214] The court stated that such a copyright would only be valid if the derivative work was a "new work," and that without a change in the tune or lyrics of the song, there could not be a new work.[215]

There are other cases to similar effect.[216] In a 1936 decision, the U.S. District Court for the District of Massachusetts held in *Norden v. Oliver Ditson Co.* that occassional rhythmic changes in the musical composition were insufficient to warrant a derivative copyright.[217] The court thought 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."[218]

While these cases show a hesitancy of courts to grant derivative copyrights to slightly-altered musical works, they are not determinative because they all concerned a derivative musical composition and not a derivative sound recording.[219] Conceivably, one could make changes to a work that make it sound sufficiently different from the previous sound recording while doing little to alter the underlying musical composition.[220] For example, if an engineer stereoized a monaural recording, he may do little to the musical composition, but would greatly change the sound recording.[221]

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

[213] 73 F.Supp. at 167.

[214] *Id.*

[215] *See id.*

[216] *Norden*, 13 F.Supp. at 418; *Cooper*, 213 F. at 873.

[217] 13 F.Supp. at 418.

[218] *Id.*

[219] *See* 17 U.S.C. §102(a); *supra* notes 206–218 and accompanying text.

[220] *See supra* notes 136–174 and accompanying text.

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

2. Sound Recordings

Moving beyond musical compositions and into derivative sound recordings, the U.S. District Court for the Central District of California ruled in the 1997 case *Maljack Productions, Inc. v. UAV Corp.* that the plaintiff created a derivative work when it altered a motion picture soundtrack by remixing the work, stereoizing it, and upgrading its sound quality.[222] Plaintiff Batjac's copyright claim involved two works to which it added copyrightable elements.[223] Batjac created a "panned and scanned" version of a public domain motion picture for videocassette, and additionally edited the picture's public domain monaural soundtrack by remixing, resequencing, sweetening, equalizing, balancing and stereoizing it, and also adding entirely new sound material.[224] Defendant claimed that Plaintiff did not have a valid derivative copyright in the new soundtrack.[225] The court held that Batjac had a valid derivative copyright in the digitized soundtrack, finding motion picture soundtracks to be analogous to sound recordings.[226]

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.[227] The Court cited 17 U.S.C. 114(b), but it first looked to the Compendium.[228] The court was swayed that the Compendium accepts alterations such as remixing and stereoizing as sufficiently original to constitute a derivative work.[229] In addition, the court rejected the testimony of defendant's expert witness, who stated that the two different soundtracks were audibly indistinguishable.[230] The court listened to both and found the 1993 version to be a "noticeable improvement" over the original.[231]

While the soundtrack in *Maljack* was re-engineered much like a reamstered album, the case's result may not control in litigation over remastered albums.[232] Of note, the soundtrack in *Maljack* was re-

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[222] *Id.*
[223] *See id.* at 1426–28.
[224] *Id.* at 1418.
[225] *Id.* at 1428.
[226] *Id.*
[227] *See Maljack*, 964 F. Supp. at 1428.
[228] *Id.*
[229] *Id.* (*citing* Compendium II §496.03(b)(1)).
[230] *Id.*
[231] *Id.*
[232] *See infra* notes 233–238 and accompanying text.

mixed in addition to being otherwise reengineered.[233] A remixed album can sound noticeably different from the original, as the mixing engineer can adjust the particular levels for any of the various tracks of the recording.[234] Perhaps recognizing the amount of creativity required by this practice, the Compendium accepts a claim of remixing as sufficient to receive a copyright.[235] Moreover, the engineer in *Maljack* stereoized the monoaural soundtrack.[236] Record labels generally stopped releasing monaural records in the late 1960s.[237] Because termination rights only apply to works created on or after January 1, 1978, it is highly unlikely a remastered version of these works would be stereoized, simply because all of the works likely will have been recorded in stereo sound originally.[238]

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.[239] These cases can help determine how substantial the differences between the two works must be for the derivative work to be deemed original.[240]

In 1983, the U.S. Court of Appeals for the Seventh Circuit held in *Midway Mfg. Co. v. Artic Intern., Inc.* that a sped-up version of a video game was a derivative work.[241] The court's conclusion implies that the existence of demand for remastered sound recording separate from demand for the original sound recording is important in answering whether remastered sound recordings are derivative works.[242] The defendants in that case sold circuit boards for use inside video game machines including one, created under Plaintiff's license, that sped up the rate of play — how fast the sounds and images changed — of Plaintiff's video game "Galaxian."[243] The court acknowledged that a sped-up version of a record is likely not a derivative work, but distin-

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[233] *See Maljack*, 964 F. Supp. at 1428.

[234] *See supra* note 138 and accompanying text.

[235] Compendium, *supra* note 129, at §493.03(b)(1).

[236] *Maljack*, 964 F. Supp. at 1428.

[237] *Stereophonic Sound*, IEEE Global History Network, http://www.ieeeghn.org/wiki/index.php/Stereophonic_Sound (last visited Jan. 23, 2011).

[238] *See* 17 U.S.C. §203(a); *Stereophonic Sound*, *supra* note 237.

[239] *See infra* notes 241–258 and accompanying text.

[240] *See infra* notes 241–258 and accompanying text.

[241] 704 F.2d 1009, 1013 (7th Cir. 1983).

[242] *See id.* at 1014.

[243] *Id.* at 1010–11.

guished that from a sped-up version of a video game because of the separate demand for the sped-up game.[244] 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."[245]

Maljack, the case from the U.S. District Court for the Central District of California, is also helpful in this regard for its holding regarding plaintiff's derivative copyright of a "pan-and-scan" version of a movie.[246] A pan-and-scan version of a movie is a more narrowly-formatted version that better fits on a standard television screen.[247] In *Maljack*, after the movie was reformatted, the ensuing derivative work used only fifty-six percent of each frame compared to the original picture.[248] 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 lacked necessary creativity.[249] The court then ruled that the plaintiff's panned-and-scanned work was itself copyrightable as a derivative work.[250] The court did not credit declarations submitted by the defendant of two editing experts stating that the two works were visually indistinguishable.[251] Instead, the court credited the creator's statement, in which he attested to making his cutting selections in order to effectuate the storytelling, characters, and interplay of characters.[252] The court also compared the two works itself and found sufficient changes.[253]

While both cases provide useful analogies, they do not explicitly answer the question at hand.[254] Of foremost importance, both analyses do not involve sound recordings.[255] Additionally, in *Maljack*, because the Copyright Office granted Batjac a copyright in the pan-and-scan version of the film, the court presumed the copyright was valid

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[244] *Id*. at 1014.

[245] *Id*. at 1014.

[246] *See Maljack* 964 F. Supp. at 1426–28. The theatre version has an aspect ratio (the ratio of screen length to screen height) of 2.35-to-1, while plaintiff in *Maljack* reduced that ratio to 1.33-to-1 for the television version. *Id*. at 1418.

[247] *Id*.

[248] *Id*.

[249] *Id*. at 1426–27.

[250] *Id*. at 1428.

[251] *Id*. at 1427.

[252] *Maljack*, 964 F. Supp. at 1427–28.

[253] *Id*. at 1428.

[254] *See infra* notes 255–258 and accompanying text.

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

prima facie.[256] A fair reading of *Maljack*, then, only shows that the defendants failed to overcome this presumption of validity.[257] While record labels are beginning to seek and receive copyrights for remastered works, it is not clear all such remastered works will be separately copyrighted when this issue is litigated.[258]

III. Remastered Albums are Derivative Works

Remastered sound recordings present a difficult case for the preexisting derivate work originality framework.[259] Commentators have examined the issue but have failed to establish a consensus legal opinion.[260] It is not possible to provide a definitive answer covering all possible remastered sound records and their status as derivative works considering the spectrum of creativity and originality possible in all works considered "remastered."[261] Considering the effect of the loudness wars on the mastering of music and its eventual sound, however, it seems plausible that many remastered sound recordings sound noticeably different from the underlying works.[262] This Part of the Note argues that, as a general rule, remastered works, particularly those that fell victim to loudness wars mastering, meet the standard of originality, making them derivative works.[263] Thus, record companies will be able to continue to exploit these remastered recordings post-termination.[264]

A. Within the Legal Standard

Remastered albums by and large fit into the standard articulated by judges and commentators of a copyrightable derivative work.[265] While courts occasionally ask for substantial differences between the two works, the generally agreed upon standard is one of something merely more than a minimal contribution.[266] This contribution is one that distinguishes the derivative work from the prior work in any

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[256] 17 U.S.C. §410(c); *Maljack,* 964 F. Supp. at 1426.
[257] *See* 17 U.S.C. §410(c); *Maljack*, 964 F. Supp. at 1426.
[258] *See supra* notes 176–178 and accompanying text.
[259] *See supra* notes 184–258 and accompanying text.
[260] *See* Frisch & Fortnow, *supra* note 7, at 225–26; Gould, *supra* note 13, at 131–33.
[261] *See supra* notes 139–143 and accompanying text.
[262] *See supra* notes 131–183 and accompanying text.
[263] *See infra* notes 265–361 and accompanying text.
[264] *See* 17 USC § 203(b)(1) (2006).
[265] *See infra* notes 266–315 and accompanying text.
[266] *See supra* notes 195–202 and accompanying text.

meaningful manner.[267] As one scholar has said, this source of originality in a sound recording can emanate from not just the artist but the producer, who processes, compiles and edits the sound.[268] 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.[269]

As the reaction to the loudness wars has made clear, consumers are able to sense meaningful differences between original recordings and their remastered counterparts.[270] Artists, such as Duran Duran guitarist Andy Taylor, have claimed a marked difference in their original sound recordings and the remastered recordings.[271] Music reviewers have referred to other remastered recordings as "much better" than the original recordings.[272] Additionally, consumers have made it clear that they believe remastering can render a sound recording noticeably different by calling for the remastering of certain recordings.[273] Over 22,000 fans of the band Metallica have signed an online petition to have the album Death Magnet remastered because of their disappointment with the original sound recording.[274] When sonic engineers remaster recordings to change the product, consumers and artists notice — for better or worse.[275]

Remastered sound recordings also fit the definition of derivative works in light of case law.[276] The analogy between the remastered sound recordings and the pan-and-scan movie from *Maljack Productions, Inc. v. UAV Corp.* is perhaps most telling.[277] 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* still found the process of editing the film to meet a new aspect ratio crea-

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[267] *See* Nimmer, *supra* note 74, at 3-10; *see also* Mass. Museum of Contemporary Art Found., Inc. v. Buchel, 593 F.3d 38, 64–65 (1st Cir. 2010).

[268] Marshall A. Leaffer, Understanding Copyright Law 138 (5th ed. 2010).

[269] *See infra* notes 270–315 and accompanying text.

[270] *See Petition to Re-Mix or Remaster Death Magnetic*, GoPetition.com, http://www.gopetition.com/petitions/re-mix-or-remaster-death-magnetic.html.

[271] Michaels, *supra* note 168.

[272] *The Thirty Best Reissues Ever*, NME, (Aug. 17, 2011) http://www.nme.com/photos/the-30-best-reissues-ever/230625/1/1#4).

[273] *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.

[274] *Id.*

[275] *See supra* notes 162–174 and accompanying text.

[276] *See infra* notes 277–315 and accompanying text.

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

tive enough to warrant derivative copyright protection.[278] 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.[279] The lack of such changes, however, does not appear to be something that copyright law deems significant.[280] The sound engineer, much like the editor of the pan-and-scan movie, makes artistic decisions, in this case how to best reach the sonic potential of a song through balancing, equalizing and enhancing certain aspects.[281]

The analogy is not perfect.[282] The producer of the pan-and-scan movie deleted forty-four percent of the film.[283] A remastering engineer, meanwhile, only changes what already exists without deleting any preexisting material.[284] It does not appear, however, that copyright law takes note of such a distinction.[285] For example, in *Midway*, the U.S. Court of Appeals for the 7th Circuit found that a merely 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.[286] The two works were so similar that the district court found that of approximately 10,000 "bytes" or computer words of source code in the two works, there were only about 488 differences.[287] Regardless, the sped up version of the video game was found to be a derivative work because of its value as a separate work to consumers.[288] The previously noted consumer demand for remastered sound recordings provides a similar rationale.[289]

Artists may argue that a remastered sound recording does not meet the requisite level of creativity necessary to receive a copy-

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[278] *Id.*

[279] *See Maljack*, 964 F. Supp. at 1427; *supra* notes 136–149 and accompanying text.

[280] *See Maljack*, 964 F. Supp. at 1427.

[281] MILES & RUNSTEIN, *supra* note 131, at 21; VALVETONE, *supra* note 143.

[282] *See Maljack*, 964 F. Supp. at 1426–28; *see also infra* notes 283–285 and accompanying text.

[283] *Maljack*, 964 F. Supp. at 1427.

[284] *See* Guttenberg, *supra* note 132; KATZ, *supra* note 139, at 12; Reid, *supra* note 149.

[285] *Compare* Grove Press, Inc. v. Collectors Publ'n, Inc., 264 F. Supp. 603, 605–06 (C.D. Cal. 1967) (denying copyright 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 a sped-up version of "Galaxian" videogame to be a derivative work of the original videogame).

[286] *Midway*, 704 F.2d at 1010–13.

[287] 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).

[288] *Midway*, 704 F.2d at 1013–14.

[289] *See supra* notes 170–174 and accompanying text.

right.[290] This argument will not likely hold water.[291] For one, as the Supreme Court has held, creativity is a component of originality.[292] The originality standard for derivative works articulated by Professor Nimmer, requiring more than a minimal contribution that renders the derivative work distinguishable from its prior work in a meaningful way, thus encapsulates a test for creativity.[293] If remastered works satisfy this test, which this Note argues they do, then they are sufficiently creative to warrant copyright protection.[294] Additionally, looking at the creativity requirement separately, the Supreme Court in *Feist* held that the necessary level of creativity is quite low — that the vast majority of works meet the standard quite easily, no matter how "crude, humble or obvious" the creativity may seem.[295] As such, the act of choosing which parts of a song to accentuate and alter through the remastering process almost certainly meets such a low standard.[296]

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 solved with reference to *Maljack's* treatment of the pan-and-scan movie.[297] There, the court stated that panning-and-scanning had the "potential" to create a derivative work, impliedly holding that panned-and-scanned versions of motion pictures are not given per se derivative work treatment.[298] The court went on to rule that this particular panned-and-scanned film was copyrightable, citing the declaration of its creator, who claimed to make artistic decisions about the composition of each frame.[299] For example, if two characters in a motion picture have a conversation at a distance too

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

[291] *See infra* notes 292–296 and accompanying text.

[292] *See Feist*, 499 U.S. at 345.

[293] *See* NIMMER, *supra* note 74, at 3-8, 3-10.

[294] *See id.*; *supra* notes 265–289 and accompanying text.

[295] *Feist*, 499 U.S. at 345.

[296] *See supra* notes 139–143, 146–149 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 publisher's price listings for collectible coins to be creative and thus copyrightable); Kregos v. Associated Press, 937 F.2d 700, 709 (2d Cir. 1991) (holding form compiling statistics on baseball pitchers to be creative and thus copyrightable).

[297] *See Maljack*, 964 F.Supp. at 1427; Gould, *supra* note 13 at 132 (arguing that if simple remastering qualifies for the derivative works exception, the entire termination scheme for sound recordings would be vitiated); Frisch and Fortnow *supra* note 7 at 225–26 (highlighting how easy it could be for record labels to cheaply create derivative works and continue to exploit valuable recordings).

[298] *See Maljack*, 964 F. Supp. at 1427.

[299] *Id.* at 1427–28.

wide to keep both from fitting within the television's dimensions, the editor must make a creative decision as to whether to focus on just one character during the conversation or to pan between the two.[300] It seems unlikely that a computer program that merely cut off the outer forty-four percent of the frame, or a creator doing the same, would portray enough creativity to warrant a copyright.[301]

Similarly, attempts to cheaply produce remastered albums by upping the average volume would also likely lack sufficient creativity.[302] Instead, the record label would have to show that creative decisions were made regarding which parts of the sound recordings to sonically edit to best effect the overall enjoyment of the song and improve its quality.[303]

Furthermore, *Maljack's* treatment of the remixed and remastered soundtrack provides better guidance for courts handling remastered sound recordings than the trio of cases rejecting derivative copyright in altered musical compositions.[304] Those cases focus on the composition of the work and not the sound recording.[305] As a result, the courts articulate rules that do not withstand scrutiny when applied to sound recordings.[306] For example, in 1947, in *Shaprio, Bernstein & Co. v. Jerry Vogel Music Co.*, the Federal 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.[307] This may be true regarding a musical composition, but it is clearly not true for a sound recording.[308] The 1976 Act itself urges against extending such a standard to sound recordings, explicitly recognizing that a "derivative work in

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[300] 3 Lindey on Entertainment, Publ. & the Arts § 6:14, at 6-33 (3d ed. 2011).

[301] *See* Maljack, 964 F. Supp. at 1427; Lindey, *supra* note 300, at 6-33.

[302] *See id.*

[303] *See id.*

[304] *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).

[305] *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).

[306] *See Shapiro*, 73 F. Supp. at 167; *Norden*, 13 F. Supp. at 418; *Cooper*, 213 F. at 873; *see also infra* notes 307–310 and accompanying text.

[307] *Shapiro*, 73 F. Supp. at 167

[308] *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, *supra* note 129, at §496.03(b)(1) (same). Editing a sound recording to make it stereo instead of mono would not change the underlying musical composition. *See* Jaffe *supra* note 16 at 146 (explaining the difference between sound recordings and musical compositions).

which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality" is protectable.[309] As previously argued, remastering a sound recording certainly has the potential to alter its quality, even if it is for the worse.[310]

Maljack, in examining the soundtrack, provides a better model for how a court will decide the issue because the *Maljack* court deals with sound recordings and not with arrangements.[311] The court, importantly, used its own judgment by actually listening to the two different sound recordings, rejecting expert testimony regarding the two works' similarities.[312] This reliance on notable auditory differences may well lead to remastered works being granted derivative copyrights, as artists, sound technicians and consumers alike claim that there is often a noticeable difference between the original sound recording and its remastered version.[313] The *Maljack* court's distrust of expert testimony, however, could hurt litigants seeking to receive a derivative copyright in remastered works.[314] While an expert would likely testify to there being technical sonic differences in a remastered sound recording, a judge with an undiscerning ear could well disregard that testimony if she does not hear a significant difference between the two recordings.[315]

B. The Economic Fallout

Artists may well argue that even if remastered works are derivative works, such a result does not effectuate the purpose of the statute, and a court should avoid a finding that skirts the statute's intent.[316] As this Section and the following Section explain, however, such a finding not only effectuates the purpose of the termination provision, but also realizes the purpose of the derivative works exception to ter-

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[309] 17 U.S.C. § 114(b)

[310] *See supra* notes 162–174 and accompanying text.

[311] *See Maljack*, 964 F. Supp. at 1428.

[312] *Id*.

[313] *See supra* notes 162–174 and accompanying text.

[314] *See Maljack*, 964 F. Supp. at 1428.

[315] *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. 964 F. Supp. at 1428. This testimony is so easily refuted, however, by simply listening to the recordings in question, that the court may have just discredited the totality of the expert's testimony and not actually weighed its subjective opinion over that of a credible expert. *See id*.

[316] *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.").

mination.[317] To understand why, some economic analysis is necessary.[318]

If remastered sound recordings are found to be derivative works, the recording artist can still terminate the grant to the original recordings, while the record label is allowed to keep the remastered version of the songs.[319] The record company can continue to utilize those remastered versions, while the recording artist is free to seek a new contract with the original recordings in hand.[320] Thus, as a result of termination, both the record label and the artist will have copyrights in separate sound recordings of the same underling song.[321] 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 replacement goods.[322]

These separate copyrights are bad, economically, for both the record company and the recording artist.[323] Copyright normally grants an artificial monopoly to its holder, allowing the copyright holder to charge a price higher than one that would exist under normal market conditions.[324] This monopoly no longer exists if most

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[317] *See infra* notes 319–361 and accompanying text; *see also* House Comm. On the Judiciary, 87th Cong., 1st Sess., Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 53 (Comm. Print 1961). ("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 76–78 and accompanying text (explaining the purpose of the derivative works exception to the termination provision).

[318] *See infra* notes 319–345 and accompanying text.

[319] *See* 17 USC §203(b)(1).

[320] *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 additional copies of its derivative work. *See* 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §11.02[C][1] at 11-20 (2010). 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.* at 11-20–11-21.

[321] *See* 17 U.S.C. §203 (b)(1) (2006); Frisch & Fortnow, *supra* note 7 at 226.

[322] *See* Frisch & Fortnow, *supra* note 7 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 well suit his purpose. *See supra* notes 279–281 and accompanying text (noting that a remastered version of a song will have the same lyrics and melody as the original work).

[323] *See* Frisch & Fortnow, *supra* note 7 at 226; Nimmer & Menell, *supra* note 16, at 415–16; Mark Seidenfeld, Microeconomic Predicates to Law and Economics, 39–42 (1996) (explaining the economic advantages of a monopoly market for the producer).

[324] *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

consumers view the two versions of the song as replacement goods.[325] Simple economic theory posits that if there is competition in the market place, prices will eventually fall to their marginal point — the cost of producing and distributing one additional copy.[326] For an already produced sound recording, where the cost of production is extremely low, this marginal point is also quite low.[327]

One could argue that, with just two competing sellers, there is not perfect competition.[328] 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 price.[329] 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.[330] It is thus advantageous for the group to not compete on price to keep prices from falling to their marginal point.[331] 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.[332]

For multiple reasons, however, this does not affect the preceding economic analysis.[333] For one, it is not clear that such a market would fit a traditional economic definition of an oligopoly.[334] Copyrighted works are public goods, meaning copies are easy to make and essentially unlimited.[335] 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.[336] Additionally, even if the market can be classified as an oligopoly, economic theory posits that a

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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).

[325] *See* Seidenfeld, *supra* note 323 at 12–14 (explaining the effect on substitutions to a market); Frisch & Fortnow, *supra* note 7 at 226; Nimmer & Menell, *supra* note 16, at 415–16; .

[326] *See* Seidenfeld, *supra* note 323 at 38; Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 Tex. L. Rev. 989, 995 (1997).

[327] *See* Landes & Posner, *supra* note 324 at 328; Lemley, *supra* note 326 at 995.

[328] *See infra* notes 329–332 and accompanying text.

[329] Seidenfeld, *supra* note 323, at 85.

[330] *See* E. Thomas Sullivan & Jeffrey L. Harrison, Understanding Antitrust and Its Economic Implications 25 (4th ed. 2003).

[331] *Id.*

[332] *See id.*

[333] *See infra* notes 334–338 and accompanying text.

[334] *See infra* notes 335–336 and accompanying text.

[335] *See* Landes & Posner, *supra* note 324 at 326.

[336] *See id.* at 326–27.

good's price in an oligopoly, while greater than marginal cost, will be less than the same good's price in a monopoly.[337] As such, both competitors may find it smarter and safer to split the profits of the higher monopoly price by coming to an agreement rather than risking competition.[338]

The result is that, despite keeping possession of part of a recording artist's catalogue, the record company's profitability will decrease.[339] Additionally, the artist will not receive the full benefit of his or her termination rights.[340] Other record labels will be reluctant to purchase the rights to the terminated sound recordings because of potential competition in the market.[341] 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 only sell their work at its low marginal point or, alternatively only at the oligopolistic price instead of the monopoly price.[342]

Facing this economic situation, both parties will likely choose to renegotiate with one another to maintain the copyright monopoly.[343] Now, however, the recording artist has the ability to cut into the record company's profits.[344] Thus, when the two parties renegotiate, the result is likely that the artist will get a higher percentage cut of the profits and a more definitive voice in the exploitation of the work than she had in the original contract.[345]

C. An Equitable Result

This end result realizes the underlying goal of the termination provision of the 1976 Act.[346] It allows recording artists to receive

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[337] *See* Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 Minn. L. Rev. 9, 17 (2004).

[338] *See id.*

[339] *See* Piraino, *supra* note 337 at 17; Nimmer & Menell, *supra* note 16, at 415.

[340] Gould, *supra* note 13, at 132; *see* 17 USC § 203 (b) (1).

[341] Frisch & Fortnow, *supra* note 7 at 226.

[342] *See supra* notes 323–338 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 107 ("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.")

[343] *See* Frisch & Fortnow, *supra* note 7 at 226; Nimmer & Menell, *supra* note 16, at 415–16. This decision may raise antitrust concerns, which is beyond the scope of this note. *See* 15 U.S.C. § 2.

[344] *See* Nimmer & Menell, *supra* note 16, at 415–16.

[345] *See id.*

[346] *See* Abrams, *supra* note 41, at 209–11 ; Nimmer & Menell, *supra* note 16, at 416.

more fortuitous contracts once the true value of their work is better known.[347] When artists first sign with a record label, they usually receive somewhere between nine percent to thirteen percent royalties.[348] Meanwhile, artists whose albums sell more than 750,000 copies generally earn between nineteen percent and twenty percent in royalties.[349] In addition, sound recordings can fetch prices from as low as $5,000 to as high as $150,000 if they are used in motion pictures.[350] Artists will only be paid half of this as per normal recording contracts.[351] Artists, facing the ability to distribute their work independently after termination, will likely demand higher royalty rates.[352] Record labels, which have high costs and rely on valuable artists to drive revenue, will likely concede some percentage of profits to maintain the ability to continue to monopoly price the sound recordings.[353]

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.[354] When a record label signs a new artist, it takes a substantial risk.[355] The record label often provides 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.[356] If the artist never reaches commercial success, the label does not require the artist to repay the investment, and the label takes a financial loss.[357] And, more often than not, labels take that loss, as few signed artists ever become commercially successful.[358] In this way,

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[347] *See* Nimmer & Menell, *supra* note 16, at 416.

[348] Donald S. Passman, All You Need to Know About the Music Business, 109 (1997).

[349] *Id*. at 108–09.

[350] *Id*. at 409.

[351] *Id*. at 412; Donald E. Biederman et al., Law and Business of the Entertainment Industries 723 (5th ed. 2007).

[352] *See* Nimmer & Menell, *supra* note 16, at 415–16.

[353] *See* Biederman, *supra* note 351, at 704–10; Passman, *supra* note 348, at 83–86 (listing the various different divisions of a fully-staffed record company).

[354] *See* Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. Copyright Soc'y U.S.A. 209, 247 (1983) (stating that a problem of the termination provision is that some value of the author's copyright, including production and marketing costs, was contributed solely by the producer).

[355] *See infra* notes 356–358 and accompanying text.

[356] Biederman, *supra* note 351, at 709(stating that perhaps only one in twenty newly signed artists will ever break even); Passman, *supra* note 348, at 111–12.

[357] Biederman, *supra* note 351, at 709; Passman, *supra* note 348, at 103.

[358] Biederman, *supra* note 351, at 709.

record labels share the same concern about termination that motion picture producers do: needing to recoup costly upfront investment.[359] Congress seemingly found this argument persuasive when it carved out exceptions to the termination right.[360] This result thus also effectuates the purpose of the derivative works exception by protecting the investment of resources into a risky artistic venture.[361]

Conclusion

Record labels are scared of the terminator, and with good reason. When artists begin to terminate, litigation will likely be heavy as recording companies try desperately to hold onto the rights of valuable sound recordings. While those companies will surely argue that the works are works made for hire, and thus non-terminable, 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. 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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[359] *See* Biederman, *supra* note 351, at 709; Passman, *supra* note 348, at 103; Goldstein, *supra* note 354, at 247*; supra* notes 76–78 and accompanying text.

[360] *See supra* notes 76–78 and accompanying text.

[361] *See* Abrams, *supra* note 41, at 213.