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## YOU BELONG WITH ME: RECORDING ARTISTS' FIGHT FOR OWNERSHIP OF THEIR MASTERS

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## YOU BELONG WITH ME: RECORDING ARTISTS' FIGHT FOR OWNERSHIP OF THEIR MASTERS

### Cover Page Footnote

Ann Herman, J.D. candidate 2021. I would like to dedicate this Note to my grandfather and journalist, Martin "Gene" Herman, who always inspired and encouraged me to write. He was one of my earliest editors and supporters, and I would not be where I am today without him.

N O R T H W E S T E R N  
JOURNAL OF TECHNOLOGY  
AND  
INTELLECTUAL PROPERTY

**YOU BELONG WITH ME:  
RECORDING ARTISTS' FIGHT FOR  
OWNERSHIP OF THEIR MASTERS**

*Ann Herman*



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## YOU BELONG WITH ME: RECORDING ARTISTS' FIGHT FOR OWNERSHIP OF THEIR MASTERS

*Ann Herman\**

**ABSTRACT**—Copyright law, governed by the Copyright Act, is based on utilitarian theory, which balances artists' interests in ownership of their creations with the public's interest in accessing and enjoying such creations. Copyright law provides for rights for creators of sound recordings, which include master rights—the recording artist's copyright in the recording. Taylor Swift has brought the concept of master rights into the forefront of pop culture. In June 2019, Swift's masters—the original sound recordings of her songs—were sold, and she publicly aired her dissatisfaction with the sale, as well as with overall premise that artists do not have a complete right of ownership over their masters. In this Note, I analyze the rhetoric of Taylor Swift and other musicians and determine that many artists, based on their rhetoric in expressing their views of ownership rights under the current copyright regime, seem to favor a property rights model of copyright law, in which the creator of a work is entitled to ownership of it. Based on these observations, I suggest some solutions which propose changes to copyright law and state law, inspired by previous solutions posed by other scholars, that would place artists' rights to ownership and control of their work at the forefront of the laws' purpose. This, in turn, will spur creativity and create a copyright regime that is fairer to artists and listens to what they want.

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I. CALL IT WHAT YOU WANT:  
THEORIES OF INTELLECTUAL PROPERTY

The Constitution of the United States provides for the “promot[ion] [of] the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”<sup>1</sup> This constitutional grant provides the basis of U.S. copyright law. U.S. copyright law is governed by the federal government under the Copyright Act.<sup>2</sup> Copyright protection in the U.S. is largely premised on utilitarian theories of intellectual property, of which copyright law is a facet.<sup>3</sup> Utilitarian theories seek to balance the interests of authors, creators, and inventors with the interests of the public.<sup>4</sup> Utilitarian theory recognizes the importance of incentivizing creation while also making such creation available for the public’s use and benefit. U.S. copyright law seeks to reach such a balance.

Apart from the utilitarian theory, there are various other theories of intellectual property, such as property rights theory and personhood theory. Property rights theory is largely based upon the theories of John Locke.<sup>5</sup> Locke believed one should be able to ascertain ownership over the things she creates—the fruits of her labor. While this theory originally applied to physical property, it has been expanded to intellectual property. Thus, one who creates a work of art is entitled to the ownership of her creation, for it is her rightly owned property.

Personhood theory is largely based on the theories of Immanuel Kant and Georg Wilhelm Friedrich Hegel.<sup>6</sup> Personhood theory stresses the emotional and mental labor an artist or author puts into her work and the connection she has to the finished product.<sup>7</sup> Thus, because a creation is inextricably linked to the creator, the creator deserves to maintain control

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<sup>1</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>2</sup> 17 U.S.C. § 101 *et seq.*

<sup>3</sup> See Wendy J. Gordon, *Intellectual Property*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 623–24 (Peter Can & Mark Tushnet eds., 2003).

<sup>4</sup> See William W. Fisher, III, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 169 (Stephen R. Munzer ed., 2001).

<sup>5</sup> See *id.* at 170.

<sup>6</sup> See *id.* at 171.

<sup>7</sup> See *id.* at 171–72; Seana Valentine Shiffrin, *Intellectual Property*, in A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 660 (Robert Goodin et al. eds., 2007).

over it.<sup>8</sup> Personhood theory, like property rights theory, recognizes and emphasizes the creator’s personal relation to the work as a result of her labor and perceives the creator’s rights as more important than the public interest.

In this Note, I analyze the rhetoric of popular musicians, most notably Taylor Swift, regarding a musician’s right to own her master recordings. I then parse the rhetoric to ascertain what theories of intellectual property such rhetoric conjures and what rights such rhetoric implies to seek. I then suggest—inspired by a survey of proposals from legal scholars—how U.S. copyright law and state law can respond to these demands.

## II. THE STORY OF US: COPYRIGHT LAW AS RELATED TO MUSIC

Copyright rights in music are split between musical compositions and sound recordings.<sup>9</sup> A musical composition constitutes the written music and lyrics, or the “instructions” for playing the song.<sup>10</sup> A sound recording is a recording of a performance of the musical composition.<sup>11</sup> The songwriter or songwriters initially own the copyright in the composition.<sup>12</sup> The performer or performers of a sound recording initially own the copyright in the sound recording.<sup>13</sup> Often, owners of musical compositions contract with music publishing companies to license use of their music.<sup>14</sup> Under the Copyright Act, the owner of the copyright of a musical composition has the exclusive rights of distribution, reproduction, public performance, public display, and the right to create derivative works.<sup>15</sup> These exclusive rights are alienable, and any of them can be licensed to other parties.<sup>16</sup> Copyright owners of sound recordings enjoy fewer rights than do copyright owners of musical compositions.<sup>17</sup>

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<sup>8</sup> See Fisher, *supra* note 4, at 172; Shiffrin, *supra* note 7, at 660.

<sup>9</sup> JEANNE C. FROMER & CHRISTOPHER JON SPRIGMAN, *COPYRIGHT LAW: CASES AND MATERIALS* 378 (2019).

<sup>10</sup> *Id.* This does not mean that the music necessarily has to be written down. It is enough for an artist to record her song, and that would still constitute a composition.

<sup>11</sup> *Id.*; *Copyright Registration of Musical Compositions and Sound Recordings*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/register/pa-sr.html> [<https://perma.cc/K4FB-AY6L>].

<sup>12</sup> FROMER & SPRIGMAN, *supra* note 9, at 380.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*; 17 U.S.C. § 106.

<sup>16</sup> FROMER & SPRIGMAN, *supra* note 9, at 380.

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

The original sound recording is the master recording, and the copyright rights of the recording artist are the master rights, or the masters.<sup>18</sup> The master recording is the recording “from which all later copies are made.”<sup>19</sup> Ownership of the master rights provides for control over the use of the recording.<sup>20</sup> Often, in exchange for the financial backing of a record label, musicians will assign their master rights to the label.<sup>21</sup> The owner of the master rights has the ability to control the licensing of the recording down to who can use it, when one can use it, what purposes it can be used for, and the price of its use.<sup>22</sup> Thus, musicians who do not own their masters may not be able to control how their music is used in movies, commercials, and other types of media;<sup>23</sup> whether the music can be publicly performed; and how the music is released, such as through which services and platforms.<sup>24</sup>

### III. SPEAK NOW:

#### TAYLOR SWIFT AND MUSICIAN RHETORIC

In 2006, Taylor Swift signed her first major record deal with Big Machine Records.<sup>25</sup> Like many young artists, this was a dream come true, and signing away her master rights seemed like a reasonable price to pay for the chance to release her own album.<sup>26</sup> Now, fifteen years later, she has publicly aired her dismay over her inability to own her master recordings.<sup>27</sup>

Taylor Swift is arguably one of the most powerful celebrities in the music industry.<sup>28</sup> She is also publicly vocal about musicians’ rights

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<sup>18</sup> Amanda Prah, *Taylor Swift Is Still Fighting the Battle Over Her Masters, and Here’s Why It’s So Important*, POPSUGAR (Nov. 15, 2019), <https://www.popsugar.com/entertainment/What-Does-Mean-Own-Your-Masters-Music-46337890> [<https://perma.cc/2WV8-KXWU>].

<sup>19</sup> Elizabeth Vulaj, *Singing a Different Tune: Taylor Swift & Other Artists’ Fight for Music Ownership*, PRACTITIONER INSIGHTS COMMENTARIES, Aug. 28, 2020, 2020 PRINDBRF 0225.

<sup>20</sup> Prah, *supra* note 18.

<sup>21</sup> *Id.*

<sup>22</sup> Damon Brown, *Jay-Z Became Hip-Hop’s First Billionaire By Doing 1 Simple Thing Well*, INC. (June 4, 2019), <https://www.inc.com/damon-brown/jay-z-is-now-hip-hops-first-billionaire-by-doing-1-simple-thing-well.html> [<https://perma.cc/7J6H-8XFK>].

<sup>23</sup> *Id.*; Vulaj, *supra* note 19.

<sup>24</sup> Vulaj, *supra* note 19.

<sup>25</sup> Andrew Flanagan & Anastasia Tsioulcas, *Taylor Swift’s Former Label Big Machine is Sold, Rankling the Star*, NPR (July 1, 2019, 12:01 PM), <https://www.npr.org/2019/07/01/737613627/taylor-swifts-former-label-big-machine-is-sold-rankling-the-star> [<https://perma.cc/3B69-GQZ6>].

<sup>26</sup> *Why Owning Your Master Recordings Means Everything*, AWAL (Sept. 19, 2018), <https://www.awal.com/blog/maintaining-ownership-rights-as-an-artist> [<https://perma.cc/Z74Z-ARX6>]; Taylor Swift (taylorswift), TUMBLR (June 30, 2019), <https://taylorswift.tumblr.com/post/185958366550/for-years-i-asked-pleaded-for-a-chance-to-own-my> [<https://perma.cc/7XGN-EG67>].

<sup>27</sup> Swift, *supra* note 26.

<sup>28</sup> At the American Music Awards on November 24, 2019, Swift was named the “Artist of the Decade.” She has won twenty-nine American Music Awards, the most of any artist. *American Music Awards 2019: Taylor Swift Takes Artist of the Decade in Record-Breaking Haul*, THE GUARDIAN (Nov.

pertaining to compensation for and ownership of their music. In June 2019, Swift publicly expressed her dissatisfaction with the sale of her first six albums to Ithaca Holding Group.<sup>29</sup> Swift's underlying unhappiness with the sale was due to her desire to own her music and her failed effort at purchasing the master recordings of her first six albums.<sup>30</sup> In her statement, Swift laments her inability to purchase her masters. Although she has a new deal with another record label—a deal that allows her to retain her master rights—her statement alludes to feeling cheated by signing a contract at age fifteen that divested her of those rights.<sup>31</sup>

Swift is not the only major artist that has publicly expressed the importance of owning her master recordings and shed light on the music industry's de facto denial of such ownership rights. Prince publicly denounced his record label amidst issues regarding ownership of his masters in the early 1990s. Prince's early grievances began with his unhappiness with the restrictions his label placed on him.<sup>32</sup> Prince "wanted to put out an album whenever the urge struck him, and it could be a three-song album or a 70-song album."<sup>33</sup> Prince firmly believed artists deserved the right to control and own their works. In an interview with *Rolling Stone* in 1996, the singer warned "[i]f you don't own your masters, your masters own you."<sup>34</sup> As expressed by one of Prince's attorneys, "[Prince] drew attention to the issue of artists controlling their own destiny."<sup>35</sup>

Rapper Jay-Z also understood the importance of owning his masters, and in his negotiations with the record label Def Jam in 2004, Jay-Z assigned his master rights to Def Jam with the condition that they would revert back

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25, 2019), <https://www.theguardian.com/culture/2019/nov/25/taylor-swift-wins-2019-ama-artist-of-the-year> [<https://perma.cc/JJB6-NQVQ>]. Swift has won eleven Grammys and at the time was the youngest artist to win Album of the Year at the Grammys; she won the award when she was twenty years old. *Taylor Swift*, RECORDING ACADEMY, <https://www.grammy.com/grammys/artists/taylor-swift> [<https://perma.cc/BG7N-VAZD>].

<sup>29</sup> Anne Steele, *Scooter Braun Makes \$300 Million Deal for Big Machine Records*, WALL ST. J. (June 30, 2019), <https://www.wsj.com/articles/scooter-braun-makes-300-million-deal-for-big-machine-records-11561893008> [<https://perma.cc/6SX5-4DMQ>].

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

<sup>31</sup> See Swift, *supra* note 26.

<sup>32</sup> Melinda Newman, *Inside Prince's Career-Long Battle to Master His Artistic Destiny*, BILLBOARD (Apr. 28, 2016), <https://www.billboard.com/articles/news/cover-story/7348551/prince-battle-to-control-career-artist-rights> [<https://perma.cc/98MT-EM6U>].

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

<sup>34</sup> Rachel DeSantis, *From the Beatles to Taylor Swift: Why It's So Hard for Musicians to Own Their Music*, PEOPLE (July 1, 2019, 5:23 PM), <https://people.com/music/beatles-to-taylor-swift-why-its-hard-musicians-own-their-music/> [<https://perma.cc/5RTN-H5TK>].

<sup>35</sup> Newman, *supra* note 32.



to him in ten years.<sup>36</sup> Thus, while the ownership of one's masters has incredible economic incentives, ownership also has personal significance because of the control it provides the owner.

#### IV. HOAX: CURRYING THE WRONG INCENTIVES

U.S. copyright law claims to operate under an “incentives-for-artists rationale,”<sup>37</sup> under the premise that artists need incentives to create and that copyright law provides those incentives. However, this rationale does not align with the psychology of creativity nor does it reflect how copyright law actually operates.

Professor Julie Cohen posits that copyright law, as it currently operates, is not so much about incentivizing creativity, but rather is about providing the framework through which copyrighted work can be exploited.<sup>38</sup> For the law to actually incentivize creativity, it must focus on the artists and what drives them to create.

The psychology of creativity shows that intrinsic motivation is more powerful than extrinsic motivation in spurring creative activity.<sup>39</sup> Currently, copyright law primarily provides extrinsic motivation—economic incentives—for artists. However, artists create because “[t]ime spent and the burden of the everyday work [of creating] is a source of pride and worth, both as a matter of personal identity as well as professional merit.”<sup>40</sup> An artist's work is “intimately linked to their self-concept[.]”<sup>41</sup> and, as a result, many artists have possessory interests in their work. Thus, fair copyright laws that would incentivize artists to create would recognize artists' possessory interests and would allow them to retain as much control as possible over their work.

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<sup>36</sup> Zack O'Malley Greenburg, *Jay-Z's \$50 Million Music Box*, FORBES (Sept. 22, 2010, 6:18 PM), <https://www.forbes.com/sites/zackomalleygreenburg/2010/09/22/jay-zs-50-million-music-box/#19a14dc650de> [<https://perma.cc/QS8Z-UMN8>].

<sup>37</sup> Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 143.

<sup>38</sup> *Id.*

<sup>39</sup> Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999, 2007–08 (2011).

<sup>40</sup> Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and “Work-Makes-Work,” Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091, 2122 (2011).

<sup>41</sup> Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1766 (2012).

*A. Mine:  
The Importance of Control*

While economic rights are important, the ability to control one's work may be just as—if not more—important to some artists. Control can also act as an incentive to creation.<sup>42</sup> Ideally, artists want to control the use of their work by limiting who can use it, how others can use it, and when others can use it. On the other hand, artists may be interested in compensation for their work and will cede control in return for compensation. Scholarship suggests artists are more concerned with reputational harm, attribution, and misattribution than they are with economic rights.<sup>43</sup>

As expressed by musicians' rhetoric regarding ownership of masters, control may be more important or more desirable than compensation due to the personality and identity-representative aspects of their work. Further, some artists simply believe they should have control over their works “for having labored on them.”<sup>44</sup> However, economic incentives and control are not mutually exclusive. One aspect of control that is so important is that it would allow an artist to decide how she wants to exploit her work. She would have the power to have complete autonomy over her work, or she would have the power to surrender some control in return for compensation. Control is important because it provides an artist with the power of choice. Thus, copyright law should address the importance of control and should not focus solely on economic incentives.

*B. Peace:  
The Importance of Fairness*

Research has shown that perceived workplace fairness can “lead to enhanced creativity.”<sup>45</sup> Further, “[w]hen organization members perceive their environment to be fair, they voluntarily respond to higher levels of job demands by engaging more frequently in . . . creative behavior[.]”<sup>46</sup> Conversely, when working in environments that they perceive to be unfair, people are less likely to generate creative ideas and are likely to feel less motivated.<sup>47</sup> This research has been extrapolated to the context of expressive creators, such as recording musicians, and argues the same principles of

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<sup>42</sup> See Stephanie Plamondon Bair, *Rational Faith: The Utility of Fairness in Copyright*, 97 B.U. L. REV. 1487, 1488 (2017).

<sup>43</sup> Silbey, *supra* note 40, at 2120–21.

<sup>44</sup> Fromer, *supra* note 41, at 1770.

<sup>45</sup> Bair, *supra* note 42, at 1502.

<sup>46</sup> *Id.* at 1503.

<sup>47</sup> *Id.*

fairness and creative output apply.<sup>48</sup> Thus, in order to incentivize creation, artists must feel they are being compensated fairly and are being treated fairly regarding their ownership and control of their work.

In general, artists are likely to perceive a working environment or an agreement as fair if they feel that “their individual preferences, interests, and special needs are respected.”<sup>49</sup> Having a voice in the decisions regarding their work and being given proper credit for their work also increases perceptions of fairness.<sup>50</sup>

Providing artists with greater property rights, as well as moral rights, which will be discussed in Part VII of this Note, will likely cause artists to feel that they have greater control over their work and are being treated fairly. As a result, artists will be more likely to continue to create, and the utilitarian goals of U.S. copyright law will be furthered.

#### V. TOLERATE IT: WHY WE SHOULD CARE ABOUT WHAT ARTISTS WANT

Society, copyright intermediaries (such as record labels, music publishing companies, and streaming platforms), and lawmakers should care about what artists want. If the purpose of copyright law is to incentivize creation, then it matters what artists perceive as being fair. Having greater control over their works and being subject to laws that they deem as more fair will incentivize and spur artists to create. Artists are the backbone of the copyright regime. As there would be no need for copyright protection without artists, it only seems logical that such a regime should primarily recognize their rights. For it is “the producers and the writers and the artists [who] are the ones who are making music what it is[,]”<sup>51</sup> not the public or intermediaries. While copyright law is artist-centered on its face, in reality, it is not.<sup>52</sup> “Although the incentives-for-authors story [of copyright law] purports to celebrate authors, it has supported a system of property rights that

<sup>48</sup> *Id.* at 1504.

<sup>49</sup> *Id.* at 1511.

<sup>50</sup> *Id.* at 1511–12.

<sup>51</sup> Glenn Rowley, *Taylor Swift Talks Changing Music Industry, Taking Control*, BILLBOARD (Nov. 5, 2019), <https://www.billboard.com/articles/columns/pop/8542711/taylor-swift-talks-changing-music-industry-taking-control> [<https://perma.cc/9EVV-V45G>].

<sup>52</sup> See Cohen, *supra* note 37, at 144. Copyright law purports to incentivize creativity and create a system where an author is compensated for her work, so that she can devote the proper time and effort to it. Copyright law also focuses on protecting an artist’s work so that she is willing to disseminate her work to the public. Thus, on its face, the law seeks to protect artists. However, particularly in the music industry, music has become commercialized, and record labels and other music production companies have used the law to profit themselves. Often, due to access to more resources, these entities have greater bargaining power than the artist and can use the law to provide incentives to artists in a way that increases their own profits while taking rights away from the artist. *Id.* at 142–44.

as a practical matter relegates authors to the economic . . . margins of the intellectual property system.”<sup>53</sup> Society and intermediaries are the beneficiaries of creative output, and it follows that they should have the burden of adapting to laws favoring artists. For, as society and intermediaries have learned to adapt to the current copyright regime, they would be able to adapt to a new, more artist-friendly regime. To achieve optimal incentivization of creation, as copyright law purports to do, artists must come first.

#### VI. COME BACK . . . BE HERE: THE IMPLICATION OF PROPERTY RIGHTS

Much of musicians’ rhetoric regarding ownership of masters is reminiscent of property rights theory—that the creator has property rights in the fruits of her labor. Property rights theory is more artist-friendly than utilitarian theory because, at a base level, property rights theory provides for the creator’s exclusive property ownership of her creation. This theory has been interpreted as a “value-added” theory.<sup>54</sup> If the product of one’s labor provides value to society, then she deserves to be rewarded for her contribution.<sup>55</sup> A reward may come in the form of control or ownership of her contribution. As artistic works have long been considered valuable to society, artists should be rewarded for the value they add to it.<sup>56</sup>

Thus, if U.S. copyright law strictly adhered to property rights theory, musicians’ property rights would always be paramount to the public’s interest in access to musicians’ work because the musician deserves to have such rights due to her efforts or due to the positive public value of her creations.

In her post about the sale of her masters in 2019, Swift emphasized the importance of owning her work.<sup>57</sup> She stated “[y]ou deserve to own the art you make,”<sup>58</sup> suggesting the importance of property rights for an artist, in line with property rights theories. In her acceptance speech for Artist of the Decade at the American Music Awards in November 2019, Swift described

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<sup>53</sup> *Id.* at 144.

<sup>54</sup> Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 305 (1988).

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

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

<sup>57</sup> Swift, *supra* note 26.

<sup>58</sup> *Id.*

the award as celebrating “a decade of hard work and of art . . . ,”<sup>59</sup> once again alluding to property rights theories.

But why are these property rights so important? As explained in Part IV of this Note, a main reason is control. Ownership of one’s masters provides her with control over what others can do with her work. Many of the issues Prince had with his record label were about his lack of control. Because Prince had signed his master rights to his record label, he was unable to release music without the label’s approval.<sup>60</sup> Prince once likened the control his label had over him to slavery.<sup>61</sup> While this is an exaggeration, he clearly wanted to convey how confining and dehumanizing he felt his situation to be. In addition to requiring artists to assign their master rights to the record label, many recording contracts place creative restrictions on artists and lure them into long-term contracts that prevent them from making music. Typical recording contracts “require the exclusive personal services of the artist with respect to recording as a feature artist, for the duration of the contract” and are often “structured to require a minimal commitment on the part of the record label to actually record any albums, while reserving a considerable number of unilateral options to require additional albums.”<sup>62</sup> This enables record labels to “renew and extend the term of the recording contract on the same terms that applied at the beginning of the deal,”<sup>63</sup> which may be unfair and do not take into account an artist’s increasing popularity and bargaining power.

Depending on the artists’ popularity when entering into the contract, a recording contract may stipulate that the label will only release music that is “commercially satisfactory,” or music that it thinks will sell well.<sup>64</sup> Thus, the record label may have the ability to block artists’ music that it does not like. Further, many recording contracts’ durations are “stated in terms of delivery, instead of specific time periods.”<sup>65</sup> Thus, depending on how long it takes the artist to record the number of songs specified in the contract to the label’s liking, “a contract requiring delivery of five studio albums could easily span

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<sup>59</sup> Alyssa Bailey, *Taylor Swift’s AMAs Artist of the Decade Speech Was All Love, No Drama*, ELLE (Nov. 25, 2019), <https://www.elle.com/culture/celebrities/a29847923/taylor-swift-amas-artist-of-the-decade-speech-transcript/> [https://perma.cc/53T3-ZJKY].

<sup>60</sup> Newman, *supra* note 32.

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

<sup>62</sup> Tuneen E. Chisolm, *Whose Song Is That: Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act*, 19 YALE J.L. & TECH. 274, 308 (2017).

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

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* For example, a recording contract may include language stipulating that the initial contract period and each renewal period end “six to nine months after the delivery of the last album required for that period, but no less than a specified minimum time period[.]” *Id.* (internal brackets omitted).

a period of more than seven years.”<sup>66</sup> As a result, artists “could remain trapped in an unfavorable deal for years, despite success of early albums that would otherwise give the artist enough clout to negotiate a better deal.”<sup>67</sup>

Rapper Lupe Fiasco expressed similar rhetoric to Prince when he claimed he was “a hostage” to his label because if he did not give his label what it wanted, “at the end of the day the album wasn’t coming out.”<sup>68</sup> Singer Kelly Clarkson expressed dissatisfaction with her label because it pressured her to change her look and sound in ways she was unhappy with because it believed that would sell better.<sup>69</sup> Further, the label would not let her create the music that she wanted to create and controlled the genre and the specific songs that Clarkson could release.<sup>70</sup> Singer JoJo also had an issue with her label where it continuously delayed the release of her album. Because her contract stipulated that she could not record music outside of the recordings done with her label for the duration of the contract, she was unable to continue to create music simply because her label would not release the music she had created.<sup>71</sup> Similarly, it took years for singer Sky Ferreira to create an album that her label approved of, and the label continually delayed the album’s release.<sup>72</sup> Swift has also alluded to creative constraints while she was with her previous record label.<sup>73</sup>

Rapper Iggy Azalea, who recently entered into a deal with a label to create a new album in which she retains the master rights, has also expressed disillusionment with the music industry norms.<sup>74</sup> Azalea posted on Twitter in response to Swift’s statement regarding the sale of her masters. Azalea supported Swift’s call for musicians to be able to own their master rights. She alluded to her own issues with the industry and stated, “this is why I’m so happy to own my master [recordings] for this new album, they really do

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<sup>66</sup> *Id.* at 308–09.

<sup>67</sup> *Id.* at 309.

<sup>68</sup> Aylin Zafar, *What It’s Like When a Label Won’t Release Your Album*, BUZZFEED (May 12, 2013), <https://www.buzzfeed.com/azafar/what-happens-when-your-favorite-artist-is-legally-unable-to> [<https://perma.cc/B97E-88FT>].

<sup>69</sup> Brian Hiatt, *Kelly Clarkson on ‘The Voice,’ New Album, Her Dramatic Clashes with Old Label*, ROLLING STONE (Mar. 20, 2018, 12:50PM), <https://www.rollingstone.com/music/music-features/kelly-clarkson-on-the-voice-new-album-her-dramatic-clashes-with-old-label-203672/> [<https://perma.cc/U32R-DDUN>].

<sup>70</sup> *Id.*

<sup>71</sup> Zafar, *supra* note 68.

<sup>72</sup> *Id.*

<sup>73</sup> Rowley, *supra* note 51 (“In my previous situation, there were creative constraints, issues that we had over the years[.]”).

<sup>74</sup> Iggy Azalea (@IGGYAZALEA), TWITTER (June 30, 2019, 4:30 PM), <https://twitter.com/IGGYAZALEA/status/1145444575521181696>.

[people] crazy dirty on ownership of their intellectual property in the [business].”<sup>75</sup>

Singer Ciara also entered a deal with a new label in which she retains the master rights and has expressed that “[b]eing able to own [her] masters has been really cool. . . . To have that freedom and flexibility is amazing.”<sup>76</sup> Ciara’s statements again express the importance of control for artists and the constraints that lack of control places on them.

If copyright law adhered to a property rights model, artists would have greater control over their work and would not feel that their creative expression or freedom was stifled by the business strategies of record labels. As the law stands, the artists, who are encouraged and incentivized to create, are prevented from fully expressing themselves and creating due to the restrictions and demands of the labels that are meant to release the artists’ creations to the public. The current model neither incentivizes creation nor benefits the public interest if artists are unable to create what and as much as they want.

#### VII. I’M ONLY ME WHEN I’M WITH YOU: THE IMPLICATION OF MORAL RIGHTS

An artist’s ownership of her masters also reflects the personal ties she has to her work. Because art is expressive, many artists feel their work is more than just a completed piece, but that it is part of themselves and reflects who they are.<sup>77</sup> Because artists have such intense ties to their work, ownership of the work is about more than monetary gains. It is about artistic autonomy and owning a piece of themselves.<sup>78</sup>

Throughout her career, Swift has been open about the emotional connection she has to her work. In an op-ed she wrote for the *Wall Street Journal* in 2014, Swift alluded to the effort and emotional taxation of creating her music as an aspect of the music’s value.<sup>79</sup> She stressed that “[m]usic is art, and art is important and rare.”<sup>80</sup> In speaking about her desire to own her masters, Swift related the importance of ownership to her personal life and childhood dreams. When she realized she was unable to purchase her master recordings and that they would be sold, she “had to make

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<sup>75</sup> *Id.*

<sup>76</sup> Vulaj, *supra* note 19.

<sup>77</sup> *See generally* Fromer, *supra* note 41.

<sup>78</sup> *Id.*

<sup>79</sup> Taylor Swift, *For Taylor Swift, the Future of Music is a Love Story*, WALL ST. J. (July 7, 2014, 6:39 PM), <https://www.wsj.com/articles/for-taylor-swift-the-future-of-music-is-a-love-story-1404763219?ns=prod/accounts-wsj> [<https://perma.cc/XD5C-MLUD>] (“In my opinion, the value of an album is, and will continue to be, based on the amount of heart and soul an artist had bled into a body of work[.]”).

<sup>80</sup> *Id.*

the excruciating choice to leave behind [her] past.”<sup>81</sup> For Swift, her music is part of her, so giving up ownership felt like parting with a piece of herself.

Musicians and other celebrities have publicly supported Swift’s cries for ownership, and their rhetoric furthers the notion that both musicians and non-musicians recognize an emotional connection between a musician and her work.<sup>82</sup> In support of Swift’s plea for ownership, singer Halsey spoke of the emotional impact of Swift’s work and referred to Swift’s work as “the painstaking labor of [Swift’s] heart.”<sup>83</sup> Recording artists have an undeniable connection to their work that should be recognized when considering ownership rights of these works.

## VIII. BEGIN AGAIN: SOLUTIONS

Solutions that provide artists with greater control over their works can be accomplished by alterations to the Copyright Act and state laws that address both property rights and moral rights.

### A. *Our Song: Addressing Property Rights*

Section 203 of the Copyright Act provides an author the right to terminate a grant of her rights thirty-five years after the execution of the grant.<sup>84</sup> In order to exercise her termination rights, an author must provide advance notice to the current owner of the rights at least two years before the date on which she can begin to exercise her termination rights.<sup>85</sup> An author’s termination rights are inalienable but must be exercised within five years of

<sup>81</sup> Swift, *supra* note 26.

<sup>82</sup> See generally Kathryn Lindsay, *Everyone Who Is Wrapped up in the Taylor Swift-Scooter Braun Drama*, REFINERY29 (July 1, 2019, 10:25 AM), <https://www.refinery29.com/en-us/2019/07/236691/taylor-scooter-big-machine-artists-celebrities-reactions> [https://perma.cc/YFH3-HFXC]; Dan Clarendon, *Celebrities Stand with Taylor Swift Amid Scooter Braun and Scott Borchetta AMAs 2019 Drama*, US WKLY. (Nov. 22, 2019), <https://www.usmagazine.com/celebrity-news/pictures/celebrities-stand-with-taylor-swift-amid-amas-2019-drama-pics> [https://perma.cc/E7DE-3GU3]. Singer Selena Gomez’s mother, Mandy Teefey, referred to Swift’s music as Swift’s “blood, sweat and tears, especially as a young woman who shared growing up in front of the world[.]” Mandy Teefey (@mandyteefey), INSTAGRAM (June 30, 2019), <https://www.instagram.com/p/BzWVSIJhT7Y/>. Model Martha Hunt also referred to Swift’s music as her “blood, sweat, + tears.” Martha Hunt (@MarthHunt), TWITTER (June 30, 2019, 7:29 PM), <https://twitter.com/MarthHunt/status/1145489481652482048>.

<sup>83</sup> Halsey (@halsey), TWITTER (June 30, 2019, 3:53 PM), <https://twitter.com/halsey/status/1145435250295635968>. Singer Halsey expressed: “[Swift’s music] made my teeth ache like cold water and my heart swell and my eyes leak[.]” *Id.*; see also Lindsay, *supra* note 82.

<sup>84</sup> 17 U.S.C. § 203.

<sup>85</sup> *Id.* § 203(a)(4).



the end of the thirty-five-year period, or she loses her rights to terminate a grant of ownership.<sup>86</sup>

1. *It's Nice to Have a Friend:  
Inalienable Ownership Rights*

A change to U.S. copyright law that would favor artists' property rights would be to make copyright ownership rights inalienable. Under such a scheme, an author could license uses of her work; for example, she could license rights to a record label to produce and market her recordings, but she could not transfer her full ownership rights of those recordings. While this would be a radical departure from current practice in the music industry, the industry could adapt to such a change. Instead of it being customary for artists to transfer ownership rights to record labels, it would become customary for artists to retain the ownership rights and only license rights for particular uses, such as for production and marketing.

Further, labels would continue to be able to commercially exploit an artist's work even if she had an inalienable right of ownership. For, as reflected by some artists' ability to retain ownership rights while continuing to work with labels, labels still stand to profit from exploiting artists' works.<sup>87</sup> As in Taylor Swift's current situation, she likely would approve of inalienable ownership rights for artists, as expressed by her beliefs that artists "deserve to own the art [they] make."<sup>88</sup> However, amidst this belief, she has not ceased providing her music to the public or working with record labels. In November 2018, Universal Music Group announced its contract with Swift making it her "exclusive worldwide recorded music partner" and that the Universal Music Group-owned label, Republic Records, will serve as her record label.<sup>89</sup> The agreement allows Swift to retain ownership rights in her masters.<sup>90</sup> So, allowing artists to retain ownership rights can still be worthwhile for record labels.

2. *Long Live:  
Decreasing the Termination Period and Making it Perpetual*

According to the legislative history of the Copyright Act, Congress included a termination provision in recognition of the unequal bargaining

<sup>86</sup> *Id.* § 203(a)(3), (5).

<sup>87</sup> Taylor Swift, Jay-Z, Rhianna, Iggy Azalea, Frank Ocean, Ciara, and other artists have struck agreements with record labels to continue to work with them and share profits while still retaining their ownership rights. See Vulaj, *supra* note 19.

<sup>88</sup> Swift, *supra* note 26.

<sup>89</sup> Jem Aswad & Chris Willman, *Taylor Swift Signs Landmark New Deal with Universal Music Group*, VARIETY (Nov. 19, 2018, 7:06 AM), <https://variety.com/2018/music/news/taylor-swift-news-alert-1203032124/> [<https://perma.cc/AKB9-CSTC>].

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

power of new artists in contrast to the entities with which they contract.<sup>91</sup> While the addition of a termination provision is favorable to artists, the provision does not do enough to protect an artist's ownership rights and still pays too much heed to the interests of industry titans. In order to level the playing field, the termination period should be reduced, and the termination right should be perpetual.

The logic behind providing an extended period before which an artist may exercise her termination rights is to enable record labels and other distribution agencies a chance to regain the economic capital they invested in promoting an artist.<sup>92</sup> Because it is difficult to determine the success of an artist when a label signs them, the label takes a financial risk in doing so. Thus, if the artist becomes successful and a lucrative asset to the label, the thirty-five-year period from the grant of rights to when the artist can exercise her termination rights gives the record label plenty of time to profit or break even on its investment.

Thirty-five years is more than enough time for a record label to make back any losses from the investment and to realize profits on the risky investment that is signing an artist.<sup>93</sup> Providing record labels with thirty-five years to economically exploit the artist's work is a significant portion of the artist's copyright term.<sup>94</sup> Professor Jessica Litman has proposed decreasing the termination period from thirty-five years to fifteen years from the transfer of the original grant of ownership.<sup>95</sup> Fifteen years, while considerably less time than thirty-five years, is still a sufficient amount of time "to make investment in copyrighted works worthwhile."<sup>96</sup> Professor Litman's fifteen-year proposal is appropriate, but not with the five-year notice period. If the termination period is to be fifteen years, the notice period should be reduced or eliminated altogether, as explained in more detail in Section VIII(A)(3) of this Note. With the current notice provisions, artists should be able to

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<sup>91</sup> H.R. REP. NO. 94-1476, at 124 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5740 ("[Section 203] is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited. Section 203 reflects a practical compromise . . .").

<sup>92</sup> Amy Gilbert, Note, *The Time Has Come: A Proposed Revision to 17 U.S.C. § 203*, 66 CASE W. RES. L. REV. 807, 816–17 (2016).

<sup>93</sup> See generally Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 48 (2010).

<sup>94</sup> 17 U.S.C. §§ 302–03. A typical copyright term for an author, when the work is not a work made for hire, is the life of the author plus seventy years. The term is the same for joint works, but the measuring life is the life of the longest-living author.

<sup>95</sup> Litman, *supra* note 93, at 48. Professor Litman also proposes increasing the minimum amount of notice to five years in combination with the decreased termination period. *Id.*

<sup>96</sup> *Id.*

exercise their termination rights ten—to a maximum of fifteen—years from the original grant of ownership.

Record labels are sophisticated parties aware of the termination rights provided in the Copyright Act. Ten years provides labels plenty of time to determine the profitability of an artist and to make back money invested in them. Limiting the termination period provides artists with a greater sense of control over their work by providing them with the chance to reclaim their ownership rights in a foreseeable amount of time.

Additionally, the termination right should be perpetual. An artist should be able to determine when they want to exercise their termination rights, and if that is over forty years, that should be their prerogative. Doing away with the five-year limitation to exercise termination rights does nothing to harm a record label's planning for the termination and gives the artist the deserved autonomy over her ownership rights and actions.

### 3. *I Knew You Were Trouble:*

#### *Eliminating the Notice Provision of 17 U.S.C. § 203*

The notice provision is meant to provide the current holder of the to-be-terminated copyright rights time to plan for the loss of those rights when the author terminates them.<sup>97</sup> While it makes sense that the current holder should receive notice of termination, anyone involved in the music industry, particularly record labels, would be familiar with the termination right and would understand the possibility that an artist may seek to exercise that right thirty-five years from the grant. Such an extensive notice period actually gives the current holder time to devalue the copyright.<sup>98</sup> For example, prior to the termination date, as communicated in the notice, the current holder could make the copyrighted work widely available at reduced prices in the hopes of increasing demand for the work, so that once the rights revert to the original owner, the value of the copyrighted work is significantly diminished.<sup>99</sup> This way, the current rights holder can attempt to make as much money from the work as they can while they still own it, so that once the work reverts back to the original owner, there is not much value in it, and thus the current holder is not losing much in losing ownership. While there is no guarantee that a current holder would take such unscrupulous action, the risk to the original owner remains. Because the amount of notice required appears to be arbitrary, and current holders are likely aware of the

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<sup>97</sup> Gilbert, *supra* note 92, at 845–46. The legislative history fails to provide reasoning for the implementation of the notice provision. *Id.* (citing H.R. REP. NO. 94-1476, at 126).

<sup>98</sup> Gilbert, *supra* note 92, at 846.

<sup>99</sup> *Id.* at 837.

termination provision and had thirty-five years to plan for such termination, the amount of notice should be eliminated or at least drastically reduced.<sup>100</sup>

No notice is a plausible solution because of the current owner's knowledge of when an artist may exercise her termination rights. The current owner can take affirmative steps and discuss with the artist whether she plans to exercise her termination rights. Alternatively, a reduction in the notice period would still provide warning to the current owner—which is likely the reasoning behind the provision—and prompt them to plan for the ultimate termination. Additionally, a reduced or eliminated notice period would protect artists from unscrupulous actors by preventing them from having time to devalue the artist's work. Eliminating the notice period would also protect artists who may not have competent legal support who would inform them of the notice requirement or who are unaware of the intricacies of the Copyright Act. These artists would lose their ability to re-gain their ownership rights simply because they did not have the proper information.

#### 4. *I Forgot That You Existed:*

##### *The Role of State Law in Protecting Master Rights*

In addition to changes in the Copyright Act, artists' ownership of their master rights can be achieved through state law. Artists are often divested of their master rights through contracts with record labels. In addition to, or in lieu of, changing the Copyright Act, states can pass their own laws regarding what can and cannot be written into contracts and how recording artists are categorized with regards to works made for hire as applied to copyright ownership of master recordings.<sup>101</sup> However, without any changes to the Copyright Act, these laws cannot conflict with the Act because, as a federal law, it would preempt any conflicting state law.<sup>102</sup> Such laws should focus on artists' ownership rights and should strive to preserve artists' ownership over master recordings. Such laws should also seek fairness in recording contracts so that artists with little bargaining power are not induced to agree to unfair deals that hold them hostage to their label.

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<sup>100</sup> *Id.* at 845–46.

<sup>101</sup> States may impose statutory restrictions on contracts “so long as their laws do not run afoul of some specific federal constitutional prohibition.” David E. Bernstein, *Freedom of Contract* (GMU Law & Econ. Research Paper Series No. 08-51, 2008), [https://www.law.gmu.edu/assets/files/publications/working\\_papers/08-51%20Freedom%20of%20Contract.pdf](https://www.law.gmu.edu/assets/files/publications/working_papers/08-51%20Freedom%20of%20Contract.pdf) [https://perma.cc/UMB6-TRM7] (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 730–31 (1963)).

<sup>102</sup> *Preemption*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/preemption> [https://perma.cc/8S2J-KEQK].

a. *Epiphany:*

*Clarify When a Sound Recording is a Work Made for Hire*

One solution is tackling the work made for hire problem. Under the Copyright Act, a work can be categorized as a “work made for hire.”<sup>103</sup> This means that the author of the work created it in the course of her employment or was hired for the purpose of making the work and thus is not the legal “author” of the work—her employer is. The Act defines a work made for hire as “a work prepared by an employee within the scope of his or her employment; or a work specially ordered or commissioned . . .” for use in specific copyrightable works listed in the statute.<sup>104</sup> Currently, sound recordings are not listed as a type of work that may be “specially ordered or commissioned” as a work made for hire, and it is unclear whether or not they may be considered works made for hire.<sup>105</sup> If they may be, this would prevent the original copyright owner from exercising her § 203 termination rights, as those rights do not apply to works made for hire.<sup>106</sup> To address this problem, state law could prohibit record labels from declaring that master recordings are works made for hire when the recording artist is not an employee of the label. Alternatively, as done in California, state law could delineate specific factors that must be shown in order for a recording artist to qualify as an employee, so that it is clear-cut when a recording artist enters into an agreement whether they will be considered an employee or an independent contractor.

In 1999, Congress passed an amendment to the Copyright Act that included sound recordings in the list of works that could be specially ordered or commissioned as a work made for hire.<sup>107</sup> However, the amendment was vehemently opposed by recording artists who successfully lobbied Congress to repeal it; thus, sound recordings are not included in the types of works that may be specially ordered or commissioned as works made for hire.<sup>108</sup> If the amendment had remained in force, it would be significantly easier for sound recordings to be considered works made for hire, and thus it would be significantly easier for recording artists to lose their termination rights.

Even with sound recordings being excluded from potential specially ordered or commissioned works, the work made for hire provision still threatens to divest artists of their termination rights. Often, recording

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<sup>103</sup> 17 U.S.C. § 101.

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

<sup>105</sup> Abdullahi Abdullahi, Note, *Termination Rights in Music: A Practical Framework for Resolving Ownership Conflicts in Sound Recordings*, 2012 U. ILL. J. L. TECH. & POL’Y 457, 464–65 (2012).

<sup>106</sup> 17 U.S.C. § 203.

<sup>107</sup> Abdullahi, *supra* note 105, at 464–65.

<sup>108</sup> *Id.*

contracts state that while recording artists are not employees of the record label, their masters are works made for hire.<sup>109</sup> Further, contracts frequently state that in the event that the masters are determined not to be works made for hire, the artist assigns the masters to the record label and grants the label a power of attorney to transfer the master rights to the label in the event the artist refuses to sign the transfer.<sup>110</sup> Thus, even though a sound recording is not one of the enumerated works in the Copyright Act that can be specially ordered or commissioned as a work made for hire, record labels still attempt to contractually make sound recordings works made for hire in order to grant the label greater control over the work. While courts may deem such a contractual clause unenforceable, and while the few cases regarding termination rights have been resolved in favor of the artist,<sup>111</sup> this does nothing to prevent record labels from fighting an artist attempting to exercise her termination rights. And, as the more powerful party in many situations, the record label likely has greater resources to fight a lengthy suit and may willing to do so in order to prevent an artist from exercising her termination rights and losing its control over a lucrative asset—the artist’s works.

If sound recordings were deemed to be works made for hire, recording artists’ property rights in their work and the control they can exert over their work would be significantly limited. Particularly relating to recording artists who already do not possess control over their works in the form of ownership of the underlying musical composition, the inability to utilize the termination provision would provide them with almost no rights in their work, which is starkly against the creation incentives of utilitarian theory. To remedy this problem, state laws could prohibit record labels from stipulating in recording contracts that the recording artist is not an employee of the record label, but the works are works made for hire nonetheless. The law would require that either the artist must be considered an employee of the record label under the contract (and be paid a salary and benefits accordingly), and thus works would be deemed works made for hire; or the contract must provide that the artist is not an employee of the record label, and thus any master recording she makes would not be owned by the record label and would not be a work made for hire.

Alternatively, state law can strengthen protections for recording artists as independent contractors. California has recently addressed the work made

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<sup>109</sup> Elizabeth Henslee & William Henslee, *You Don’t Own Me: Why Work for Hire Should Not Be Applied to Sound Recordings*, 10 J. MARSHALL REV. INTELL. PROP. L. 695, 711 (2011).

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

<sup>111</sup> Abdullahi, *supra* note 105, at 476.

for hire problem in an amendment to its labor code.<sup>112</sup> Under the amendment, recording artists are subject to stricter standards when a court determines whether the artist is an employee or an independent contractor.<sup>113</sup> This classification has important implications for the artist's work. If the artist is determined an employee, the artist's work is a work made for hire and her ownership rights are divested. If the artist is an independent contractor, her work is her own creation and her ownership rights are preserved. This new law—subjecting recording artists to a stricter legal test—makes it more difficult to prove that a recording artist is an employee, as opposed to an independent contractor. Thus, it is less likely that a recording artist's work will be considered a work made for hire when that was not the intention of the parties. Therefore, state laws could also use this model of protecting recording artists from crooked works-made-for-hire claims by record labels.

Changes to state law would not dramatically alter the copyright landscape and are in line with European countries.<sup>114</sup> These changes would simply prevent record labels from claiming exclusive ownership of sound recording rights under a work-made-for-hire claim and would allow recording artists to retain their termination rights. However, such laws would still provide for works made for hire in appropriate situations. Additionally, these changes would decrease frivolous lawsuits by record labels attempting to deprive artists of their termination rights by claiming recordings as works made for hire or would make it much clearer when a recording artist's work is a work made for hire and when it is not. Further, state laws of this nature

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<sup>112</sup> Legis. Assemb. B. No. 2257 (Cal. 2020), [http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB2257](http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2257) [https://perma.cc/BUS8-WTYD]; CAL. LAB. CODE § 2780 (West 2020).

<sup>113</sup> *Id.* The Amendment provides for the use of the multi-factor *Borello* test in determining whether a recording artist is an employee or independent contractor, instead of the less-comprehensive ABC test. See Anthony J. Oncidi et al., *California Amends Independent Contractor Law (Again)—New Exemptions for Music Industry Workers, Freelance Writers and Photographers*, PROSKAUER (Sept. 9, 2020), <https://calemploymentlawupdate.proskauer.com/2020/09/california-amends-independent-contractor-law-again-new-exemptions-for-music-industry-workers-freelance-writers-and-photographers/> [https://perma.cc/5ARN-ES9K]. The *Borello* test “requires consideration of all potentially relevant facts—no single factor controls the determination.” *Independent Contractor Versus Employee*, STATE OF CAL. DEP'T OF INDUS. RELS., [https://www.dir.ca.gov/dlse/faq\\_independentcontractor.htm](https://www.dir.ca.gov/dlse/faq_independentcontractor.htm) [https://perma.cc/D3W3-56VN].

<sup>114</sup> See Fromer, *supra* note 41. Discussing French law, Fromer states

In fact, French copyright law . . . holds as “a dominant principle . . . that only a natural person may be an author.” Therefore, French law, albeit with some exceptions, “precludes the existence . . . of doctrines of works for hire that vest not only the initial ownership of copyright, but also the status of author, in the employer.”

*Id.* at 1796 (quote omissions in original); see also Paul E. Geller, *International Copyright: The Introduction*, 1 INT'L COPYRIGHT L. & PRAC. § 6[2][b][ii] (2018) (“German law vests all rights in a work made on the job in the flesh-and-blood author of the work, but allows an employer to use this work, effectively as a licensee, consistently with the underlying ‘service or employment relationship.’”).

would not be preempted by the Copyright Act, as sound recordings are not specifically listed as works that can be specially ordered or commissioned as works made for hire.

*b. We Are Never Ever Getting Back Together:  
Limiting the Duration of Recording Contracts*

Additionally, state laws should limit the duration of recording contracts. As explained previously, typical recording contracts are “stated in terms of delivery, instead of specific time periods.”<sup>115</sup> In order to prevent the situation in which an artist is stuck in a contract with a record label, state laws should limit how long recording contracts can last. This would provide the artist with an exit opportunity from an undesirable or limiting contract and enable her to seek to negotiate a new contract with the same or a different label.

Under California law, personal service contracts may not last for a duration of more than seven years.<sup>116</sup> However, the law provides an exception for contracts rendering “personal service in the production of phonorecords in which sounds are first fixed”<sup>117</sup>—or for contracts regarding master recordings. Thus, for recording contracts, in order to get out of a contract of a duration of more than seven years, the artist must give written notice to the record label “specifying that the [artist] from and after a future date certain specified in the notice will no longer render service under the contract.”<sup>118</sup> Further, the record label would then have the “right to recover damages for a breach of the contract during its term”<sup>119</sup> and “for each phonorecord as to which that party has failed to render service.”<sup>120</sup> Thus, California law does not easily allow a recording artist to get out of a recording contract in a time period less than seven years. California law should allow recording artists to have the rights of other personal service contractors without the limitations of a notice requirement. The law should also prevent a label from being able to sue the artist for damages as to every unproduced phonorecord, and other states should follow suit.

State law should place a time-limit—not based upon output—on recording contracts, after which the recording artist is free to get out of the contract. Recording contracts would then have to be tailored to end within that time limit and the artist must be able to end the contract after that limit without being sued for damages for breach of contract or for every

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<sup>115</sup> Chisolm, *supra* note 62, at 308.

<sup>116</sup> CAL. LAB. CODE § 2855 (West 2007).

<sup>117</sup> *Id.* § 2855(b).

<sup>118</sup> *Id.* § 2855(b)(1).

<sup>119</sup> *Id.* § 2855(b)(2).

<sup>120</sup> *Id.* § 2855(b)(3).



unproduced phonorecord. Such a law would prevent artists from being held in unfavorable contracts for an unknown and elongated duration. This would allow recording artists to seek labels that offer them better deals and would allow artists to leverage any increased bargaining power they may have amassed since initially signing a contract. Such a law would be fair to the artist and would spur creative activity by encouraging artists to seek agreements that allow them to create what they want and give them a sense of control over their creations.

*B. Wildest Dreams:  
Addressing Moral Rights*

Moral rights provide artists with noneconomic protection of their work.<sup>121</sup> Traditional moral rights include the rights of attribution and integrity.<sup>122</sup>

In 1990, Congress passed the Visual Artists Rights Act (VARA).<sup>123</sup> The Act provides for moral rights for artists of “work[s] of visual art.”<sup>124</sup> While moral rights are provided to artists in many European countries, they are generally not provided to artists in the U.S.<sup>125</sup> VARA adds a limited set of moral rights to U.S. copyright law by providing creators of works of visual art with the rights of attribution and integrity. Specifically, artists have the right: (1) “to prevent the use of his or her name as the author of any work of visual art which he or she did not create;” and (2) “to prevent the use of his or her name as the author of the work . . . in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation[.]”<sup>126</sup> VARA provides artists with control over certain uses of their work they find offensive or degrading to their reputation.

VARA’s legislative history reveals that it was passed to recognize and emphasize the importance of art and artists. The legislative history notes, “[t]he arts are an integral element of our civilization; the arts are fundamental to our national character and are among the greatest of our national treasures.”<sup>127</sup>

While VARA is an important step in incorporating moral rights into U.S. copyright law, VARA’s limited nature is firmly rooted in utilitarian

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<sup>121</sup> See Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 801–02 (2001).

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

<sup>123</sup> Visual Artists Rights Act of 1990, 17 U.S.C. § 106A.

<sup>124</sup> *Id.*

<sup>125</sup> ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY* 37 (2009).

<sup>126</sup> 17 U.S.C. § 106A(a).

<sup>127</sup> H.R. REP. NO. 101-514, at 7 (1990), as reprinted in 1990 U.S.C.C.A.N. 6915, 6917.

principles prevalent in the law. As expressed in the legislative history, “[b]ecause of its limited nature, [VARA] protects the legitimate interests of visual artists without inhibiting the rights of copyright owners and users, and without undue interference with the successful operation of the American copyright system.”<sup>128</sup> In order to avoid excessive expansion of moral rights, VARA only provides protection for works of visual art, which is a narrow definition that does not include sound recordings.<sup>129</sup> However, VARA should be expanded to specifically provide recording artists with moral rights related to their masters. The language in VARA’s legislative history acknowledges the importance of artists and the connection between an artist’s work and her reputation.<sup>130</sup> However, there is no reason that an artists’ connection with her art should not extend beyond visual artists.

The legislative history provides scraps of rationale for the exclusion of other types of artistic works, specifically audiovisual works. The legislative history harps on the differences between visual works and audiovisual works. Audiovisual works—unlike visual works—are usually works made for hire, and the creator of the work does not typically have economic rights in it.<sup>131</sup> Further, normally many copies of audiovisual works are produced and distributed for commercial purposes.<sup>132</sup> Because there are many copies of a single audiovisual work available, the destruction of one copy is not detrimental to the creator because the copy is replaceable.<sup>133</sup> However, this logic focuses solely on the physical destruction of a work of art as opposed to the reputational alteration or mutilation of a work in the form of a derivative work or other undesirable uses.

While a sound recording can be copied and distributed widely for commercial gain like an audiovisual work, sound recordings are often not considered works made for hire, and the creator retains economic rights in the recording, unless they assign them. The artist does not necessarily create the work with the knowledge that she will never own it.

Additionally, recording artists, like visual artists, are inextricably linked to their work to the extent that “[a]ny distortion of such works is automatically a distortion of the artists’ reputation. . . .”<sup>134</sup> Some scholars argue that recording artists are more connected to their work than are visual

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<sup>128</sup> *Id.* at 10.

<sup>129</sup> 17 U.S.C. § 106A.

<sup>130</sup> See H.R. REP. NO. 101-514, at 6.

<sup>131</sup> *Id.* at 9.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 6.

artists because “a voice is as distinctive and personal as a face. The human voice is one of the most palpable ways identity is manifested” and “the singer manifests herself in the song.”<sup>135</sup> From the perspective that VARA is meant to recognize the importance of art to an artists’ reputation, sound recordings are akin to works of visual art.

Because works of visual art are different from sound recordings, the rights of VARA do not have to be expanded to sound recordings in a parallel fashion. VARA, as related to sound recordings, should provide the original recording artist the right to prevent the use of her recording for purposes she deems to be “prejudicial to his or her honor or reputation.”<sup>136</sup> Like typical VARA rights, this right shall not be transferrable and shall last for the author’s lifetime,<sup>137</sup> but the right should not be waivable. Thus, even if the original copyright owner in a sound recording no longer owns the copyright in her work, she still retains control over her work in that she can object to uses of her work she finds harmful or offensive to her reputation, such as use of her song in an ad supporting the National Rifle Association when she is an anti-gun advocate. Also, a record label or other entity should not be able to attempt to take VARA rights away by providing waiver of such rights as a contractual provision. Such a simple expansion of VARA would provide recording artists with the important right of integrity. This would protect an artist’s reputation with regard to her works and would provide her with an important sense of control of property she deems as indistinguishable from her person and reputation.

The right of integrity is provided for recording artists in the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty (WPPT). The U.S. is a signatory to the WPPT, but “[d]espite the commitments the United States made in joining WPPT, the treaty has had no effect on performers’ [(including recording artists’)] rights under domestic law.”<sup>138</sup> Under U.S. law, such moral rights must be specifically contracted for in order for an artist to exercise them.<sup>139</sup> Providing recording artists with such moral rights would simply bring the U.S. into compliance with its obligations under the WPPT. Further, some European countries, such as France and Germany, provide performers with moral rights.<sup>140</sup> Thus,

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<sup>135</sup> Tureen E. Chisolm, *In Lieu of Moral Rights for IP-Wronged Music Vocalists: Personhood Theory, Moral Rights, and the WPPT Revisited*, 92 ST. JOHN’S L. REV. 453, 453–54 (2018) (internal quotations omitted) (quoting *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988)).

<sup>136</sup> 17 U.S.C. § 106A(a)(3)(A).

<sup>137</sup> *Id.* § 106A(d)(3), (e)(1).

<sup>138</sup> Mary LaFrance, *Are We Serious About Performers’ Rights?*, 5 IP THEORY 81, 89 (2015).

<sup>139</sup> *Id.*

<sup>140</sup> See CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] art. L212-2 (Fr.); URHEBERRECHTSGESETZ [URHG] [ACT ON COPYRIGHT AND RELATED RIGHTS] § 75, Sept. 9, 1965,

providing these rights would also bring the U.S. into harmony with other countries.

#### IX. LONG STORY SHORT: CONCLUSION

Taylor Swift's public desire to own her masters is both reasonable and understandable. She and all artists work hard to create their work and deserve to have ultimate control over it. Thus, increasing both property rights and moral rights for artists under U.S. copyright law and implementing state laws that protect artists' property rights will reward the very people who create the valuable capital copyright law painstakingly attempts to protect and will incentivize them to create. Implementing changes to U.S. copyright law and state laws that provide greater control and are fairer to artists further the goals of copyright law.

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