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## It Takes a Village to Make a Difference: Continuing the Spirit of Copyright

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**It Takes a Village to Make a Difference:  
Continuing the Spirit of Copyright**

*Stella Brown*



# It Takes a Village to Make a Difference: Continuing the Spirit of Copyright

By Stella Brown\*

*The year is 2003, and Betty Lu Brown, a now-famous blues singer and songwriter, sits in deep thought reminiscing about her successful and long-standing music career. She continues to hear her music played over the radio and through the car windows of her now-mature fans, even though she has not released an album for over a decade. Each time she hears her music playing, she cannot help but wonder how much money her publishers and record labels are making from her music, compared to her own earnings. She was very young when she signed her contract and transferred her copyright rights to the music entities. She had no idea her music would produce so many hits.*

*Betty is now debating whether she should take advantage of 17 U.S.C. § 203, a provision added to the Copyright Act of 1976 that would allow her to terminate the transfer of rights she gave away thirty-five years prior in 1978. According to the statute, 2003 is the first year she can provide the music entities with notice of termination. Because her first album came out in 1978, and she wrote and sang each song on the album, Betty's rights can revert back to her in the year 2013. That year will be the first time anyone can terminate a grant of transfer.*

*On the other hand, Betty recognizes that her record label and publisher make a lot of money from her songs and may not want to give back her music. She also understands that she might have to go to court, but is worried about the outcome. She wonders what arguments her publisher and record label will have, as well as how courts will handle this novel issue. Betty knows she has a lot to think about and only a short time to make a decision.*

*This Note will discuss the issue of copyright termination and the difficulties songwriters and music artists will experience when they attempt to terminate the grants in their music that they provided to publishers and recording labels beginning in 1978. The Note addresses this issue in two ways through the context of the *Scorpio Music S.A v. Willis* case. First, the Note provides the many arguments publishers and recording labels will argue in an attempt to keep rights in songwriters' and music artists' songs. Secondly, the Note provides the counterarguments from the songwriters and music artists that will likely outweigh the arguments of the music entities. The Note concludes that the songwriters' and artists' arguments will likely be most successful and that only time will tell which side the court system will seem to favor.*

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## INTRODUCTION

¶1

Beginning in 2013, every year will bring with it the opportunity for music artists and songwriters to reclaim rights they gave away thirty-five years prior. 17 U.S.C § 203, introduced by the Copyright Act of 1976 (“1976 Act”), allows them to do so.<sup>1</sup> The provision allows artists and songwriters who granted transfers of their copyrights in their works to publishing companies and recording labels in 1978 to be the first group to terminate those rights in 2013.<sup>2</sup> As artists and songwriters exercise their termination rights, publishing companies and recording labels will offer many arguments why they are entitled to hold on to the music. Given the forthcoming terminations and decrease in the industry’s revenue within the past few years, recording and publishing executives feel

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<sup>1</sup> Though 17 U.S.C. § 203 (2006) applies to all areas of copyright, this paper will focus on termination in the music context.

<sup>2</sup> 17 U.S.C. § 203 (2006).

especially pressured to produce revenue. They possibly need the royalties that extend from those musical works and sound recordings.<sup>3</sup> The upcoming years could bring with them an immense amount of litigation between creators and intermediaries (publishers and record labels).

This Note will discuss the effect of the termination provision, introduced in the 1976 Act, on the music industry through an examination of the decision of *Scorpio Music S.A. v. Willis*.<sup>4</sup> Part I will discuss the duration of copyright, the renewal right under the Copyright Act of 1909 (“1909 Act”), and its replacement by the termination right. Part II will give an in-depth discussion of the termination procedure and its relationship to the relevant exclusive rights under the current statute. Part II will also explore an argument in favor of a revised termination provision presented by a Congressman on the Committee on the Judiciary, a subcommittee that focuses on the area of intellectual property, competition, and the Internet.<sup>5</sup> Part III will discuss how exclusive rights are assigned between songwriters and publishers, as well as between music artists and record labels. Part IV will go on to discuss the case of *Scorpio Music S.A. v. Willis* and possible future arguments that will be raised by publishing companies and record labels during litigation. Part V will discuss the consequences of the *Scorpio* decision on the music industry, individual artists, and the public interest. Additionally, this part will address why courts should hesitate to side with the publishing companies and record labels when it comes to an artist or songwriter exercising her termination right. Part VI will conclude.

## I. THE EVOLUTION OF COPYRIGHT DURATION

To better understand termination rights, it is necessary to learn how the duration of copyright was structured under the 1909 Act and how it works today. Under the 1909 Act, published works displaying the proper copyright notice were granted a twenty-eight-year term of copyright protection.<sup>6</sup> The copyright owner was required to renew the copyright if she wanted an additional twenty-eight years of protection.<sup>7</sup> The 1909 Act required the application for renewal to be made “within the year prior to the expiration of the original term of copyright and [set] forth a schedule listing those to whom the right shall accrue.”<sup>8</sup> Additionally, if the copyright owner transferred the copyright during the first term, the copyright would revert back to the author once the second term began.<sup>9</sup> On the other hand, if the copyright owner failed to file the renewal, the copyright protection would expire at the end of the original twenty-eight-year term.<sup>10</sup>

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<sup>3</sup> See Laura McQuade, *Record Companies Prepare for Another Copyright Battle in 2013 Over Termination Rights*, in BLOOMBERG LAW REPORTS, 1, 1–2 (Oct. 27, 2011).

<sup>4</sup> No. 11cv1557 BTN (RBB), 2012 WL 1598043, at \*1 (S.D. Cal. May 7, 2012).

<sup>5</sup> See *About the Judiciary Committee*, U.S. H. REPRESENTATIVES COMM. ON THE JUDICIARY, <http://judiciary.house.gov/about/about.html> (last visited Oct. 18, 2013). The House Committee on the Judiciary has jurisdiction over other areas of interest in addition to intellectual property.

<sup>6</sup> Copyright Act of 1909, Pub. L. No. 60-349, § 23, 35 Stat. 1075 (1909) (repealed 1978).

<sup>7</sup> *Id.*

<sup>8</sup> Theodore R. Kupferman, Note, *Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 COLUM. L. REV. 712, 714 (1944).

<sup>9</sup> Copyright Act of 1909 § 23.

<sup>10</sup> *Id.*

¶4 Essentially, authors were given the opportunity to have a second bite at the apple through reversion. If they were unhappy with the contract under which they transferred their rights the first term, they could renew and grant the copyright to someone else or keep it for themselves the following term. For example, if a songwriter granted a publishing company his copyright in a prospective hit song during the first term, he could renegotiate his contract with the company at the time of renewal to receive a higher royalty percentage. Otherwise, he could take his song elsewhere during the following term.

¶5 The 1976 Act, carried over the renewal system for existing works and increased the length of the renewal term to forty-seven years.<sup>11</sup> In 1992, there were many concerns about the abrupt expiration of copyright protection for those who forgot to file a renewal notice.<sup>12</sup> And after famous movies, such as *It's a Wonderful Life* and *Pygmalion*, lost copyright protection, Congress eliminated the requirement of a renewal notice; this made all renewals automatic.<sup>13</sup>

## II. TERMINATION UNDER CURRENT LAW

¶6 Under current law, the copyright for post-1978 works by a single author lasts for the duration of the author's life plus an additional seventy years.<sup>14</sup> The copyright for a work created by joint authors, if not a work made for hire, lasts for the life of the last surviving author plus seventy years.<sup>15</sup> Not only has the copyright term been extended, but the 1976 Act added § 203, creating a right to terminate transfers.<sup>16</sup> The statute states, in part:

In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination . . . thirty-five years from the date of publication of the work under the grant . . . .<sup>17</sup>

¶7 When Congress expanded the protection given to copyright through the Act, it made sure artists and songwriters who transferred their copyright in songs to music entities had an opportunity to reevaluate those transfers. After reevaluating, artists and songwriters were to determine whether to continue the status quo, negotiate for more money, or look elsewhere. The renewal process was replaced by the termination right.

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<sup>11</sup> U.S. COPYRIGHT OFFICE, CIRCULAR NO. 15A, DURATION OF COPYRIGHT 1, 2 (2011), *available at* <http://www.copyright.gov/circs/circ15a.pdf>.

<sup>12</sup> JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 161 (3d ed. 2010).

<sup>13</sup> U.S. COPYRIGHT OFFICE, *supra* note 11; *see also* ROBERT SPOO, WITHOUT COPYRIGHTS: PIRACY, PUBLISHING, AND THE PUBLIC DOMAIN 78 (2013).

<sup>14</sup> 17 U.S.C. § 302(a) (2006).

<sup>15</sup> *Id.* § 302(b).

<sup>16</sup> *Id.* § 203(a).

<sup>17</sup> *Id.*

### A. *The Termination Provision*

¶8 The statute provides a stringent procedure for artists and songwriters who want to terminate a transfer of copyright. According to the statute, the artist or songwriter must serve a notice of termination on the music entity grantee

at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.<sup>18</sup>

The statute also requires the artist or songwriter to state the termination effective date in the notice and to serve the notice between two and ten years prior to the specified effective date.<sup>19</sup> On the specified effective date, all rights that were covered under the grant revert back to the artist or songwriter.<sup>20</sup>

### B. *Relationship between Termination and Exclusive Rights of Copyright*

¶9 In the music industry, because any of the five exclusive rights of a copyright may be transferred, the termination right affects and applies to all of those rights: reproduction, distribution, performance, adaptation (ability to create derivative works) and display.<sup>21</sup> Because exclusive rights are divisible and can therefore be transferred individually, they can also be terminated individually.<sup>22</sup> Songwriters and music artists usually transfer the first four exclusive rights to their respective music entities so that those entities can fully exploit their music. In essence, music publishers and labels acquire most of the exclusive rights. They obtain the rights needed to exploit the music commercially, such as selling copies of the music and licensing it to the radio. This process is unfair to the artists and songwriters because it is only after this exploitation and these transfers of copyright that they could learn their music is worth much more money than they are receiving. The termination statute is meant to remedy this issue by giving artists and songwriters “a second chance to obtain fair remuneration for [their] creative efforts.”<sup>23</sup>

¶10 Due to the collaboration of artists and songwriters with the labels that record their music and the publishers that promote their music, there is often ambiguity about copyright ownership.<sup>24</sup> Recently, individuals have argued that the termination provision is unclear and should be revised because of this ambiguity. In 2011, Congressman John Conyers Jr., the Ranking Member on the House Committee on the Judiciary and a supporter of artists’ rights, argued that Congress should revise the copyright law to remove the ambiguities surrounding exactly who can reclaim ownership of songs and

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<sup>18</sup> *Id.* § 203(a)(3).

<sup>19</sup> *Id.* § 203(a)(4).

<sup>20</sup> *Id.* § 203(b).

<sup>21</sup> *Cf. id.* §§ 106, 201(d)(2).

<sup>22</sup> *Cf. id.* § 101 (stating that copyright ownership can be transferred by any means of conveyance).

<sup>23</sup> *Stewart v. Abend*, 495 U.S. 207, 220 (1990).

<sup>24</sup> *See infra* Part V.

sound recordings.<sup>25</sup> The congressman also claimed that labels make an enormous amount of money from the work of music artists “without fairly distributing these profits to the artists.”<sup>26</sup>

¶11 Though the congressman’s first argument is a fair one, there are downsides to changing the statute. First, the legislature would have needed time to revise the law before 2013, when grants of copyright transfers could revert back to artists and songwriters who terminated their grants. The year is currently 2014, and the legislature has not yet passed a revision. As a result, litigation will likely be heavy between artists and songwriters and the music entities. Secondly, though Congress can overrule judicial precedent, litigation has already started, and Congress should wait to see if judicial resolution is sufficient before revising the statute. Lastly, the court in *Scorpio Music S.A. v. Willis* did not find the statute to be ambiguous; the court relied heavily on the literal meaning and legislative intent of the statute when reaching its decision.<sup>27</sup> As more courts rule on this statute, it will become more transparent to the music industry.

¶12 The Congressman’s second claim, however, is quite true. Artists usually are not paid enough for their music at the outset. As this paper will later discuss, artists are initially unaware of the value of their songs, but once the music labels and publishers exploit the music, a truer value is determined. The statute Congressman Conyers speaks of, 17 U.S.C § 203,<sup>28</sup> actually provides artists with a second chance to be paid in correlation with the value of their music.

### III. SONGWRITER-PUBLISHER AND ARTIST-RECORD LABEL RELATIONS

¶13 As previously stated, termination will affect both recording artists and songwriters; they both have an option to terminate transfers of copyright in their music. The next portion of this paper will explore the way songwriters and artists typically transfer their copyrights in music to their respective entities.

#### A. Songwriter-Publisher Agreement

¶14 A contract between a songwriter and a publisher contains a set of unique elements referred to as “deal points.”<sup>29</sup> These deal points include “the rights transferred between the parties, the length of the agreement, the number of recordings to be made, and the financial arrangement between the songwriter and the publisher.”<sup>30</sup> First, the songwriter’s transfer of copyright to the publisher is the most important part of the contract.<sup>31</sup> As stated earlier, this transfer allows the publisher to exploit the songwriter’s music and financially gain from that exploitation. Second, along with the transfer of rights in current songs, songwriters will often also agree to transfer rights in their future compositions.<sup>32</sup>

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<sup>25</sup> Larry Rohter, *Legislator Calls for Clarifying Copyright Law*, N.Y. TIMES, Aug. 28, 2011, at C1.

<sup>26</sup> *Id.*

<sup>27</sup> See *infra* Part IV.

<sup>28</sup> See *supra* Part IIA.

<sup>29</sup> Todd M. Murphy, Note, *Crossroads: Modern Contract Dissatisfaction as Applied to Songwriter and Recording Agreements*, 35 J. MARSHALL L. REV. 795, 800 (2002).

<sup>30</sup> *Id.*

<sup>31</sup> See *id.* at 801.

<sup>32</sup> See *id.* at 802.



This means that the songwriters agree that all compositions they make during the period of their contract with the publishers will solely be made for the exploitation of their music by the publishers.<sup>33</sup> This is also referred to as a term-songwriter agreement.<sup>34</sup>

¶15 Third, terms are usually tied to the delivery of a predetermined number of songs.<sup>35</sup> If individuals are hit-writing songwriters, they may be able to give an approximate number of songs they will deliver during each period of the term.<sup>36</sup> Additionally, if the individuals are songwriters with clout, they have a better chance of getting publishers to move the term forward, despite the songwriters' failure to deliver all the songs they promised.<sup>37</sup> Finally, though there are specific percentage arrangements with respect to sheet music, all income from a songwriter's compositions is traditionally split fifty-fifty between the songwriter and the publisher.<sup>38</sup> Performance monies are paid directly from performing rights societies<sup>39</sup> to the songwriters.<sup>40</sup>

¶16 Though songwriters must agree to a multitude of varying terms, the publishers have duties as well. Through contractual agreements, publishers assume the obligation to exploit the compositions using their administrative rights.<sup>41</sup> These administrative rights allow publishers to find people to use the songs,<sup>42</sup> grant those users licenses,<sup>43</sup> and ensure artists and songwriters receive payment.<sup>44</sup> Publishers indeed play an important role in the success of their songwriters.

### B. Music Artist—Recording Label Agreement

¶17 A contract between an artist and a recording label contains deal points differing from those present in a songwriter–publisher contract. The relevant points for this discussion are: how many (record commitment), how long (term), and delivery requirements (type). Some of these elements illustrate how record deals seem to be more favorable for the labels than the artists.

#### 1. How Many Tracks or Albums?

¶18 Most labels will commit to record a certain number of albums, usually one (referred to as “firm albums”), while maintaining the option to require an additional five to six albums, each one at the label's discretion (option albums).<sup>45</sup> Sometimes they may

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<sup>33</sup> *Id.*

<sup>34</sup> DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 281–82 (8th ed. 2012).

<sup>35</sup> *Id.* at 285.

<sup>36</sup> *Id.* at 285–86.

<sup>37</sup> *Id.* at 286.

<sup>38</sup> See *id.* at 220–21.

<sup>39</sup> Performing Rights Societies (PRSs) license performing rights to a publisher's entire catalog to places such as radio and television stations, concert halls, etc. The publisher receives a share of the fee charged for every license a PRS negotiates. See *id.* at 238–40; *infra* Part V.

<sup>40</sup> PASSMAN, *supra* note 34, at 277.

<sup>41</sup> *Id.* at 219–20.

<sup>42</sup> *Id.* One of the responsibilities of a publisher is to introduce the artist's music to film producers for soundtrack music; magazines for articles, cover shoots, etc.; and recording labels for purchase.

<sup>43</sup> See *infra* Part V.

<sup>44</sup> PASSMAN, *supra* note 34, at 219–20.

<sup>45</sup> *Id.* at 104.

commit to record only one or two masters.<sup>46</sup> This allows the label to see if an artist has potential, while giving the label the option to drop the artist if they are not worth the price.<sup>47</sup> For example, usually, if a label decides to commit to two albums and the first album is unsuccessful, the label has the right to opt out of recording the second album.<sup>48</sup> According to Passman, options are never good for artists.<sup>49</sup> He argues, “[i]f [the artist’s music is] a flop, [she’ll] never see the money; if [the artist’s music is] a success, it will probably be less than [the artist is] worth.”<sup>50</sup> Options are a way for record labels to get out of deals.<sup>51</sup>

## 2. How Long Will The Relationship Last?

¶19 After years of figuring out a way to best clarify a time period for an artist contract, labels have finally adopted a custom of using terms. Multiple provisions are included in contracts either to keep labels in check (based on prior litigation) or to make sure artists do not have more control than they should. The first provision states that “each period ends six to nine months after delivery of the last album required for that period, but it can be no less than a specified minimum (e.g., eighteen months).”<sup>52</sup> A period is a portion of a term, and a term is the amount of time a record label keeps an artist under an exclusive agreement.<sup>53</sup> Passman provides the following example of this type of provision: “if [an artist is] required to record two albums, the period might start upon the signing of [the artist’s] deal and end six months after delivery of the second album, but no sooner than eighteen months after signing.”<sup>54</sup> This provision plainly notifies an artist of the exact amount of time that constitutes a term.

¶20 A second provision notifies artists that labels can withdraw from a contract if albums are not delivered within a designated amount of time. The provision usually states that the label may pull out of the deal if the artist fails to deliver an album “within a certain period of time after delivery of the previous album (usually twelve to eighteen months . . .).”<sup>55</sup> The time-period is negotiable depending upon the artist’s bargaining power.<sup>56</sup>

¶21 The final provision protects record labels from having to accept more than one album at a time. This provision states that an artist cannot start recording a new album until she has delivered the prior album “and that the new album can’t be delivered sooner than six months after delivery of the prior album.”<sup>57</sup> This allows the publisher, along with

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<sup>46</sup> See *id.* A master is the original recording of a song made in the studio, and the recording from which all copies are made. *Id.* at 72.

<sup>47</sup> *Id.* at 104–07.

<sup>48</sup> *Id.* at 104.

<sup>49</sup> *Id.* at 105–07.

<sup>50</sup> *Id.* at 106.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 109.

<sup>53</sup> *Id.* at 107.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 109.

<sup>57</sup> *Id.*

the artist, to obtain the maximum financial benefit from each album.<sup>58</sup> During the periods of time specified in the provisions, the artist will make records exclusively for the label.<sup>59</sup>

### 3. Delivery Requirements

¶22 The delivery requirement relates to the types of music labels will accept. An artist's contract will state whether she is to deliver commercially satisfactory or technically satisfactory recordings. If the contract requires the work to be commercially satisfactory, the label is only required to take recordings if it believes they will sell.<sup>60</sup> In other words, if a label does not like the commercial prospects of the music, the artist must come up with something else. On the other hand, if the contract says technically satisfactory, as long as the recording is technically made well, the label must take it.<sup>61</sup> According to Passman, if an artist reaches superstar level, she will likely have a lower threshold to fulfill under the technically satisfactory requirement.<sup>62</sup> In this case, the label may not have to approve the recording but may "have language saying the recordings must be of a 'style' (and perhaps even a 'quality') similar to [the artist's] previous recordings."<sup>63</sup> As artists move up the ladder of success, they are given more control over the music their label releases.

#### C. Terminating a Contract as an Artist or Songwriter

¶23 While the above deal points seem to provide labels with a large amount of control and protection, there seems to be none of the same for artists. If a songwriter or artist becomes unhappy with her publishing or recording deal, terminating either will be very difficult. There are three ways for an artist or songwriter to terminate a contract with a music entity: "(1) a decision of the court; (2) a declaration of bankruptcy; or (3) a reversion of rights."<sup>64</sup>

¶24 The action used by a court to nullify the contract is known as rescission. A court makes a determination after examining the reasonableness and legitimacy of the artist's discontent.<sup>65</sup> Parties seeking to nullify the contract typically argue "unconscionability, undue influence, and unequal bargaining power."<sup>66</sup> If the court agrees with one of the arguments, the contract at issue is nullified and the aggrieved party can be entitled to damages.<sup>67</sup> The second method of termination involves the ability of a person in bankruptcy to reject undesirable contracts.<sup>68</sup> While filing bankruptcy is the most common tactic used by artists to terminate their recording contracts, songwriters also sometimes

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<sup>58</sup> *Id.* at 109–10.

<sup>59</sup> *Id.* at 171.

<sup>60</sup> *Id.* at 110.

<sup>61</sup> *Id.* at 111.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See Murphy, *supra* note 29, at 806.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See 11 U.S.C. § 365(a) (2006). A rejected contract in bankruptcy is treated as though the debtor had breached the contract immediately before filing their bankruptcy petition, which entitles the contractual counterparty to damages at the same priority as other unsecured creditors. *Id.* § 365(g).

use it as a financial tool to terminate an undesirable contract.<sup>69</sup> Though this method is not used as often as it was in the past,<sup>70</sup> it remains a tool to assist artists when convenient. The final method of termination, a reversion of rights, is available to songwriters and may occur if the publisher failed to adhere to the terms of the contract.<sup>71</sup> This method is also possible when an artist or songwriter terminates her grant under § 203.<sup>72</sup>

¶25 The first two above-referenced methods are cumbersome, time-consuming, can be difficult to obtain, and predominantly deal with terminating a contract. Therefore, the last method is most important because it provides artists with that second bite at the apple and is likely less burdensome for them.

#### IV. SCORPIO MUSIC S.A. V. VICTOR WILLIS

¶26 The Southern District of California is thus far the sole court that has decided a case under 17 U.S.C. § 203 in the music context.<sup>73</sup> In *Scorpio Music S.A. v. Willis*, Defendant Victor Willis, a songwriter and former lead singer of the group The Village People, served a notice of termination on the plaintiffs, music publishing companies Scorpio Music S.A. (“Scorpio”), Can’t Stop Productions, Inc. (“CSP”), and Can’t Stop Music.<sup>74</sup> The songwriter intended to terminate his musical works grant with respect to thirty-three compositions, including the hit song “Y.M.C.A.”<sup>75</sup> In return, Scorpio filed suit, and Willis filed a motion to dismiss.<sup>76</sup> The court was faced with the issue of whether a songwriter who composes a piece with other authors and transfers his respective copyright interest in the piece through a separate agreement can terminate his grant of copyright, or whether a notice from the majority of the authors is necessary for a valid termination.<sup>77</sup> Scorpio argued that Willis’s notice of termination was invalid under 17 U.S.C. § 203(a)(1).<sup>78</sup> In the case of joint authorship, a majority of the authors “who transferred their copyright interests in a joint work” must terminate in order for any of the authors to regain ownership rights in the compositions.<sup>79</sup>

¶27 Scorpio also sought declaration that if Willis was found to have a right to terminate his transfer, he be limited to the same “percentage ownership as he receive[d] as compensation relating to the Compositions and as set forth in the Agreements.”<sup>80</sup> For

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<sup>69</sup> See Murphy, *supra* note 29, at 807.

<sup>70</sup> Justin Pritchard, *Striking a Chord with Congress*, L.A. TIMES Aug. 19, 1998, available at, <http://articles.latimes.com/1998/aug/19/business/fi-14460>. During the mid-to-late 1990s, many famous music artists used bankruptcy as a way to terminate their contracts with music entities and in most circumstances to “land a more lucrative deal with another studio.” This became such a problem that the record industry asked Congress to pass legislation to make it harder for artists to use bankruptcy as a means of ending a contract. Though a bill was drafted, it was never passed by both houses. See *id.*

<sup>71</sup> Murphy, *supra* note 29, at 807.

<sup>72</sup> See *supra* Part II.

<sup>73</sup> Courts have applied the termination provision in other contexts such as superhero comic book characters. See, e.g., *Marvel Characters, Inc. v. Kirby*, No. 11-3333-cv, 2013 WL 4016875 (2d Cir. Aug. 8, 2013).

<sup>74</sup> *Scorpio Music S.A. v. Willis*, No. 11cv1557, 2012 WL 1598043, at \*1 (S.D. Cal. May 7, 2012).

<sup>75</sup> *Id.* at \*1.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at \*1–2.

<sup>78</sup> *Id.* at \*1.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at \*5.

example, under the Adaptation Agreement signed for “YMCA,” though the song was written by Willis and two others, Willis received only 20% royalties on the song.<sup>81</sup> Scorpio intended to keep Willis’s royalty percentage where it was.

¶28 The court ruled against Scorpio and granted Willis’s motion to dismiss.<sup>82</sup> The court held that: (1) a joint author who separately transfers his copyright interest may unilaterally terminate that grant, and (2) under 17 U.S.C. § 203(b), upon termination, the author is entitled to the percentage of copyright interests “he transferred—his undivided interest in the whole.”<sup>83</sup> In the case of Willis’s allotted percentage of royalties to “YMCA,” Willis had a one-third undivided copyright interest in the composition and was therefore entitled to such upon reversion.<sup>84</sup>

¶29 The court used two methods of statutory interpretation to reach its conclusion. First, it focused on the plain meaning of the statute. The court analyzed the differences between joint authors who grant their copyright interests as a unit and authors who individually grant copyright interests in their portion of the composition.<sup>85</sup> The court interpreted § 203(a)(1) as stating that when a grant is executed by one author, she alone can terminate the grant.<sup>86</sup> A majority of joint authors may terminate a grant if they together executed the grant.<sup>87</sup> The court determined that, because the provision refers to a “grant” in the singular when discussing joint execution, it is only in that context a majority is necessary.<sup>88</sup> The court further determined that “[i]f . . . a single joint author enters into a grant of his copyright interest, that author alone can terminate his grant.”<sup>89</sup>

¶30 Second, the court looked at the 1976 Act’s legislative history. To determine Willis’s ownership percentage, the court relied on the House Report that accompanied the 1976 Act during its passage.<sup>90</sup> The Report analogized § 203(a)(1) joint authorship interests to interests of tenants in common. The Report stated: “Under the bill, as under the present law, coowners of a copyright would be treated generally as tenants in common, with each coowner having an independent right to use or license the use of a work, subject to a duty of accounting to the other coowners for any profits.”<sup>91</sup> By analyzing the plain language of the statute and focusing on Congress’s intention, the court created the initial and only case law precedent on the issue of termination in the music context.

¶31 Though the court dismissed the case, it did grant leave for Scorpio to amend its complaint. The court allowed Scorpio to seek declaratory judgment regarding the dispute between the parties about the percentage of copyright interest Willis actually had in certain songs.<sup>92</sup> The court noted that knowledge of authorship was important because it

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at \*5, 7.

<sup>83</sup> *See id.*

<sup>84</sup> *See id.*

<sup>85</sup> *Id.* at \*2.

<sup>86</sup> *Id.* at \*3.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> H.R. Rep. No. 94-1476 at 121 (1976), *quoted in Scorpio Music* at \*3.

<sup>92</sup> *Scorpio Music* at \*6.

would determine how much Willis was entitled to receive relative to the other joint authors.<sup>93</sup>

¶32 The court's decision to allow Scorpio to seek declaratory judgment regarding Willis's percentage of interest led to another issue that courts will be forced to handle. One month following the court's decision, Scorpio filed an amended complaint seeking a "judicial determination of the respective shares of the authors of the Compositions."<sup>94</sup> Scorpio claimed Willis translated the song lyrics to the twenty-four songs in dispute and shares the copyright to the musical work portion of the songs with the original foreign composer.<sup>95</sup> Scorpio also contended that Willis's assertion that he shares the copyright with only one other person is barred by a statute of limitations as well as the equitable doctrine of laches.<sup>96</sup>

¶33 In contrast, Willis argued that none of the disputed songs were translated by him and were instead created as new and original works.<sup>97</sup> Willis filed a counterclaim for declaratory relief seeking 50% interest in the copyrights to each of the twenty-four songs in dispute.<sup>98</sup> He argued the foreign songwriter had no claim to half of his interest because Willis did not translate any of the twenty-four disputed songs to English based on foreign language lyrics.<sup>99</sup> Willis's counterclaim also added the foreign composer, Henri Belolo, as a defendant to the dispute.<sup>100</sup> Willis alleged Belolo used his power as the managing and sole director of CSP to negatively affect Willis.<sup>101</sup> Specifically, Willis alleged Belolo "has dominated, controlled, directed, caused, and guided the conduct of CSP complained of for his own personal gain, benefit, interest, and to the detriment of Willis."<sup>102</sup>

¶34 Scorpio responded to Willis's counterclaim three months later and sought to dismiss the counterclaim because it was barred by the statute of limitations under 17 U.S.C. § 507(b).<sup>103</sup> Under the statute, "[n]o civil action shall be maintained . . . unless it is commenced within three years after the claim accrued."<sup>104</sup> Scorpio argued Willis had known about his shared copyright status with Belolo for well over three years.<sup>105</sup> The court depended on the explanation provided by the *Zuill v. Shanahan*<sup>106</sup> court when making its decision. The *Zuill* court explained that "claims of co-ownership, as distinct from claims of infringement, accrue when plain and express repudiation of co-ownership is communicated to the claimant, and are barred three years from the time of repudiation."<sup>107</sup> From this explanation, the *Willis* court determined that "§ 507(b) operates

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<sup>93</sup> *Id.*

<sup>94</sup> First Amended Complaint for Declaratory Relief, *Scorpio Music v. Willis*, No. 11cv1557 (S.D. Cal. June 5, 2012).

<sup>95</sup> See *id.* at 4.

<sup>96</sup> *Id.* at 7–8.

<sup>97</sup> Defendant Victor Willis' Answer to Plaintiffs' First Amended Complaint for Declaratory Relief and Counterclaim at 11, *Scorpio Music v. Willis*, No. 11cv1557 (S.D. Cal. Aug. 1, 2012) at \*11.

<sup>98</sup> *Id.* at 20.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 5.

<sup>101</sup> *Id.* at 8.

<sup>102</sup> *Id.*

<sup>103</sup> *Scorpio Music S.A. v. Willis*, No. 11cv1557, 2013 WL 790940, at \*2 (S.D. Cal. Mar. 4, 2013).

<sup>104</sup> 17 U.S.C. § 507(b) (2006).

<sup>105</sup> See *Scorpio Music*, 2013 WL 790940, at \*5.

<sup>106</sup> 80 F.3d 1366 (9th Cir. 1996).

<sup>107</sup> *Scorpio Music*, 2013 WL 790940 at \*2 (emphasis omitted) (quoting *Zuill*, 80 F.3d 1366, 1369).

as it normally does,” even when there is an issue of co-authorship in the context of grant termination.<sup>108</sup> The court lastly denied Scorpio’s motion to dismiss and held that there was an issue of fact as to whether Willis knew he was considered to have co-authored the songs with Belolo and, consequently, whether his counterclaim was barred by the statute of limitations.<sup>109</sup>

¶35 The percentage-of-interest and co-ownership issues set out above are additional matters the courts will have to resolve in termination disputes. In the case of joint works, this leeway will provide publishers and record labels with another way to prolong the termination process. As the plaintiff in this case has shown, publishers and labels will want to keep any interests that may revert back to the artist at a minimum.

## V. THE EFFECTS OF THE SCORPIO DECISION

### A. *Future Record Label and Publisher Arguments*

¶36 Though *Scorpio Music v. Willis* has created precedent on this issue, there will be a plethora of litigation far beyond 2013. And although the district court’s decision is not binding on other federal courts in other jurisdictions, it will likely be persuasive to those courts. As more litigation arises, music publishers and record labels will have various arguments. While the music publishers will be concerned with the musical works portion of the music, the record labels will focus on the sound recording interests.

#### 1. Record Label Arguments

¶37 Record labels may argue that the recordings were a work made for hire. According to the relevant portion of 17 U.S.C. § 101, a work is a work made for hire if it was prepared “by an employee within the scope of his or her employment.”<sup>110</sup> A work is also considered a work made for hire if it is (1) “specially ordered or commissioned,” (2) falls within certain categories of work, and (3) the parties signed an agreement designating it to be a work made for hire.<sup>111</sup>

¶38 For example, in *Community for Creative Non-Violence v. Reid*, an organization that advocated for the right of the homeless in America retained an artist to “produce a sculpture that would depict the plight of the homeless and be displayed at the annual Christmastime Pageant of Peace in the District of Columbia.”<sup>112</sup> The organization paid \$15,000 for the production of the sculpture, but the sculptor did not charge for his actual services.<sup>113</sup> The sculptor accepted most of the organization’s suggestions and directions as to the sculpture’s configuration and appearance.<sup>114</sup> When the sculptor wanted to use the sculpture for a purpose not related to the organization, the organization claimed the

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<sup>108</sup> *Id.* at \*3.

<sup>109</sup> *See id.* at \*6.

<sup>110</sup> 17 U.S.C. § 101 (2006).

<sup>111</sup> *Id.*

<sup>112</sup> Daniel Porter, Note, *Then I Saw the Contract, Now I’m a Believer: Why “Concept Groups” Are “Works for Hire” and Cannot Invoke Statutory Termination Rights After 2013*, 32 N. ILL. U. L. REV. 507, 518 (2012) (citing *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989)).

<sup>113</sup> *Id.*

<sup>114</sup> *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 734 (1989).

sculpture was a work made for hire. The court held that because the sculptor worked in his own studio, purchased his own supplies, was not provided any type of employee benefits, and the contract between the parties did not designate the sculpture as a work made for hire, the sculptor was an independent contractor, and therefore at least jointly owned the copyright to the work.<sup>115</sup>

¶39 Though standard recording contracts state that anything the artist records is considered a work made for hire, labels will have to choose exactly which work made for hire category the work fits into.<sup>116</sup> The grant cannot be terminated if a label can show that the work was a work made for hire.<sup>117</sup> The labels' most convincing argument is that the work fits into the compilation category. To satisfy a work made for hire category, labels may argue that both masters<sup>118</sup> and albums are compilations under § 101.<sup>119</sup> Under § 101, a compilation is defined as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works."<sup>120</sup>

¶40 Recordings first involve placing music on masters. These recordings are multi-track, "meaning that each instrument and voice part is recorded on a separate track or channel: the drums on one track, guitar on another, voice on another, etc."<sup>121</sup> Once the recording is finished, the master is then edited, mixed, and equalized ("EQ'd").<sup>122</sup> This means the music is spliced, the volume levels for each type of track are adjusted, and the bass, midrange, and treble levels are balanced.<sup>123</sup> Labels will likely base their compilation argument on this process. Labels could contend that by combining, editing, and adjusting the levels of multiple tracks, after first recording the tracks individually, the labels in essence collect and assemble the pre-existing tracks and make them into a single song. The resulting work could then be considered an original work of authorship, because the separately recorded tracks are combined to create a single song.

¶41 In case labels lose the argument on masters, they could also argue that a complete album in itself is a work made for hire. They could argue that taking recordings and compiling them onto an album in a particular order is enough to fulfill the creativity requirement under a compilation.<sup>124</sup> In this scenario, though the labels would not own a copyright in each individual song, they would own a copyright to the album itself. To fulfill the entire requirement,<sup>125</sup> labels could also state that they contracted with the artist for her to provide the voice or instrumentals on the recordings, and that the artist signed a contract that stated the work was a work made for hire. If the labels are able to prove this

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<sup>115</sup> *Id.* at 752–53.

<sup>116</sup> See Randy S. Frisch & Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 COLUM. J.L. & ARTS 211, 217 (1993). 17 U.S.C. § 101 does not include recordings as a work made for hire category.

<sup>117</sup> 17 U.S.C. § 203(a) (2006).

<sup>118</sup> A master is a recording of a particular song. See PASSMAN, *supra* note 34, at 72.

<sup>119</sup> See Frisch & Fortnow, *supra* note 116, at 222.

<sup>120</sup> 17 U.S.C. § 101.

<sup>121</sup> PASSMAN, *supra* note 34, at 72.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> See Frisch & Fortnow, *supra* note 116, at 222.

<sup>125</sup> See 17 U.S.C. § 101 (outlining the statutory requirements).



argument, the album would be considered one made for hire. Though these are the most realistic arguments on which labels could win, courts have yet to decide whether these will be successful arguments.

¶42 On the contrary, courts may potentially consider artists to be independent contractors who own the copyright to the recordings. Courts are less likely to see artists as employees because labels do not offer benefits, artists are given discretion as to how long they take to learn and record a new song and make an album, and artists have a particular skill the labels needs: their voice, instrument playing, or both.<sup>126</sup>

¶43 In response to labels' arguments regarding the masters, artists could argue that, though the labels offered their facilities for the recordings to take place (and even this is rare),<sup>127</sup> they did not contribute enough to the work to obtain a copyright interest in the work. This argument will be especially beneficial for those artists who play an instrument, because they are providing both the voice and music; they could argue that the labels only provide a background for the artists. This argument is supported by the fact that, over time, artists have come to be the individuals who hire and pay royalties to the producer.<sup>128</sup> Similar to what the labels could claim is their function, a producer "is responsible for bringing the creative product into tangible form" as a recording by "finding and selecting songs, deciding on arrangements, [and] getting the right vocal sound."<sup>129</sup> The producer also has administrative duties such as booking studios and hiring musicians.<sup>130</sup> Though the duties above are satisfactory to establish the title of author to the producer, it is due to the producer's subordinate position that he or she is not the author. The producer is solely commissioned by the artist to enhance her music, and, thus, anything the producer creates is in essence a work made for hire for the artist.<sup>131</sup>

¶44 In response to the labels' argument regarding albums, artists could argue they own the songs on the albums. If artists are found to own the copyright to the individual songs, the record labels' album argument will become moot. For example, if a record label created an album by combining the songs of an artist already determined to have a copyright in those songs onto one album, the label would essentially be attempting to create a derivative work without the owner's permission.<sup>132</sup>

## 2. Publisher Arguments

¶45 Publishers could also argue they are entitled to retain the rights to music because of joint authorship. Unlike the joint authorship argument in *Scorpio*, some publishers may consider themselves to be one of the joint authors. Some "creative" publishers combine their own writers with other songwriters, "help them fine-tune their writing, match

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<sup>126</sup> See Frisch & Fortnow, *supra* note 116, at 219–20; *cf.* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–53. In *Community for Creative Non-Violence*, the court looked to the above-mentioned factors, among others, to establish whether an individual was an employee or independent contractor. See Porter, *supra* note 112, at 519–20.

<sup>127</sup> Frisch & Fortnow, *supra* note 116, at 220.

<sup>128</sup> PASSMAN, *supra* note 34, at 126–27.

<sup>129</sup> *Id.* at 120.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 126; Frisch & Fortnow, *supra* note 116, at 226–27.

<sup>132</sup> 17 U.S.C. § 103(a) (2006).

writers with artists, etc.”<sup>133</sup> By functioning in the described manner, these publishers could say they have contributed to the overall work. To succeed in that argument, the publishers will have to show that they significantly contributed something to the originality and creativity of the piece.<sup>134</sup> This argument will either succeed or fail depending upon whether another court interprets the statutory language concerning joint authorship termination in the same way the *Scorpio* court did. If other courts determine that a separate transfer of a songwriter’s partial ownership in a song will allow them to unilaterally terminate that transfer, a publisher’s partial ownership as a joint author of the song will not void the artist’s eligibility to terminate so long as the artist executed a separate transfer. Additionally, the success of the argument will depend on the specific facts of each particular case. If later courts follow suit with the *Scorpio* court on similar factual cases, the publishers will only be successful if they can prove the songwriter transferred her interest to the publisher as a joint work.

¶46 Secondly, publishers may attempt to argue that the work was a work made for hire. By bringing together different songwriters, as well as connecting music artists with songwriters, publishers could argue they brought together the individual parties for the purpose of creating specific musical works. Framed this way, the argument sounds as though the publishers commissioned a compilation; they brought together multiple individuals who would create new collective songs. This argument is unlikely to be convincing because songwriters are usually seen as joint authors when they create songs together.<sup>135</sup>

¶47 The reasoning under the second argument may work best under a collective works argument. According to 17 U.S.C. § 201(c), one person can have a copyright in an entire work, while contributors to that work maintain a copyright in each portion they contributed.<sup>136</sup> For example, a publisher could combine two different sections of a song that were written by two different songwriters. The songwriters would have copyrights in their individual portions, and the publisher would have a copyright in its compilation of those sections. Only time will tell if courts apply termination to works made for hire in the same manner the *Scorpio* court applied it to joint authorship.

## B. How the *Scorpio* Decision Affects the Music Industry

### 1. The Way Business is Currently Done

¶48 The termination of transfer provision and the decision rendered by the *Scorpio* court could have a major effect on the music industry. Publishers as well as record labels may experience a large decrease in royalties, while individual artists and songwriters may gain an immense amount of bargaining power that will likely lead to a higher royalty percentage. This section will explore how publishers and labels currently make a large portion of their money and how those portions will change or disappear.

¶49 Music publishers make a significant amount of their money by asserting their right to reproduce and distribute the musical compositions, or musical works, through the

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<sup>133</sup> PASSMAN, *supra* note 34, at 222.

<sup>134</sup> See 17 U.S.C. § 101 (2006) (definition of a joint work); see also, e.g., *Janky v. Lake County Convention & Visitors Bureau*, 576 F.3d 356 (7th Cir. 2009) (finding joint authorship in a song).

<sup>135</sup> See 17 U.S.C. § 101.

<sup>136</sup> *Id.* § 201(c).

granting of two types of licenses: mechanical and performance.<sup>137</sup> “Mechanical licenses are the most common tool used to account for a composition’s profits . . . [and] account for the profits generated by the physical copies of the composition.”<sup>138</sup> This type of license serves as the main royalty source for a publishing company, because record labels pay publishing companies for the right to use a song in records.<sup>139</sup> Though a publishing company could issue these licenses itself, most use the Harry Fox Agency to do so.<sup>140</sup>

¶50 Performance licenses make up most of the rest of the income that publishing companies receive on compositions.<sup>141</sup> “A performance is any means through which the public is exposed to the songwriter’s work.”<sup>142</sup> By using performance rights societies such as the American Society of Composers, Authors and Publishers (ASCAP), and Broadcast Music, Incorporated (BMI) to sell blanket licenses to radio and television stations, concert halls, etc., publishers receive a share of the monies collected.<sup>143</sup> The societies will usually split the income fifty-fifty between the songwriters and the publishers.<sup>144</sup> The more popular a song or artist, the more money record companies and venues that want to use and perform the music will be willing to pay.

## 2. Changes

¶51 Due to the interpretation of § 203 by the *Scorpio* court, publishers will no longer retain the distribution and reproduction right if the songwriter chooses not to negotiate. If the songwriter does choose to renegotiate, and her music has brought the publisher a large royalty income, the publisher will likely improve many deal points the songwriter requests (though the fifty-fifty royalty income will likely remain the same because it is standard). In either scenario, whether a songwriter chooses not to negotiate and take their music elsewhere or negotiate for a larger royalty percentage, the publishers will make less money than they do now. Record labels will be affected in the same way, with the exception that, because they deal with some exclusive rights publishers do not, they will no longer have the right to license the sound recordings for distribution, reproduction, or performance. Also, because the termination provision allows for the termination of both exclusive and non-exclusive grants of transfers or licenses of a copyright, both entities will be affected by the absence of the right to create derivative works.<sup>145</sup> However, they will be able to continue utilizing any derivative works that were prepared under the authority of the grant before its termination.<sup>146</sup> This limitation does not extend to the

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<sup>137</sup> See Murphy, *supra* note 29, at 804–05.

<sup>138</sup> *Id.* at 804.

<sup>139</sup> See PASSMAN, *supra* note 34 at 224–25.

<sup>140</sup> See *id.* at 225. The Harry Fox Agency is an organization that exists for the purpose of issuing mechanical licenses for publishing companies in exchange for a certain percentage of gross monies collected.

<sup>141</sup> Murphy, *supra* note 29, at 805.

<sup>142</sup> *Id.*

<sup>143</sup> PASSMAN, *supra* note 34, at 238–39. A blanket license gives each music user the right to perform all of the compositions controlled by every publisher that is affiliated with the Performance Rights Society. *Id.* at 239.

<sup>144</sup> See Bernard Korman & I. Fred Koenigsberg, Performing Rights in Music and Performing Rights Societies, 33 J. COPYRIGHT SOC'Y U.S.A. 332, 365 (1986).

<sup>145</sup> 17 U.S.C. § 203 (a) (2006).

<sup>146</sup> *Id.* § 203(b)(1).

preparation of other derivative works based upon the copyright work after the termination.<sup>147</sup>

¶52 As a result of the *Scorpio* decision, once songwriters recover their rights to distribute and reproduce their work, they will no longer have to go through the publishing company or the Harry Fox Agency. If an artist chooses not to bargain for a better deal but instead executes her reversion right in her copyright, record labels will have to receive a license directly from the artist, while venues would have to do the same for a performance license. On the other hand, record labels will be able to obtain a compulsory license on the songs as long as they pay the statutory rate.<sup>148</sup> As this relates to the *Scorpio* case, if Willis chooses not to negotiate and instead terminates his transfer of rights to the publisher, he will have his full ownership percentage of rights back in each composition and will therefore receive money that the publisher no longer will.<sup>149</sup> If Willis at any point decides to serve a notice of termination on the record label for his interest in the sound recording, he would also receive his portion of rights in the sound recording. In the end, when an artist who is a songwriter terminates her grant of copyright with both the publishing company and the record label, she would own the copyright interest in the entire song (assuming the song is not a joint work). This would make the artist or songwriter a one-stop shop for those in need of mechanical and performance licenses.

¶53 Those music artists who choose to renegotiate with their publishers and recording labels, and continue to make albums, may receive other benefits in addition to the bargaining power related to royalties they procured through the *Scorpio* decision. In essence, those artists obtain leverage and become similar to superstar artists—those who will not have to deal with options.<sup>150</sup> The artists will have the power to walk away following the completion of each album, instead of giving the record labels the option to commit to two albums while having the power to require an additional four or five at the label’s discretion.<sup>151</sup> If an option remains, superstars will likely be more successful negotiating increased royalties for the optional albums.<sup>152</sup>

¶54 For those artists or songwriters who choose to take their music to another publisher or record label, not only will they benefit from the higher royalty percentage they will receive, but they will bring in royalties for the new entity they have chosen to contract with. Those new entities will obtain the rights to license the music, and therefore, collect monies as the songwriters’ or artists’ music continues to be physically sold and digitally downloaded.

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<sup>147</sup> *Id.*

<sup>148</sup> 17 U.S.C. § 115 allows labels and other organizations to obtain compulsory licenses by stating, in part: “When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery.”

<sup>149</sup> See generally *Scorpio Music S.A. v. Willis*, No. 11cv1557, 2012 WL 1598043, at \*5 (S.D. Cal. May 7, 2012).

<sup>150</sup> Cf. Passman, *supra* note 34, at 105–06.

<sup>151</sup> *Id.* at 105.

<sup>152</sup> See *id.* at 105–06.

### 3. Public Policy

¶155 The *Scorpio* decision serves a powerful public policy interest as well. The interpretation of the statute by the court shows that copyright continues to protect the interest of the author of a work. The decision also serves the purpose of incentivizing others to continue to make music without fear of permanently losing their rights to the publishers and music companies that may take advantage of them in the beginning. Additionally, it can be argued that the decision puts individuals on notice regarding joint authorship; if one chooses to participate in a joint work, she should transfer her interest in the work through a separate agreement.<sup>153</sup>

¶156 The *Scorpio* decision could also have a negative effect on social policy. At the outset of a recording or publishing deal, labels and publishers are now aware that at least one court has interpreted § 203 to mean artists and songwriters can terminate transfers thirty-five years later in their own songs and songs they created jointly. As a result, there is a possibility artists will receive even worse deals. Publishers and labels, in attempts to get the most out of their investment, may negotiate even lower-paying royalties and less favorable deal points. Though this is a possibility, this negative effect does not exceed the benefits that come with the *Scorpio* decision. Although artists may receive worse deals, they will know that thirty-five years later they will have a chance to change them. All a good artist needs is for her music and talents to be exploited. After that, she not only understands the worth of her music, but music entities understand that the artist is aware of that worth as well.

#### C. Why Courts Should Hesitate to Side with Music Publishers and Record Labels

¶157 There are valid reasons why courts should be hesitant to side with publishing companies and record labels regarding termination. First, new artists and songwriters enter into contracts that are not legally sound and financially fair due to their ignorance of the business, along with other things.<sup>154</sup> By ruling in favor of the publishers and labels, it would be as though the court is encouraging the music entities to continue exploiting less sophisticated musicians. Second, as illustrated in earlier sections, it is quite difficult for an artist or publisher to get out of a contract, let alone to receive her copyright back in her works. Not giving artists and songwriters back their copyrights would equate to the court taking away that second bite at the apple that Congress intended: the chance for artists and songwriters to renegotiate their agreements. Lastly, if the courts side with publishers and labels, they run the risk of deterring individuals from entering the business solely based on fears of never being able to own their music again.

## VI. CONCLUSION

¶158 The year 2013 was an important year for many artists and publishers, and 2014 will likely continue to bring with it an abundance of litigation. Due to § 203, music publishers

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<sup>153</sup> Cf. *Scorpio Music* at \*5.

<sup>154</sup> See Murphy, *supra* note 29, at 808 (“An artist’s intense desire to obtain a recording contract at the beginning of his or her career often hampers the pursuit of a contract that is legally sound and financially fair.”).

and record labels may no longer be allowed to indefinitely receive large royalties for certain songs while their true authors receive very little. Though publishers and record labels will contest their requirement to relinquish ownership of the music under arguments related to works made for hire and joint authorship, courts will likely consider artists and songwriters to be independent contractors. Also, though litigation will be very costly for the music entities, it is fair to argue that the publishers and labels might lose much more money if they are unable to hold on to the rights of certain songs. Those songs that have made a lasting impression not only in the United States but across the world have brought publishers and labels financial security that they cannot afford to lose. Nonetheless, despite what the loss of copyright interests will do to the music business, the courts should be more concerned with continuing the true and overall purpose of copyright: to promote the progress of creativity by authors.<sup>155</sup>

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<sup>155</sup> The purpose of the Copyright Act is to “promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.” U.S. CONST. art. I, § 8, cl. 8.