Better Together: Joint Authorship in Technicians' Contributions to Sound Recordings

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Music is a team sport. Like most art, it is often improved by collaboration. Contributions by the featured artist, backing musicians, songwriting collaborators, and even outside artistic influences can all play a large role in the final musical product. Another set of individuals also plays a considerable, and usually unseen, role in crafting a song—technicians. Technicians (producers and engineers) play a critical role in shaping a song into something commercially viable, but often, they are left out of conversations surrounding copyright. Even though technicians often make important creative contributions to recordings, they are almost never considered "authors" of the resulting work.

That should change. Technicians should have a seat at the copyright table. These artistic collaborators should own the art they help create—and just as importantly, be compensated for it. The compensation structure for technicians is often ambiguous. Many technicians are hired by artists who, because of royalty arrangements with record labels, may lack the funds to pay technicians. While industry customs have developed to account for this, relegating technicians' pay to industry custom is concerning. Copyright ownership provides certainty and negotiating leverage to technicians. An ownership interest could take the form of recognition via joint authorship or a statutory royalty scheme for radio play. The Music Modernization Act shows that Congress can reimagine the relationship between music and copyright. The law should go a step further by recognizing collaborators' contributions.

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INTRODUCTION

It takes a veritable army of individuals to produce a hit song. Songwriters, musicians, technicians, businesspeople, music labels, and a number of others all leave their imprint on the recordings that make up the music marketplace. The expanding number of songwriting credits for songs is evidence of that.[1] How many individuals are truly involved in the "creative" aspects of making a song, however? Of course, the featured artist and musicians are involved in that process; someone has to play the music heard on the recording. But there are others that play an unseen, critical role in the production of music: producers and engineers.

In any copyrightable work, it is important that authorship rights are properly allocated, even if those rights are later assigned away. Even when an assignment occurs, a putative author can terminate that transfer of rights subject to statutory limitations.[2] As music industry revenues begin to see a resurgence after several years, those who make creative contributions to the work should be recognized—and compensated appropriately—for their contributions.[3] The difference is particularly stark when considering that featured artists, who typically own the copyright in a sound recording *and* the underlying musical composition, receive compensation from exploitation of either. Technicians, on the other hand, receive compensation for neither barring contractual agreement. While technicians sometimes have compensation schemes that are more favorable than artists', the compensation scheme is dependent on an industry norm.[4]

This paper proceeds in three parts. Part I briefly describes the legal

1. Mark Sutherland, *Songwriting: Why It Takes More Than Two to Make a Hit Nowadays*, Music Week (May 16, 2017, 12:01 AM), https://perma.cc/DM2G-NMAR

2. *See* 17 U.S.C. §§ 203, 304.

3. *See generally* ALAN B. KRUEGER, ROCKONOMICS: A BACKSTAGE TOUR OF WHAT THE MUSIC INDUSTRY CAN TEACH US ABOUT ECONOMICS AND LIFE (2019) (discussing the economic resurgence of the music industry in recent years after several years of declining revenues).

4. *See infra,* Part II.

standards relevant to copyright ownership in sound recordings. Part II discusses the contributions of technicians in the recording process, contends that these contributions rise to the level of joint authorship, and analyzes joint authorship case law. Part III recognizes that even in the absence of an expanded judicial joint authorship standard, there are statutory solutions possible that would recognize and compensate these individuals for their contributions to the creation of sound recordings. For example, 17 U.S.C. § 101 could be amended to clarify what exactly is required of a joint work, or an outright performance right could be added to 17 U.S.C. § 114.

I. IT TAKES TWO: THE LEGAL STANDARDS FOR JOINT AUTHORSHIP

First, let us turn to a brief overview of the legal standards accompanying copyright authorship. Copyright attaches to any creative work deemed sufficiently original and fixed.[5] The bar for originality is exceedingly low. The work must be independently created and possess some minimal degree of creativity to qualify as original.[6] Likewise, fixation requires simply that the work be embodied in a tangible medium perceptible by humans by or under the authority of the author.[7] That is to say, the baseline for copyright protection is relatively low when compared to other intellectual property regimes; patent law, for example, requires an invention to be "novel," amongst other strict qualifications.[8]

As it relates to music, copyright subsists in two categories of works: musical compositions and sound recordings. As of the Copyright Act of 1976, the song as composed and the song as recorded are two legally distinct entities, each with its own, separate protection.[9] Indeed, in the enumerated categories of protectable works, Congress delineated those two categories.[10] Musical compositions trace their protection back to 1831, much farther than sound recordings.[11] Sound recordings have only been protected at the federal level since the 1970s.[12]

Often, copyright ownership is a relatively simple concept. The author of a book owns the copyright in that work, for example, and a photographer owns the copyright in the photo they create.[13] Ownership becomes a much more convoluted question in more complex scenarios, such as those involving multiple authors or the work of contracted employees.[14] Copyright doctrine has evolved

5. 17 U.S.C. § 102.
6. *See* Feist Publ'ns v. Rural Telephone Servs., 499 U.S. 340, 345 (1991).
7. 17 U.S.C. § 102.
8. *See* CRAIG JOYCE ET AL., COPYRIGHT LAW (11th ed. 2020).
9. 17 U.S.C. § 102.
10. *Id.*
11. Copyright Act of 1831, ch. 16, § 1, 4 Stat. 436.
12. 17 U.S.C. § 102.
13. *See, e.g.*, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884).
14. *See, e.g.,* 17 U.S.C. § 101 (setting out the statutory requirements for a work made for hire).

to account for these variations, to an extent.

Copyright law allows for joint authorship of a work. A joint work is "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[15] Joint work status allows each of the co-owners to exploit the work individually, so long as the exploitation does not confer any sort of exclusive right prohibiting the co-author from their own exploitation.[16]

The Ninth Circuit has adopted a three-part framework for assessing joint authorship based on cross-circuit precedent: (1) whether an alleged co-author exercised control over creation of the work, (2) whether all co-authors made "objective manifestations of a shared intent to be co-authors," and (3) whether "the audience appeal of the work turns on [each co-author's] contributions and the share of each in its success cannot be appraised."[17] While none of the factors are dispositive, "[c]ontrol in many cases will be the most important factor."[18]

The Second Circuit famously discusses joint authorship in *Childress v. Taylor*. There, the two parties collaborated to create a stage play. Taylor, an actress, requested that Childress, a playwright, produce a script based on the life of a comedienne.[19] Taylor contributed a number of ideas but did not make any concrete contributions to the script.[20] Upon completion of the play, Childress rejected an agreement that would have made Taylor a co-owner of the copyright.[21] Taylor then took Childress's script to another playwright, altered it, and mounted an allegedly infringing production.[22] Childress subsequently sued for copyright infringement, and Taylor claimed that she was a joint author of the original work.[23]

The Second Circuit held that Taylor was not a joint author in the play.[24] The court reasoned that for joint authorship to exist, the collaborators must have each: made an independently copyrightable contribution, intended to combine their contributions, and mutually assented to share authorship of the resulting work.[25] The Second Circuit approach has since been widely adopted by other courts.[26]

In contrast to joint authorship, the work-made-for-hire ("WMFH") doctrine creates a regime in which a work's ownership vests in an employer when the work is created by an employee acting within the scope of their employment or

15. *Id.*
16. *See H.R. Rep. No.* 94-1476, at 121 (1967).
17. Aalmuhammed v. Lee, 202 F.3d 1227, 1234 (9th Cir. 2000) (internal quotation marks omitted).
18. *Id.*
19. Childress v. Taylor, 945 F.2d 500, 502 (2d. Cir. 1991).
20. *Id.*
21. *Id.* at 503.
22. *Id.*
23. *Id.* at 504.
24. *Id.* at 509.
25. *Id.* at 507.
26. *See, e.g.*, Aalmuhammad, 202 F.3d at 1233.

by an independent contractor working in certain scenarios [27] For an employee, a creative work is a WMFH if it (1) was within the type of work the employee was hired to perform, (2) the creation of the work occurred within the time and space of the employee's job, and (3) the employee's work sought to serve the employer's purpose, even in part.[28] To be a WMFH created by an independent contractor, the work must be within one of nine enumerated categories, and there must be a signed agreement explicitly stating that the work being created is a WMFH.[29]

The complication in the WMFH doctrine is determining when an individual is an employee and when they are an independent contractor. While the parties' nominal categorization of the worker's status is relevant, it is not dispositive.[30] The Supreme Court has determined that the term employee should be given its common law meaning as applied in agency law and has listed at least thirteen factors to consider when determining whether a worker is an employee or not, including: the right to control the work, the method of payment, tax status, the location of the work being done, and the extent of the worker's independence in when and how to complete the work.[31]

Often, this categorization is what the WMFH doctrine turns on. The criteria for an independent contractor are particularly clear.[32] If a worker can prove they either created the work outside of the scope of their employment or were not an employee under agency law, then they stand a much better chance of retaining an ownership interest in their work.

Joint authorship is a preferable legal outcome for a creator due to the bundle of rights accompanying joint author status as compared to the dearth of rights conferred to those who created a WMFH. Similarly, a corporate entity—such as a music label—would seek WMFH status on a work so that it can gain authorship *ab initio* without worrying about issues like termination.

All of these rights are practically negated in the presence of some sort of contractual agreement. In the music industry, any rights that a purported author maintains in a sound recording's creation—be it an artist, engineer, producer, or anyone else—are often assigned to the corporate publishing entity, usually the label.[33] This avoids any question of authorship since, in the end, all roads lead back to the label. Even if the work of one of these non-standard authors rose to the requisite level of authorship necessary for copyright protection and joint authorship status, those rights have been neatly packaged and handed to the label

27. 17 U.S.C. § 101.
28. *See, e.g.*, Fleurimond v. N.Y. Univ., 876 F. Supp. 2d 190, 198 (E.D.N.Y. 2012).
29. 17 U.S.C. § 101.
30. *See* Cmty. For Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).
31. *Id.*
32. *See* 17 U.S.C. § 101. That is not to say determination of an independent contractor's employment status is a particularly clear endeavor, *see Reid*, 490 U.S. at 751, only that the statutory requirements for WMFH status as an independent contractor are.
33. *See generally* BOB KOHN, KOHN ON MUSIC LICENSING (5th ed. 2018).

essentially *ab initio* like a WMFH.[34]

II. UNIVERSAL SOUND: JOINT AUTHORSHIP IN SOUND RECORDINGS

One possible solution to the ownership conundrum is the judicial expansion of joint authorship to certain parties involved in the recording process, specifically producers and engineers. As an initial matter, this discussion assumes any potential ownership interest has not been dealt with via contractual assignment. However, even if such an agreement exists, ownership interests could still have a role in termination rights.[35]

A. With a Little Help from My Friends: Recording Process Roles

As early as the passage of the Copyright Act of 1976, legislative history indicates that Congress anticipated producers would hold some sort of copyright interest in the sound recordings—or even the compositions—they produce.[36] However, the role of a producer is often varied.[37] Producers play a number of roles in the record-making process, but, in broad strokes, they help shepherd the process from initiation to completion while supervising the recording.[38] Some producers play a greater role in the actual creative process than others.[39] A producer might fundamentally alter the musical direction of a song as it is recorded, while others might simply be "observer[s]" in the process.[40] Others, like the famed Phil Spector, might play an even larger, more outsized role as architect of the record from beginning to end.[41]

Engineers, on the other hand, occupy a slightly different role. In charge of many of the technical aspects of capturing and reproducing the performance, engineers often play a more hands-on role in crafting the elements of a sound recording.[42] Indeed, an engineer controls things like panning (left/right balance), equalization (high/low frequency shaping), effect placement (reverb, delay, distortion, etc.), and editing (selecting and enhancing individual takes of a recording session), all of which scholars point to as elements substantiating copyright authorship.[43]

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34. *See* 17 U.S.C. §§ 203, 304 (detailing the requirements for statutory termination of copyright transfers).

35. See 17 U.S.C. § 203 (creating a scheme under which authors can recapture transferred ownership in copyrights pursuant to certain conditions and a thirty five-year passage of time).

36. H.R. REP. NO. 94-1476, at 56 (1976).

37. Phil Hill, Note, *Fix It In The Mix: Disaggregating the Record Producer's Copyright,* 26 HARV. J.L. & TECH. 325, 327 (2012).

38. *Id.*

39. *Id.* at 340.

40. *Id.*; *see* Forward v. Thorogood, 758 F. Supp. 782, 784 (D. Mass. 1991).

41. Hill, *supra* note 37 at 340; *see also* Andrew Nietes, Note, *Bringing Swirly Music to Life: Why Copyright Law Should Adopt Patent Law Standards for Joint Authorship of Sound Engineers,* 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1321, 1323–24 (2019).

42. Hill, *supra* note 37 at 341.

43. *Id.*; 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.10.

Production of a sound recording usually involves three separate engineers.[44] First, the tracking or recording engineer captures the performance, typically in conjunction with the producer, and may very well be the producer themself.[45] Next, the mixing engineer manipulates that capture to produce a stereo reduction by setting volume levels, equalizing frequencies, adding effects, and making other artistic decisions, with varying degrees of independence.[46] Lastly, the mastering engineer further manipulates the work of the mixing engineer by adding additional processing to produce a recording suitable for distribution. Their work is often seen as a sort of black box art that is much more difficult to describe than that of other participants in the process.[47]

B. I Want It That Way: Comparative Joint Authorship Standards

All that is to say, each participant in the production process plays a vital role in creating the finished sound recording, arguably even more so than in other creative industries. Courts have struggled to apply the joint authorship standard to music. In one case, the Fifth Circuit denied a guitarist joint authorship of a song due to his failure to independently fix his contributions outside of the sound recording, thus falling short of a copyrightable contribution to the work.[48] That conclusion is short-sighted and illogical, considering a sound recording is a fixation of a work and that copyrightable contributions need not be fixed independently to qualify for joint authorship status.[49]

Likewise, a district court in California denied joint authorship status to a producer of Post Malone's hit song "Circles" because he failed to participate meaningfully in the actual creation of the work and instead only offered unprotectable ideas.[50] Since he merely made "creative recommendations" and "supplied direction and ideas" rather than contributing any independently copyrightable expression, his work failed to meet the joint authorship standard.[51] In order for a work to meet the threshold of copyrightability, it must be an expression of an idea, not merely an idea.[52] Given this idea/expression dichotomy, copyright ownership is, at least facially, more likely to subsist in the primary artist, whose contributions are more easily recognizable.

The ownership regime in other creative industries differs somewhat. In many ways, film copyright operates differently than sound recording copyright. In sound recordings, the ownership typically defaults to the performing artist, but

44. Hill, *supra* note 37 at 342.
45. *Id.*
46. *Id.*
47. *Id.* at 342–43; *see generally* BOB KATZ, MASTERING AUDIO: THE ART AND THE SCIENCE (2002).
48. *See* BTE v. Bonnecaze, 43 F. Supp. 2d 619, 628 (E.D. La. 1999).
49. *See* 17 U.S.C. § 101.
50. *See* Armes v. Post, No. 2:20-cv-0312 (C.D. Cal. Apr. 7, 2020).
51. *Id*.
52. *Id*. at *7; *See, e.g.,* Baker v. Selden, 101 U.S. 99 (1880).

the exact opposite is sometimes true in film. Film copyright ownership, in the absence of a contractual agreement, may subsist in the film's producer, not its director or primary performers.[53]

Courts typically assign ownership rights to the party determined to be the "master mind" of a film.[54] In *Aalmuhammed v. Lee*, the Ninth Circuit determined that the plaintiff was not a joint author of the film *Malcolm X* despite significant contributions to the work.[55] The plaintiff contributed script revisions and additions to supplement the accuracy of the film's religious elements.[56] However, the court found that the plaintiff never exercised any superintendence over the work, nor was there ever any evidence of an objective intent to share authorship.[57] Thus, while a contribution is necessary for joint authorship, that contribution alone is insufficient—there must be more.[58] Since the work in question indisputably owed its creation to Spike Lee, the producer and director, the court determined that he should receive the sole ownership interest as the project's driving creative force.[59]

However, the situation is less clear where there is no clear original author. While there was no question of Spike Lee's authorship in *Aalmuhammed,* the Second Circuit was forced to confront the issue of assigning ownership interest outright in *16 Casa Duse v. Merkin*.[60] There, in the face of a dispute between a director and a producer as to who was the superintendent creative force behind the project, the Second Circuit determined that the producer, as its facilitator, was entitled to sole copyright in the film.[61] Specifically, the Second Circuit rejected an approach that each collaborator could copyright their own contribution to a so-called "integrated work," instead relying on an all-or-nothing approach to ownership.[62] Either the contribution qualifies for joint authorship, or there is no authorship at all; there is no patchwork, partial protection in this space, nor is there protection for each individual's contribution independently.[63]

Thus, there is a dichotomy, explained mostly by the requirement that the superintendent party intended to share authorship with the putative joint author.

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53. *See, e.g.*, 16 Casa Duse, LLC v. Merkin, 791 F.3d 247, 261 (2d. Cir. 2015). While this is a fringe case of first impression, its analysis is applicable to the music context as well. Just as the court here found that the producer was entitled to copyright ownership in the absence of a contrary agreement because of his superintendence of the process, producers and engineers arguably hold the same superintendence over the creation of a sound recording.

54. *See* Aalmuhammed, 202 F.3d at 1234.

55. *Id.* at 1236.

56. *Id.* at 1230.

57. *Id.* at 1235.

58. *See* Childress, 945 F.2d at 507.

59. Aalmuhammed, 202 F.3d at 1236.

60. *See 16 Casa Duse,* 791 F.3d at 260.

61. *Id*.

62. *Id.* at 259; *see also* Garcia v. Google, Inc., 786 F.3d 733, 741 (9th Cir. 2015) (holding that an actress's performance in a movie was not copyrightable independent of the film itself).

63. *16 Casa Duse*, 791 F.3d at 259.

While the producer or director are considered a film's superintendent force, the performing artist typically receives that honor in music—despite the copyright system's hesitance to recognize performance.[64] While that assertion should certainly not be taken as an implicit slight to the creative contributions of featured musicians, it is odd that producers and engineers are relegated to a secondary role despite contributions that are functionally similar to their film counterparts. This is likely attributable to the intent requirement and artists' subjective hesitance to recognize these individuals as co-authors. However, is that even what the statutory definition—"a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole"—suggests?[65]

Writing in a joint authorship case, Judge Learned Hand once posited that it need not be necessary for the joint authors to ever work in concert with each other, or even to know each other, only that they intended to combine their works into a unified whole.[66] While the *Childress* test has supplanted that definition, the statute seems to indicate something more like Learned Hand's broader definition.[67]

Some scholarship suggests importing a joint inventorship analysis from patent law into joint authorship analysis.[68] This would focus on whether the parties collaborated and whether they made significant contributions to the final work.[69] By setting the threshold at mere collaboration and contribution, the doorway becomes much wider for claims of putative authorship, especially in works like sound recordings and films featuring the contributions of several people. This standard would create a system in which joint authorship is easier to achieve. However, it disregards precedent determining that collaboration alone is insufficient to confer joint authorship.[70]

Determining joint authorship in the United States requires a heavily-fact dependent inquiry, rejecting categorical definitions.[71] The specific factual circumstances involved in the creation of a work determine joint authorship, particularly in the Ninth Circuit's *Aalmuhammed* test.[72] While there is nothing inherently wrong with determining authorship on a case-by-case basis, courts should recognize there is more at play than solely the artist's performance in a sound recording. Some international systems have embraced such categorical

64. *See* Rebecca Tushnet, *Performance Anxiety: Copyright Embodied and Disembodied*, 60 J. COPYRIGHT SOC'Y U.S.A. 209, 209–10 (2013).

65. *See* 17 U.S.C. § 101.

66. Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 267 (2d Cir. 1944).

67. *See* 17 U.S.C. § 101.

68. *See* Nietes, *supra* note 41 at 1349.

69. *Id.* at 1349–50.

70. *See* Childress, 945 F.2d at 509.

71. *See* Aalmuhammed, 202 F.3d at 1236.

72. *Id.*

constructions of joint authorship to ensure greater fairness.[73] For instance, the Rome Convention—of which the United States is not a part—explicitly assigns rights in sound recordings to "producers of phonorecords."[74]

That is not to say that the work of technicians goes totally unnoticed. Congress has explicitly contemplated the copyrightability of producers' contributions, for example.[75] Recently, the statutory scheme has evolved to somewhat recognize technicians' contributions. After passage of the Music Modernization Act ("MMA") in 2018, producers, mixers, and engineers are entitled to royalties created through exploitation of sound recordings under § 114.[76] However, § 114 applies only to noninteractive digital audio transmissions, limiting royalties. Even then, technicians cannot access these royalties without explicit authorization via a letter of direction sent from the artist to SoundExchange, the organization charged with administering those royalties.[77] AM/FM "terrestrial" radio and interactive streaming services, like Spotify, are not licensed under § 114, so those uses do not generate royalties qualifying for distribution under the MMA.[78]

C. I Gotsta Get Paid: The Compensation Scheme and Its Shortcomings

In the label ecosystem, compensation for producers is split into so-called "front end" compensation in the form of an advance and "back end" compensation, typically a share of royalties in the sound recording.[79] Producers can receive an advance anywhere up to $7,500 if they are considered "low end," to more than $200,000 for high-end, supposed "superstar" producers, all recoupable against any back end payments.[80] On the back end, producers are often given a royalty in the three to four percent range, coming from the artist's share of royalties.[81]

Interestingly, producers usually receive "record one" royalties, meaning that the label does not count recording costs against their royalty payments. Although payment is deferred until the recoupment of recording costs, producers accrue royalties from the sale of record number one.[82] Usually, the producer(s)

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73. Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, art. 10, 496 U.N.T.S. 43 [hereinafter Rome Convention].

74. *Id.*

75. H.R. REP. NO. 94-1476, at 56 (1976).

76. Music Modernization Act, Pub. L. No. 115–264, 132 Stat. 3676 (2018).

77. *Id.*

78. *See* Ask Musicians For Music Act of 2019, H.R. 5219, 116th Cong. (introduced Nov. 21, 2019) (introducing a requirement for a terrestrial radio license for exploitation of sound recordings).

79. DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS, 124–137 (10th ed. 2019).

80. *Id.*

81. *Id.*

82. *See* John. P. Strohm, *Writings in the Margin (of Error): The Authorship Status of Sound Recordings Under United States Copyright*, 34 Cumb. L. Rev. 127, 152 (2003).

and the artist contract directly, so the artist is often responsible for compensating each producer.[83] Given that the producer earns record one royalties, the artist may owe the producer before the artist sees any compensation from the sound recordings.[84] To avoid this, artists and producers will usually insist that the record company take on the responsibility of paying a producer's royalties through a "letter of direction," which the record company almost always agrees to do as an "accommodation" to the parties.[85]

As for engineers, the typical arrangement involves a large upfront payment, with top-end mixing engineers in some genres earning as much as $50,000 per track.[86] Some receive a small royalty rate—typically less than one percent, that is paid identically to producers—but the vast majority of compensation comes in the form of the up-front fee.[87]

Against that background, the problem is clear: technicians bear a significant risk of being held hostage from their royalties based on something they have no control over—record sales. While it is theoretically true that these technicians will receive their record one royalties at some point, precisely "when" is left to chance. Even further, there is the distinct possibility that they are left to collect from an artist that might very well lack the funds to pay them altogether. While the industry standard letters of direction solve this problem, there is no requirement that they exist and they certainly are not binding. In the event of nonpayment, a technician must seek legal recourse against the artist rather than the label—even in the presence of a letter of direction.[88]

Ownership in the sound recording does not fix that problem by itself. What it does, however, is force labels to negotiate directly with technicians. Assuming labels want to maintain full copyright ownership of master sound recordings, they would need to negotiate with each author to maintain full control in the presence of a joint authorship relationship. Holding an ownership interest in the sound recording gives a technician valuable negotiating leverage that could be used to receive more favorable terms.

Certainly, these individuals could simply withhold their labor if they found their working conditions or agreements untenable. These employment agreements are, after all, voluntary. But withholding labor misses the point of recalibrating the relationship amongst artists, labels, and technicians. The issue is not necessarily the compensation scheme; it is the fact that the compensation scheme is oriented incorrectly. Despite being under contract with artists, technicians typically rely on labels for payment under letters of direction, as opposed to most industries where the employee and employer contract directly.

83. Passman, *supra* note 79.
84. *Id.;* Strohm, *supra* note 82 at 152.
85. Passman, *supra* note 79.
86. *Id.*
87. *Id.*
88. *Id.*

Authorship rights are a tangible medium by which a technician could bring a label to the negotiating table to help ensure that any liability for non-payment attaches to the label itself, not to the artist, who would likely be judgment-proof in the event that the technician had to seek legal recourse to be paid.[89] This recalibration more accurately allocates liability amongst the parties and helps to defray the risk artists face in creating an album.

D. I Heard It Through the Grapevine: Another Potential Interest in Joint Authorship

Another possible benefit to an expanded ownership standard is sampling licensure. Recall that joint authors of a work each have an independent right to license the work for use, so long as the use is nonexclusive and profits are accounted to their co-authors.[90] Thus, a joint author could independently license a sound recording for sampling in another work, so long as there is appropriate accounting.

In practice, this means that a technician working on a new project could sample any of their own back catalog with nothing more than an accounting of any profits to their coauthors, which may be a more cost-effective option than securing a license.[91] This could be particularly beneficial in hip hop, where producers often use samples to create songs. Even in the case of a sample that is outside of the producer's own back catalog, the presence of an alternative copyright owner provides another source that a licensor could contact to receive a license. Perhaps technicians (or even other secondary contributors) would be more likely to license the work than the primary, featured artist.

III. A CHANGE IS GONNA COME: STATUTORY SOLUTIONS

Even in the absence of a change in the authorship standard, there are solutions available to protect the contributions of secondary artists to sound recordings. Congress already recognized one such solution regarding technicians, as mentioned above.[92]

Another potential solution is to institute a public performance right in sound recordings that specifically awards royalties to the technicians.[93] Currently, there is an exception to the compulsory licensure scheme as it pertains to terrestrial radio. Terrestrial radio broadcasters are not required to pay a license fee to

89. *Id*.

90. *See supra* Section II.

91. KEMBREW MCLEOD & PETER DICOLA, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 201–12 (2011) (calculating the exorbitant cost of licensing early hip-hop albums under modern legal norms); *see also* VMG Salsoul v. Ciccone, 824 F.3d 871 (9th Cir. 2016) (finding copyright infringement when a producer sampled his own prior work because the ownership rights in the prior work had been assigned to the record label).

92. *See supra* Section II.B.

93. *See, e.g.,* Jay Mason All, *Again, From the Top! The Continuing Pursuit of a General Public Performance Right in Sound Recordings*, 22 ALB. L.J. SCI & TECH. 1 (2012).

exploit sound recordings, despite having to pay for performing rights organization (PRO) blanket licenses to exploit the underlying musical compositions.[94]

Creation of a licensure scheme for radio exploitation that specifically diverts royalties to technicians, much like the MMA creates a revenue stream from § 114 licenses, could help with compensation. Technicians do not garner the same benefit from radio play that a featured artist does. A featured artist can expect some level of recognition and publicity as a result of widespread radio play, perhaps resulting in more record sales, concert ticket sales, or some other form of monetized engagement.[95] These benefits are much less apparent for non-featured collaborators, who receive little recognition from mainstream radio. The popularity of the song could result in more § 114 licenses, and thus higher royalties, but this attenuated argument misses the point. Compensation should not be contingent on something the technician has no control over—recognition from radio play—driving secondary sources of revenue.

While it is unfair that featured artists receive no payment for the exploitation of their recordings on traditional radio, there is at least some compensation taking place. The Performing Rights Organization ("PRO") blanket license scheme pays out royalties for use of the underlying music work,[96] and the featured artists often maintain at least some interest in the composition as a songwriter.[97] Nonfeatured artists, however, rarely have those rights. Genres like pop, hip-hop, and country still rely on radio play and can involve a more extensive post-production process with contributions from technicians. A royalty from radio play would result in a recognition of the role these individuals play in the creative process, especially in genres where post-production is critical to audience enjoyment of the recording.

Practically speaking, this newfound compensation likely must be legislated rather than negotiated. There is nothing stopping a technician from negotiating for compensation based on radio play, but this makes little practical sense for either party. If the featured artist, currently recognized as the sound recording's owner, is not compensated for radio play, it seems unlikely that the artist—or more likely, the labels under a letter of direction—would then pay the technician first. Indeed, this scenario is a variation of the record one royalty conundrum in

94. *See generally* U.S. Copyright Office, Copyright and the Music Marketplace 90–105 (2015).

95. Claudia Rosenbaum & Ed Christman, *Congress Introduces AM-FM Act to Get Artists & Labels Paid for Radio Play*, BILLBOARD (Nov. 21, 2019).

96. In the United States, royalties for public performance of musical works are managed by third-party, non-governmental organizations called PROs. Rightsholders will "affiliate" with a PRO (typically one of the four major PROs: ASCAP, BMI, GMR, or SESAC) by granting the PRO the right to manage royalties for all songs in the rightsholder's catalog. The PRO then offers prospective users (concert venues and radio stations, for example) the right to purchase a "blanket license" that allows use of every composition that the PRO has in its catalog. The PRO then, in turn, pays a royalty rate back to the rightsholder. *See* Passman, *supra* note 79 at 225–26.

97. *See generally* U.S. Copyright Office, *supra* note 94 at 25.

that it would require an artist or a label to pay a producer without any offsetting income.[98] It seems difficult to believe that any compensation scheme rewarding producers before the artists would occur organically, regardless of the underlying creative contributions or potential ownership interests.

In the international intellectual property regime, there is an existing *per se* right for producers under the Rome Convention. The Rome Convention grants the producer a right to reproduce the phonogram, while granting the performer a right to the performance.[99] While a full discussion of the differing international intellectual property regimes undergirding the Rome Convention is well beyond the scope of this paper, suffice it to say that international intellectual property does not map neatly onto American conceptualizations of copyright. There is no performance protection in American law.[100] Further, the phonogram right granted in the Convention is not equivalent to an American sound recording ownership right; it is essentially a protection in the fixation of that *particular* performance that allows for control of reproduction, and is not even fully a "copyright," but rather a "neighboring right."[101]

As a result, there is no way to cleanly import the standard into American law, so it is no surprise that the United States is not a party to the Rome Convention. However, Congress could import a similar statutory categorization granting technicians a right in the sound recording specifically. Much like the compulsory cover license to exploit a musical composition under § 115, a compulsory license to exploit a sound recording with proceeds compensating technicians in forms other than a § 114 license is a possibility.[102]

Another possible solution is an amendment to § 101 that expressly disclaims or clarifies the intention requirement for joint authorship. As the law currently stands, the majority rule for joint authorship in copyright law requires that the so-called "dominant author" have intended from the beginning of creation to share ownership with the putative joint author.[103] The statute requires that the work be "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[104] Courts have determined that the intent inquiry not only requires intent that the contributions be combined, but intent that there is shared authorship.[105]

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98. *See supra*, Section II.C.

99. *See* Rome Convention, *supra* note 73.

100. *See* Newton v. Diamond, 388 F.3d 1189 (9th Cir. 2004) (discussing the scope of copyright protection and determining that a performer's advanced performance technique was not protectable within the composition).

101. Lance Clouse,, *Virtual Border Customs: Prevention of International Online Music Piracy within the Ever-Evolving Technological Landscape*, 38 VAL. U.L. REV. 109, 136 (2003).

102. *See* 17 U.S.C. § 115.

103. Thomson v. Larson, 147 F.3d 195, 202 (2d Cir. 1998) (quoting Childress, 945 F.2d at 504).

104. 17 U.S.C. § 101.

105. *See, e.g.*, Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1068–69 (7th Cir. 1994).

An amendment to the statute could clarify the exact scope of the intent inquiry such that courts are no longer relying on the *Childress* decision. This could help curb the increase in suits litigating joint authorship rights.[106] However, removal of the intent inquiry in its entirety could present challenges. Namely, it might open a proverbial Pandora's Box of potential authors each making their own creative contributions to a work. Some scholars, including Professor Melville Nimmer, suggest combating this by instituting the requirement that the contribution be more than *de minimis*.[107] This *de minimis* standard has not found wide favor with courts thus far, however, and is most often applied in circumstances where the completed integrated work is copyrightable, but no author's individual contribution was.[108] Perhaps statutorily enshrining this combination of standards within the definition of joint work could help create a slightly more bright-line rule for courts to apply rather than the situational inquiry currently performed.

Congressional action presents the most efficient option to solving this authorship issue. Specifically, an amendment to the definition of joint work puts to rest a debate that stretches outside the music context and helps to settle more problems than those presented in this discussion. Indeed, an amendment to § 101 would affect all of copyright law and create something closer to an administrable rule rather than the factor-based test that currently exists. While joint authorship will always be a fact-based inquiry, its current construction gives an outsized veto power to the supposed "mastermind" of the work.[109] This amendment would certainly help create a right for technicians, and it would also work to compensate authors across all mediums who make worthy creative contributions to integrated works given that § 101 serves as the definitional foundation for all of Title 17.

Further, congressional action is necessary to help level the playing field in negotiation. Although technicians have the freedom to negotiate whatever provisions they wish with record labels before signing a contract, the reality is that free negotiation might not lead to the most equitable outcome. While a technician might attempt to negotiate for a more expansive compensation or authorship right, not all negotiations are created equal. It is conceivable that a more established, powerful technician would have the necessary leverage to negotiate their contract as they see fit.[110] Less established technicians, on the other hand, are less likely able to effectively negotiate out of fear of replacement, much in the same way a fledgling artist might be forced to accept whatever terms

106. *See* George W. Hutchinson, *Can the Federal Courts Save Rock Music?: Why a Default Joint Authorship Rule Should Be Adopted to Protect Co-Authors Under United States Copyright Law*, 5 TUL. J. TECH. & INTELL. PROP. 77, 78 (2003).

107. *See* Nimmer, *supra* note 43.

108. Gabriel Jacob Fleet, Note, *What's in a Song? Copyright's Unfair Treatment of Record Producers and Side Musicians,* 61 VAND. L. REV. 1235, 1249 (2008).

109. *See* Daniel Gould, *Time's Up: Copyright Termination, Work-For-Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91, 136 (2007).

110. *See* Passman, *supra* note 79.

come their way in a record deal.[111] Thus, under a free-market system, compensation would likely not be based on the creativity or quality of the contribution to a work, but rather on the reputation of its author, whether deserved or not. Whether that is a desirable or even acceptable outcome is a value judgment beyond empirical answer. However, it certainly is not the goal of the copyright system. Copyright is designed to reward creativity unlike its cousin trademark, which is designed, in part, to protect reputation.[112]

Creative works should be rewarded for their creativity, and an expanded authorship standard accomplishes that. An expanded standard creates a regime in which technicians, who often make significant creative contributions to sound recordings, are rewarded for their work in a way that is more congruous with the purpose of the copyright system.

IV. DON'T LEAVE ME THIS WAY: PARTING THOUGHTS

Both producers and engineers play a critical role in the creation of sound recordings. Without their guidance and technical expertise, the music industry would look significantly different than it does today. However, these creators sometimes have their contributions overlooked. While United States copyright law explicitly rejects the "sweat of the brow" rationale for copyright protection,[113] there is an inherent equity to rewarding those who facilitated and contributed creatively in the formation of a work.

Technicians regularly make significant creative contributions to sound recordings. As discussed above, giving authorship to these individuals will increase their capacity for creative work, be it through facilitating access to new derivative works via sampling or through ensuring payment by dealing directly with the corporate machinery supporting the music industry. The Constitution sets out the foundation for the intellectual property system in order "to promote the progress of science and useful arts."[114] Altering the music copyright regime through a fairer compensation system, be it through statutory licensing or authorship, would help fundamentally advance creativity and secure a more equitable system for technicians.

111. *See id.* at 86–89.

112. *Compare Feist*, 499 U.S. at 364 (discussing copyright law's purpose to reward originality and creative choice) *with* Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003) (discussing the analytical differences between copyright and trademark law and noting that trademark law is primarily concerned with consumer protection through the protection of identifying marks indicative of producer reputation).

113. *See Feist*, 499 U.S. at 359–60.

114. U.S. CONST. art. I, § 8, cl. 8.