UNITED STATES COPYRIGHT OFFICE AND SOUND RECORDINGS AS WORK MADE FOR HIRE

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

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THURSDAY, MAY 25, 2000

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 10:03 a.m. in room 2141, Rayburn House Office Building, Hon. Howard Coble [chairman of the subcommittee] presiding.

Present: Representatives Howard Coble, F. James Sensenbrenner, Jr., Elton Gallegly, Bob Goodlatte, William L. Jenkins, James E. Rogan, Mary Bono, John Conyers, Jr., Howard L. Berman, Rick Boucher, Zoe Lofgren, William D. Delahunt, and Robert Wexler.

Staff present: Blaine Merritt, chief counsel; Debbie Laman, counsel; Vince Garlock, counsel; Chris Katopis, counsel; Eunice Goldring, staff assistant; Alec French, minority counsel; and Sam Garg, minority counsel.

OPENING STATEMENT OF CHAIRMAN COBLE

Mr. COBLE. Good morning, ladies and gentlemen. The subcommittee will come to order.

Today we will tackle two very important issues. First, we are conducting an oversight hearing on the administration of the Copyright Office of the United States. The House Judiciary Committee is charged with the responsibility of overseeing the administration and operation of the Copyright Office of the United States. To that end, we will be reviewing the administrative activities and the funding and expenditures of the Copyright Office to ensure that it is utilizing its resources effectively.

The Copyright Office is a division of the Library of Congress. It performs several functions aside from its primary responsibility to examine and register copyright claims. These other functions include maintaining records regarding transfers and terminations of copyright, administering the Copyright Arbitration Royalty Panels, providing information to the public about copyright law and registration procedures, providing technical assistance to the Congress, assisting the domestic and international copyright community in copyright protection, and collecting works to be deposited in the Library of Congress. All members of the subcommittee are wel-

come to address any issues related to the administration of the Copyright Office of the United States.

Secondly, we will discuss the issue of the recent amendment to the Copyright Act that added sound recordings to the list of works which are works made for hire. As many of you know, this amendment has caused some to criticize my colleagues, my staff, and me as having indulged in unfair, deceptive, and sneaky behavior. Unfortunately, the story circulating about the legislative history of the amendment is generously lace with deception. Hopefully, today we will reveal the truth.

Now let me say this to you, folks. We are going to be on a short leash today. I don't think the voting pattern from the Floor is going to be too disruptive, but we must be out of this room by 1:30. The Crime Subcommittee has a 2 p.m. hearing and the room must be assembled.

Having said that, the Chair will entertain opening statements from the Chair, the ranking member, the gentleman from California, and Mr. Conyers, the ranking member of the full committee. I invite other members to submit their statements in writing and they will be made part of the record.

Now let me visit with you a few minutes, folks, before I recognize Mr. Berman.

This issue is emotionally charged. And not unlike many emotionally charged issues, the truth has been bantered about recklessly. When asked to respond to the works for hire language last winter, I initially said it was my belief that the opponents of this language were overreacting. And my reasoning for having made that statement is that the Copyright Office has for years customarily registered sound recordings as works for hire. So my interpretation was that it was merely codifying existing practice. I saw no dramatic departure from the norm.

Artists and spokesmen for artists, however, continued to express anxiety over the issue and I concluded that my calm interpretation did not assuage their comfort, nor did it resolve their problem. So I then decided to grant their request for this hearing.

I discussed that decision with Mr. Berman and with Chairman Hyde and they agreed with me that a hearing should be conducted, so here we are today.

Preparing the witness list was not unlike a disorganized fire drill. Just about every day we would remove this witness and insert this name in lieu thereof. I think we did a good job of accommodating requests to testify.

I am obliged to address the famous name provision of the Anti-Cybersquatting Consumer Protection Act. I read in one of the many articles that has been published featuring this issue that an artist or artist's spokesman indicated that this language really was not necessary for artists.

Folks, why then was my door knocked upon consistently—and I am sure Howard's door and our staffs door last fall—by lobbyists urging us to be sure to incorporate this language, claiming it is critical and is absolutely necessary for the well-being of the artists? Now that it has been incorporated, I am told that we didn't need it after all.

Me thinks they protest too much, but that will be for another time.

I believe some background about sound recordings as works made for hire is necessary to evaluate the new law.

A work made for hire is a work prepared by an employee within the scope of his or her employment or a work specially ordered or commissioned for use as a contribution to a collective work or compilation if the parties expressly agree in a written instrument, signed by them, that the work shall be considered a work made for hire. The Copyright Act provides authors a right to terminate a grant of rights 35 years after the grant. The termination right, however, does not apply to works made for hire.

Since 1972, sound recordings have been registered by the Copyright Office, as I have mentioned earlier, as works made for hire even though they were not statutorily recognized as such prior to the enactment of the Intellectual Property and Communications Omnibus Reform Act of 1999. This statute included a provision that added sound recordings to the list of works eligible for work made for hire status.

Following the adoption of the provision last year, some artists have complained that the change is not a clarification of the law but has substantively affected their termination rights. And that is the purpose of the hearing today. We intend to explore this more fully.

Now, if you will, let me turn to the process by which this amendment became law.

To begin with, this amendment was not inserted on the last night of the satellite bill conference under the cloak of darkness. The truth is that the issue was raised a few days before the conference concluded—Thursday, I think—and then the conference concluded about the middle of the following week. So you are not talking about a 24-hour midnight visit on this.

In addition, no one staffer inserted the amendment in the absence of review by other staffers and conferees. The truth of the matter is that two staffers broached the topic and it was openly discussed before the entire conference staff a few days before the conference concluded. As I said, I think that was the middle of the following week.

Each conference staffer had the opportunity to review the provision and to bring it to the attention of his or her member. Over the course of the next few days, no objections were raised by the members or the staff to the amendment. The Register of Copyrights was also consulted during this period.

Certainly, I am repeating myself a little bit, and pardon me for that but I need to do this for emphasis.

Certain news articles critical of the process were published following the enactment of the statute. Based on what I believe are ill-informed insights, some of these articles essentially questioned the integrity of the primary conference participants. I have little regard for those who personalized the differences in legislative debates. I can only hope the truth we seek today will offer some consolation to the individuals whose reputations, in my opinion, have been tarnished in the most mean-spirited of ways.

Another comment about process is in order. This leads me to believe, folks, that some here believe it is acceptable to question the integrity and credibility of Members of Congress and their staffs when they don't attain 100 percent of their legislative goals. This is an unacceptable way of doing business, especially when we have worked so well together in the past to achieve great accomplishments at the behest of artists, including the enactment of the Digital Millennium Copyright Act, the Sonny Bono Copyright Term Extension Act, the Copyright Damages Improvement Act, the No-Electronic Theft Act, and the Anti-Cybersquatting Consumer Protection Act.

Let me say a word about the organizational events leading up to the hearing. During my tenure as chairman of this subcommittee, I have tried to remain diligently fair and balanced in my treatment of issues and interested parties, and I can say the same for my good friend who sits to my left, the gentleman from California. This hearing is no exception. Given the extensive criticism generated in the wake of the work for hire issue, I think we have bent over backwards to accommodate artists groups who expressed a desire to participate.

I confess, however, that I nearly reached my wit's end when one group intimated that it would produce more negative press if denied a seat at the witness table. Folks, I don't usually cotton to threats, but I have nonetheless today decided to err on the side of complete accommodation. As a result, we will have a hearing today where a witness panel is really unfairly skewed toward one perspective. To those of a different copyright persuasion, I apologize to you for that.

Now that I have addressed all the criticism of the past few months, let us focus on the policy implications of today's topic. I am confident that our hearing will allow for a full and complete airing of the views of both the recording companies and the artist groups. I look forward to the testimony of both sides. I must emphasize, however, that given the fractious nature of this controversy and the dwindling legislative schedule which remains, I am not enthusiastic about the prospects of exploring legislative responses to this issue—if warranted—during this session. But that will be for the day's end and the days ahead.

Let me conclude and then I will recognize the gentleman from California. And if you all will bear with me, I am going to be immodest.

Mr. Bill Holland, who writes for Billboard, wrote recently—I don't have his permission to say this, but I think he will not admonish me—he wrote, "Coble is viewed by Washington insiders as an even-handed chairman and is well liked throughout the copyright community, who supports creators and users."

Again, pardon my immodesty, but as the late Dizzy Dean used to say, "If it's true, it ain't bragging." [Laughter.]

Speaking of even-handed and reasonable people, I am now pleased to recognize the distinguished gentleman from California, the ranking member of the subcommittee, Mr. Berman.

Mr. Goodlatte has indicated that he has a 1-minute opening statement. Mr. Boucher has a 2-minute opening statement.

As Mr. Holland said, I am a fair-minded fellow. [Laughter.]

Mr. Rogan and Ms. Bono—folks, we need to confine it to at least 2 minutes.

I will put you on a short leash and time you, but not so with Mr. Conyers and Mr. Berman. Mr. Berman, you are recognized.

Mr. BERMAN. Thank you, Mr. Chairman. I love a long leash. It just goes to show you how unintended consequences can happen.

Last night, Mr. Boucher and I were pumping gas together at a gas station down on South Capital Street. I am sure there are people in the press who think that we have our staff pump our gas for us, but we were both there doing it ourselves. Mr. Boucher mentioned to me that he would like to make a short opening statement. I, of course, did not get down here until my customary 5 minutes late and the chairman was already speaking. But I appreciate very much his willingness to demonstrate, once again, his fairness and his flexibility by deviating somewhat from his initial and customary process in this matter.

I have a somewhat lengthy opening statement, which I would like to be included in the record, Mr. Chairman. Copies are there. It sets out in some detail my view of this process. But rather than read that opening statement, I think I am just going to ramble for a little while and make a few points that I want to make about all this.

First, this is also a hearing about the Copyright Office, and I just want to indicate publicly as well as for the record that Marybeth Peters runs a wonderful operation that does a tremendous and important job on a number of different issues and she will be talking about some of that in her testimony today. But I just want to thank her for continuing to operate that office in such a professional, efficient, and effective manner.

Turning to the other issue, work made for hire, I have had the unfortunate situation of being in the minority for nearly 6 years, but it has been mitigated to a great extent by the fact that I have been ranking Democrat on two subcommittees, first on International Relations where Doug Bereuter was my chairman, and now on Intellectual Property with Howard Coble as my chairman. I believe in both situations I could only aspire in the role that one day under exercising our power to terminate control of this place and revert it to its rightful owners, I could only hope to aspire to be as fair and as bipartisan as these individuals have been in chairing their subcommittees.

Mr. COBLE. The gentleman is allowed 10 extra minutes. [Laughter.]

Mr. BERMAN. The chairman is a man of tremendous integrity. This committee operates on a bipartisan basis. What happened last November was not a partisan effort, it was not a venal effort, it was not an effort to put something in the law under the belief that had the alternative been tried it might have failed and therefore would not have been successful.

I mentioned yesterday to a couple of folks that there is what has become somewhat hackneyed saying that the two things people should never watch being made are laws and sausages. It is not always a pretty process. It is a messy process. Sometimes it is an "in the dark of the night" process. But the notion that from that fact one drops to theories of conspiracies and paranoia about people's

intentions is just fodder for those who want to increase cynicism about this process.

My opening statement in some detail tells the story of all this stuff. But when Howard Coble and his former chief of staff Mitch Glazier were pushing Jim Rogan's legislation on cybersquatting through—I think with Rick at that time as well—when it passed our committee, it dealt with protecting the domain names of people who had trademarks. It went to the Floor, there was no real controversy, and I started getting phone calls from people in Los Angeles—celebrities, recording artists—about the fact that their domain name had been taken by someone else, that material was appearing on those sites that was frequently defamatory or representing views that were not their views, that in a sense their good name was being abused by what was happening, and then they were being shaken down in order to reacquire the right for their own name.

They asked me to try to help fix that situation. They didn't say to only do it if we could do it with hearings and full processes and giving everybody a great deal of notice. They asked me to please try to fix it.

I went to Chairman Coble and Mitch Glazier. Jim and I talked and Rick and I talked. You shouldn't have to trademark your own name in order to keep it from being usurped and taken. And in a manager's amendment on the Floor of the House, with very little discussion—if there were five Members of Congress who knew what was happening, I would be quite amazed—we fixed that particular problem. It wasn't at nighttime, it was in the afternoon, but it was in the dark of the afternoon.

People were quite happy. For Washington representatives of some of those same people to now attribute to us—and to the chairman most particularly because he has had the misfortune of having his name and Mitch Glazier has had the misfortune of having his name associated as the symbols of the process—a relatively last-minute fix of changes made by the Senate to that language, which required people to deal with how you could contractually exploit a person's domain name when the party was willing to have it exploited in order to promote a copyrighted work—well, even in a town where hypocrisy is the standard currency, such insinuations gives hypocrisy a bad name. I just want to make that clear.

In addition, bad things sometimes happen inadvertently. In a process which is messy and sometimes moving too quickly, consequences occur that we did not fully anticipate.

So in retrospect, having now spent a substantial amount of time looking at this particular issue, it is clear to me the change we made in specifically adding sound recordings to the law on works made for hire is not technical, not because the people who claimed it was technical believed otherwise, but because there are other people who weren't right there at the time who have a different view of the law. When there is one point of view about the law and another point of view about the law and both are reasonable and have legitimacy—they aren't absurd arguments or frivolous arguments—in effect dealing with something that in a sense codifies that one view of the law and thereby excludes, wipes out, and

snuffs out the other view of the law is not a technical change in the law.

So this hearing is being held. Hilary Rosen I have known for a long time. I have never, ever had occasion to be able to say that she has misrepresented anything in the context of her representation of the RIAA and I know a lot about what happened here and I continue to have tremendous faith in her representation. She has a point of view and she has an interest and all of that should be taken into consideration in evaluating her arguments, like every other argument made.

This is a pluralistic country and a pluralistic process. People come with their points of view and we are supposed to synthesize them. But no one ever misrepresented anything about this. But a mistake was made.

Now the question is, What do we do about it? We are going to have experts talking about this issue, so I am not going to synthesize those arguments. But let me say that in my mind the right way to end up here at some point is to get back to the status quo ante, the situation that existed before October or November 1999, whenever the exact date all this happened and the law was changed. But we need to do it in a way that doesn't hurt any of the parties involved in the sense of disadvantaging them from their positions before that time, to take the time to make sure we do it right.

By the way, this is one issue where we do have some time because what we are talking about is a the right to terminate that doesn't come into effect until 2013. You give your notice of intention to terminate long before that time, but the actual termination of the right doesn't exist until 2013, so we have a few weeks to look at this in a process that we now want to be especially careful doesn't have the unintended consequences that our earlier process had.

That is where I hope we end up. That is where I think the parties have to talk to each other. I think getting away from the rhetoric of venality and conspiracy makes tremendous sense. And let's go on with the hearing.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Berman follows:]

PREPARED STATEMENT OF HON. HOWARD H. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman,

Thank you for calling this hearing today.

Initially, I want to address the less publicized aspect of our hearing today—oversight of the U.S. Copyright Office. On nearly a daily basis, this Subcommittee calls upon the Copyright Office for advice and counsel on a variety of copyright policy questions. The Copyright Office also ably handles a host of other, equally important functions—from providing foreign governments with copyright policy expertise to conducting arbitrations on copyright royalties. I just want to thank Mary Beth Peters and her fine staff for continuing to operate such a professional, efficient, and effective agency.

Turning to the work made for hire issue, I first want to disabuse people of the notion that the work for hire amendment was the product of some conspiracy between the recording industry and Members or staff of either House. Today's political environment is unfortunately marked by a tendency to assume the worst, and is populated by self-interested individuals who exploit that tendency. However, I know that no conspiracy or *quid pro quo* motivated the work for hire amendment, and any allegations to the contrary are unfounded.

Mr. Chairman, I have always known you to be a man of the upmost integrity, fairness, and honor, and such allegations are an absolutely unwarranted attack upon your character.

The fact is that our Senate counterparts and I were aware of the proposal to include the work for hire amendment in the cybersquatting legislation that was rolled into the SHVIA conference report at the end of last Session. At that time, the legislation appeared to be a technical amendment; and ironically, we thought this amendment would effectuate a change in the cybersquatting bill desired by artists' groups.

We were presented with substantial evidence that work for hire clauses were standard in recording contracts. We further learned, and the Register of Copyrights confirmed, that both recording companies and recording artists customarily register their sound recordings as works made for hire. Thus, all appearances were that sound recordings were widely understood to be eligible for works made for hire status.

Of course, we soon learned that artists' groups did not agree with the characterization of the work for hire legislation as a technical amendment. On November 18, I received a call from Jack Golodner with the AFL–CIO raising concerns about the work for hire language. He faxed me a copy of a letter that an LA law firm sent to Senators Boxer and Feinstein the previous day to express such concerns.

Unfortunately, both time and process did not allow any action at that point. The consolidated appropriations bill, within which the cybersquatting legislation with the work for hire language had been combined, was being debated on the House floor literally while Jack and I spoke. One half hour after he faxed me the letter, the House adopted the conference report to the appropriations bill. The Senate adopted it later that night.

Having spent a considerable amount of time looking at this work for hire issue since last fall, I am now convinced that the inclusion of sound recordings as a enumerated category of works eligible for status as works made for hire was clearly *not* a technical amendment. Rather, it appears that, prior to the work for hire amendment, the eligibility of sound recordings for status as works made for hire was a grey area in law.

I believe the recording industry has some very credible and sincere arguments that, based on some sets of facts, sound recordings could fit within other, previously recognized categories of works eligible for work made for hire status—notably as contributions to collective works.

However, authors of sound recordings also have credible arguments that, based on other sets of facts, sound recordings would not have qualified as works made for hire prior to last session's amendment. I have read several compelling law review articles that share this opinion. Furthermore, at least two U.S. District Courts have recently opined that sound recordings do not fit within the statutorily recognized categories of works eligible to be works made for hire—though neither court opinion explains its reasoning in depth or addresses the possibility that sound recordings are contributions to collective works or compilations.

Where two interested groups have different legal positions regarding the meaning of the law, an amendment that resolves the law to the benefit of one party and to the detriment of the other *cannot* be termed technical. By clarifying this grey area of law in the way we did, Congress weakened the legal arguments available to authors of sound recordings that sound recordings cannot be works made for hire, and thus impaired their ability to exercise their termination rights.

In an admittedly unusual legislative process, it is now the responsibility of this Subcommittee to decide whether a change we have already made to the copyright law reflects sound public policy. The Chairman has called this hearing today to help guide us in this decision, and I can assure all the witnesses that we will listen to them with open minds and a strong sense of this responsibility. For their part, I hope the witnesses, who represent parties on all sides of this issue, will concentrate on providing us with policy rationales for and against including sound recordings as a category of works eligible for status as works for hire.

After this hearing, I encourage all interested parties to come together and explore how to remedy this situation. I believe that such a cooperative solution is not only possible, but absolutely necessary, as no solution is likely to move without buy-in from both sides.

At least initially, the ideal solution would restore to the parties the legal rights and arguments they had prior to enactment of the work for hire amendment. Relatedly, such a solution would not prejudice the ability of the parties to claim that their previous position had been fully restored. Arriving at such a solution may be a long and difficult process, but we should not shirk away from the effort. Likewise, we

should ensure that the process is fair and open, and does not happen in "the dead of night."

Once the parties have been made whole, so to speak, we can wrestle with the longer and harder task of either resolving the ambiguities in the law, and if such a resolution seems inappropriate legislatively, we can make a conscious decision to leave resolution of these issues to the courts.

I pledge my assistance in hammering out a solution and likewise pledge to work with all parties that demonstrate an honest desire to craft a fair solution.

Mr. COBLE. Howard, I thank you for very interesting and meaningful background. Thank you for your generous words, as well.

As Mr. Berman very accurately pointed out and I failed to, we are not on a time table here. No one is holding a stop watch on us and we must not decide this by sundown today.

The gentleman from the Roanoke Valley, Mr. Goodlatte?

Mr. GOODLATTE. Mr. Chairman, thank you.

I first want to thank you for agreeing to hold this hearing today and for your willingness to examine the issue of sound recordings as works made for hire.

As a conferee on the Satellite Home Viewer Act enacted into law last year, I was actively involved in the deliberations surrounding the work for hire issue and supported the inclusion of language that clarified sound recordings as a work made for hire.

I recognize that that is a contentious debate between those who see this as a change from previous law and those who view this as simply clarifying existing law. Because I believe sound recordings are a contribution to a collective work, and that artists have for many years knowingly signed contracts that often include work for hire language, I fall into the latter category.

Nonetheless, I look forward to hearing from both sides on this issue and learning more about why artists are opposed to codifying a designation that apparently has been referenced in recording contracts signed by those artists for some time.

Mr. Chairman, if I might use a little bit of that second minute you offered me, I want to second everything that has been said about your leadership of this subcommittee. I feel very strongly that what Mr. Berman said very accurately reflects—as does the quote you read from Billboard—your dedication to the cause of protecting creative works in this country and recognizing the value of copyright. I believe that virtually everyone on this committee stands strongly for the benefit of that.

I have introduced and you have passed through this subcommittee the NET Act, which is being used by a great many people today to try to push for greater protection of copyrighted works in the digital environment in which they have become increasingly endangered because of the ease with which they can be duplicated.

I thank you for holding this hearing. I wish to hear from those who take different points of view.

I yield back.

[The prepared statement of Mr. Goodlatte follows:]

PREPARED STATEMENT OF HON. BOB GOODLATTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman, I want to thank you for agreeing to hold this hearing today, and for your willingness to examine the issue of sound recordings as works made for hire. As a conferee on the Satellite Home Viewer Act enacted into law last year, I was actively involved in the deliberations surrounding the work-for-hire issue and

supported the inclusion of language that clarified sound recordings as a work-made-for-hire. I recognize that this is a contentious debate between those who see this as a change from previous law and those who view this as simply clarifying current law. However, because I believe that sound recordings are a contribution to a collective work, and that artists have for many years knowingly signed contracts that often include work-for-hire language, I fall into the latter category. However, I look forward to hearing from both sides on this issue and learning more about why artists are opposed to codifying a designation that apparently has been referenced in recording contracts signed by those artists for some time. Thank you, Mr. Chairman.

Mr. COBLE. Mr. Goodlatte and Mr. Berman are making an old man feel mighty good on a Thursday morning. I hope it continues.

The ranking member of the full committee, Mr. Conyers, is recognized.

Mr. CONYERS. Thank you, Mr. Chairman.

Could I begin by asking your permission to allow Karen McCarthy, our colleague from Missouri whose interests in this subject are very large, to join our panel merely as an observer, not to prolong the proceedings?

Mr. COBLE. She may come forward, if she likes.

Mr. CONYERS. Thank you very much.

I am only going to take a few minutes, so I will skip all the commendations that have been passed around. I will second them, of course.

But we come here to deal with a subject about one group of creators who get ripped off more than anybody else in any other industry, recording artists. [Applause.]

It is about time we separate the people in the recording industry from the recording artists. I keep hearing from the recording industry about what the recording artists want. I know a few recording artists, and we will be checking this. This is appropriately a sensitive subject.

Number two, some people think this was an unintended consequence. People have been trying to make this change for years and there is nobody that is a veteran in this industry that doesn't know that. So to think that it happened inadvertently or that we just thought it was technical—okay.

The problem that we have is not just about the process, which has been explained very nicely, but the actual results surrounding the extension of the work for hire doctrine into sound recordings. There may be different views on how substantive the change in fact is, but there can be no disagreement that it is controversial and that it was made in a totally-unrelated conference agreement dealing with satellite transmissions under section 119 of the Copyright Act. There were no hearings, no markups, no consideration of any kind by the Members.

I guess it was put in during daylight hours because that is when the Congress brought the measure up. But I contend, Mr. Chairman, that is not how this committee and this Congress should be writing our intellectual property matters. The normal process is too important.

So to my colleague and friend, Mr. Berman, who asked the question, "What are we to do?" I would like to answer right away that we should repeal this provision and start off by doing it right. That would be the fair thing to do since there have been no hearings or

discussion about it. Let's just agree to remove it and begin the process all over again.

I believe that this change is a highly substantive one and one for which I find little agreement. It has been said by many that the entire concept of work for hire is inconsistent with the purpose of the constitutional framework on which intellectual property is built in the first place. It is the creative spirit, not the big money, not the business people, that creates original expression.

Substantively, this amendment terminates the copyright interests of recording artists and turns them over permanently to the record companies, which means that the artists who actually record the songs will never have the exclusive right to distribute, perform, or reproduce their own recordings.

While the record industries and recording artists disagree about whether the amendment really has a substantive effect or merely clarifies past practices, it should be noted that the Register of Copyrights appearing before us—a wonderful woman whose praises I second—has stated publicly that this change is far from technical. I believe there is scant authority to suggest that the change is merely technical, so we ought to put that one away very early on.

So I would really like to make sure that we have the fair hearing that we are having. I am pleased that the subcommittee chairman has called this hearing and we have a balance of witnesses before us today.

I thank you very much, Chairman Coble.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF HON. JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

We are here today because some webcasters want the government to intervene into the private marketplace, and order copyright holders to sell them their products at fixed rates. That type of government regulation—known as a compulsory license—is anathema to copyright law, and is given only in the rarest of circumstances when marketplace failure is clear.

No one cherishes the growth of the web more than this Committee or this member. No one sees the democratizing opportunities of more channels for more content more clearly. But the phenomenon of the web is not a license to take someone else's property which a compulsory license for "over-the-air" TV signals surely would be.

Intellectual property is property just like someone's real property. Even more important, according to some, because the creativity it unleashes enriches so many lives.

Government regulation of intellectual property occurs almost never. In the 1970s, the cable industry was able to get a compulsory license for "over the air" signals only because it was a fledgling industry. In the 1980s the license was extended to the nascent satellite industry so as to set ground rules to protect against unfair duplicative distant network signals. Neither rationale exists for webcasting today. And both industries were required to adopt a series of government imposed regulations—such as must carry and educational broadcasting—in return.

The situation before us today is completely different. Internet companies may be new, but they are not struggling. They say they are competing against cable, satellite, and broadcasters, but it's the Internet companies that bring in billions from venture capitalists, advertisers, and the stock market. People are climbing all over themselves to invest in the Internet; getting in on an IPO for a high-tech company is ultimate investment dream. In fact, one of the biggest Internet companies, AOL, was worth $160 billion, and that's before it agreed to buy Time Warner. Together, they're worth $350 billion. Another, Yahoo, is worth $90 billion. Clearly, these companies can *buy* the content, they want, just as AOL bought Time Warner.

In any event, there's no evidence the free market is not working. If the Internet companies want content, they should negotiate for it the same way NBC negotiates for television shows or Ford negotiates for steel. And even if we did give Internet companies a license, we'd have to be certain we didn't let them copy the content

they were rebroadcasting, or they'd have even more rights than cable and satellite do.

We're often asked not to regulate Internet companies, to let the market drive it. But now we're being asked to take someone else's private property for the benefit of those same companies. It can't go both ways: less regulation when it hurts, but more regulation when it helps. Giving Internet companies a compulsory license would be like the government storming someone's house and turning it into a hotel. Both involve the government requiring people to give up their property to everybody else, and I would oppose them both.

Mr. COBLE. I thank the gentleman.

John, this may well be subject to interpretation, but I don't recall that efforts had been made to make this change in years gone by, but this could well be subject to interpretation.

Mr. BERMAN. Would the gentleman yield?

Mr. COBLE. I would yield to the gentleman from California.

Mr. BERMAN. John, I have been here for 18 years. Two points have been made by you and Mr. Goodlatte that I just feel compelled to respond to.

I have been here for 18 years and I have never been asked to support or push codifying sound recordings as a work for hire until the context of the cybersquatting legislation last November. I couldn't agree with you more on the role of recording artists, but I have never heard Hilary say that she is speaking for the recording artists. I wanted to make those two points.

As to the point Mr. Goodlatte made, the mere fact that it says in a contract something is a work for hire—I think it will become quite clear when we have this testimony that you can say it a thousand times, but that in and of itself does not make it a work for hire. Those are the two points I would make.

Mr. CONYERS. Well, Mr. Chairman, now that we have made points on opening remarks, could I just observe that I didn't mention Hilary Rosen's name, number one. Number two, this issue started a little bit before Hilary Rosen came to her position, and the fact that it hasn't been brought to your attention or introduced as an amendment doesn't mean that this change hasn't been sought for quite awhile.

Mr. COBLE. The gentleman from California and the gentlelady from California, I believe said they would submit their statements for the record.

Does the gentleman from Wisconsin have an opening statement? Mr. Sensenbrenner?

Mr. SENSENBRENNER. No.

Mr. COBLE. The gentleman from Virginia, Mr. Boucher?

Mr. BOUCHER. Thank you very much, Mr. Chairman.

I have another hearing to attend at 11 and I will not be able to stay for the witnesses' testimony, so I very much appreciate your accommodating the brief statement from me and also from some of my other subcommittee colleagues.

I want to commend both Mr. Berman and Mr. Conyers for making the point that the change which took place in the statutory enactment last fall was not merely technical, was not merely codifying past practice, but was in fact substantive and did deprive a certain category of performers of a very important right.

The category of performers are those who are performing works that are not collective in nature. So if you will, these are individual works.

These are also performers who sign the standard contract that is presented by recording studios which contains a clause that declares that the work is a work for hire. And if those two elements are present—it is not a collective work and that contract has been signed—then the effect of the statutory enactment last fall was to deprive those recording artists of their termination rights. That is very clear. And I think the testimony this morning, if it is fairly presented, will confirm that fact.

That right was not taken away in the normal legislative process. There was no bill, there were no hearings, there were no discussions before this subcommittee, there were no discussions in the full committee, or on the Floor of the House. The process by which that right was taken away may well have been inadvertent, and I am not going to suggest that it was done in the dark of night. It may well have been inadvertent, but nonetheless, an important and substantive right has been removed.

I would like to join with Mr. Conyers and Mr. Berman in urging that we move forward at the earliest possible time to restore that right. I think justice requires that and I look forward to working with them and hopefully with the subcommittee chairman in achieving that goal. [Applause.]

Thank you, Mr. Chairman. I appreciate your accommodating these remarks.

Mr. COBLE. You are indeed welcome.

Ladies and gentlemen, if you would, I would appreciate it if you would hold your applause either in favor or in opposition. I think it's a good idea.

The gentlelady from California, Ms. Lofgren?

Ms. LOFGREN. Thank you, Mr. Chairman.

I just wanted to join with my colleagues, Messrs. Boucher, Conyers, and Berman, in urging that we do restore the state of the law to what it was before this change was made. I think that is the only way to move forward on the issue. And I do that without reaching a conclusion on the ultimate resolution of this issue because I think we need to have hearings and listen to everyone.

I would just note that it is clear that this was not a technical change. For those of us who were not on the conference committee—and that includes me—we were not aware of this. We believed and trusted that it was no more than a technical change.

Having said that, I want to come to the defense of the chairman of this committee. I have often described my service on this committee as a bipartisan island of sanity in a congressional sea of bipartisan madness. That is because we gave a chairman who is fair-minded, and who has always treated me with fairness and courtesy. I appreciate his leadership and his service. I know that he would never intentionally mislead anyone or do anything that was less than honorable.

I have read the articles. I don't mind mentioning the name of Mitch Glazier, our former chief counsel. In my opinion, he has been maligned. I must say that in all the years I worked with Mitch, I found him to be an honorable, intelligent, decent individual who

served his country honorably on this committee. In short he was someone who I really had a great deal of respect for.

I do believe we need to restore this provision as it was. I do not malign any member of this committee either publicly or privately. But I do believe that restoration is necessary in order to move forward. I thank the chairman for allowing me to say these words. The only objection I have is that you asked the audience not to applaud just before I spoke. [Laughter.]

I now yield back my time.

Mr. COBLE. I thank the gentlelady.

And I want to say to the audience, don't think I am being cranky. But a lot of times the applause can have a disruptive effect.

I thank the gentlelady from California.

The gentleman from Massachusetts?

Mr. DELAHUNT. Thank you, Mr. Chairman.

I will be very brief. I just want to echo the sentiments expressed by everyone on this panel regarding yourself. Anyone who has worked with Howard Coble knows he is an individual who is scrupulously fair, honorable, and decent. And as my colleague from California, Zoe Lofgren, just indicated, he is someone who has led this committee in a very bipartisan way.

In fact, I would note, Mr. Chairman, that most of the kudos that are coming your way are coming from the Democratic side. I think that really underscores your leadership and your integrity and the kind of human being that he is.

Having said that, I would just make one observation. It is clear that this is more than a technical change. And for us, the best evidence of that is to look out and see that this is a crowded hearing room this morning. Clearly, it is more than technical.

However we did get here—and I, like others, did not serve on that conference committee and don't know how it happened—but however it happened, this may present an opportunity because clearly the marketplace is changing. We are now in the era of the Internet in which music is being digitized. Perhaps we have an opportunity to bring together and develop a consensus between the recording industry and the artists in the best interests of those stakeholders and at the same time serve in the best interests of the consumer and the American people.

[The prepared statement of Mr. Delahunt follows:]

PREPARED STATEMENT OF HON. WILLIAM D. DELAHUNT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Thank you, Mr. Chairman.

I think most of us would agree that it might have been better for us to have held this hearing before enacting a change in the law, rather than afterwards. But however we have come to this point, we are here, and I want to thank you for holding this hearing.

I know that some people have questioned your motives and integrity in regard to this issue, Mr. Chairman, and I want to say that those are people who do not know you as I do. You have always been scrupulously fair and honorable in your leadership of this subcommittee, and I think your readiness to devote a major portion of this hearing to the work-for-hire issue is only the latest confirmation of that.

I hope that everyone will use this opportunity to assist us in determining whether the law as it now stands is what will best serve the industry, the artists, and the consumer, in a marketplace that is changing with astonishing rapidity. And if the current law is not the best answer for the emerging marketplace, what are the solutions that we should be considering.

The fact is, Mr. Chairman, that however we got here, the advent of new channels for music distribution would eventually have required us to examine this issue. I recognize that there is a longstanding dispute between the artists and the industry over whether or not traditional sound recordings fit into one or another of the statutory categories as a work made for hire. But whatever the courts determine the law to be with regard to that question, it seems to me that new Internet-based technologies that allow the consumer to download individual selections have brought about a sea-change in the very concept of what a sound recording *is*. And old definitions that were written when a "sound recording" was a flat vinyl disk or a reel of magnetic tape may no longer apply.

By the time termination rights reach the courts, the music industry will be something completely new. Will there *be* record companies in 2013? Will there be CDs?

The one thing we can be certain of is that people will still be writing music. And they will still be singing it.

Personally, I also believe there will always be a need for producers and promoters, even in the anarchic world of the Internet. Yet we don't know what recording companies will look like, or how their contractual relationships with artists will be structured.

It is hard enough to legislate for a marketplace that exists. It is much harder to legislate for a marketplace that is yet to come into being. Perhaps we cannot expect to do this. Perhaps it is our fate to lag behind innovation.

But if we cannot always guess correctly, we can at least try to foster a legal regime that will be hospitable to innovation and will fairly balance the interests of the various stakeholders and the public.

It is not our job to pick winners and losers. But it *is* our job to be sure that the laws promote a level playing field. That is what the Copyright Act seeks to do. Using such concepts as "termination rights" and "work-for-hire", it seeks, not to set the terms of the bargain between the artist and the label, but to afford each side some degree of leverage.

It seeks to reward the recording company that takes risks by backing unknown artists. And it seeks to give successful artists of enduring hits the opportunity to renegotiate the deal at a later date.

Unless, of course, the product of their joint efforts is a work made for hire.

I am less concerned about the historical questions that are raised by this current controversy than about the policy question it has precipitated: does the present law strike the right balance? Should sound recordings be works made for hire, and, if so, under what circumstances?

The recording industry rightly points out that it is they who take the losses on recordings that never sell, and that they are entitled to recapture these losses when the other two make the Top 20. The artists rightly ask whether there are any limits to that logic, and whether a featured artist whose work is still selling 35 years later isn't entitled to strike a better deal.

I guess what I would hope is that the creative community could get together on this issue. They are both indispensable elements of one of our greatest American success stories. Together they have brought music into the lives of billions of people the world over. Together they have created wealth, not only for themselves but for our economy.

Neither half of this partnership can prosper without the other. And I think it should be possible for them to sit down together and work this out.

This hearing is part of that process, Mr. Chairman, and I hope it will point us in a positive direction. I feel great good will toward both of these communities, Mr. Chairman, as I know you do. And I want to do everything I can to bring them together so that the music will play on.

Mr. COBLE. I thank the gentleman from Massachusetts.

The gentleman from Florida?

Mr. WEXLER. Thank you, Mr. Chairman.

I will be brief and I, too, want to echo my friend from Massachusetts' comments with respect to you, Mr. Chairman.

If I could just offer an observation, however, as to the process, I serve on two committees—this committee and the International Relations Committee—and in the 3 plus years I have been here, I don't think a week goes by that we Democrats don't object to process in one form or another. There is probably not a week goes by that a bill or an amendment or something is done without what we

Democrats in the minority think is a full hearing or appropriate consultation or what have you. I think from the point of view of the minority, at times it is meritorious in terms of the objection to process. But as to the high-mindedness of some of the objections to the process in this case—and I do respect them—to suggest that it is somewhat novel in this process just totally distorts what my experience has been.

We are a Congress that gives out $50 billion in tax cuts without much of a discussion. So to be shocked that certain things may happen without the fullest of hearings to me is really just what goes on in this Congress. It doesn't make it good or bad, necessarily, it is just part of the process.

The one thing that I think is unique about the objection here, Mr. Chairman—if I may suggest—is that apparently some people believe this was a bipartisan violation of the process, which for me is somewhat unique in this process, because usually it is one side of the aisle complaining that the other side of the aisle violated the process.

So I guess this is, in this respect, novel in terms of my experience, because this is the first time that apparently there is an objection that there has been a bipartisan violation of the process. And as things go, if I put it on the scale, a bipartisan violation of the process—if it is in fact that—is probably a lot better than the things I have experienced for the last 3 years.

So I applaud this committee and the ranking member.

Mr. COBLE. I thank the gentleman from Florida.

The gentlelady from California has decided she does want to make an opening statement.

Ms. BONO. Thank you, Mr. Chairman.

I thought I would jump into the party since everybody had something to say.

I, too, want to echo the sentiments I have heard from my colleagues on the other side and say that in my 2 years of being here and of knowing you, I think more highly of you than almost any Member of Congress. And not to speak for my late husband, but I know that Sonny felt that same way, too. This issue for me is a tough one and this is the first time I have had to try to figure out what Sonny would be doing. I first of all know that he would be lauding you and who you are.

But I also want to weigh in and echo what especially the gentlelady from California, Zoe Lofgren, has said. I agree, too, that we should restore the law to the way it was before the change in November.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Bono follows:]

PREPARED STATEMENT OF HON. MARY BONO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, thank you for holding this oversight hearing on the works-made-for-hire issue. I appreciate your taking a second look on an issue that is both complicated and emotional. My hope is that this hearing will examine the ramifications of including sound recordings as a work-made-for-hire. The parties effected are both the individual artists and the record industry. I believe that the goal of these hearings should be to hear the individual arguments and hopefully suggest additional points that would bring all sides of this debate together and revisit the work-made-for-hire issue.

The real issue at stake here today is the right of a featured artist to terminate the transfer of his or her copyright. The issue of termination is critical because artists and their heirs have a substantial financial and sentimental stake in ownership of their sound recordings. Without an appropriate termination point, sound recording works that have gained popularity over the years will not financially benefit those artists who created it.

Twenty-four years ago, this committee drafted the Copyright Act of 1976 which expanded the 1972 legislation that gave sound recordings copyright protection. In the past, sound recordings did not receive all copyright protections. Sound recordings were not specifically listed as a category of commissioned works that could be considered a "work-made-for-hire, unless both parties expressly agreed to that fact in writing. The members of the House Judiciary Committee, who drafted the 1976 Copyright Act, spent two years in hearings debating the merits of what items should be included in the work-made-for-hire category. Sound recordings were not included in that category.

The 1976 Copyright Act intended to give a form of protection for authors. The goal of the 1976 Act was to give artists the right to terminate copyright assignments to record companies 35 years after the initial copyright transfers. The 35 year term was intended to protect authors who might transfer, for a small amount of money, the rights to a work that later became a major success.

These young artists who are desperate to sign a contract to a record company are the backbone of the recording industry. Any major artist had to make his or her start at the bottom as an unknown. The negotiation power the record company has over the music artist is staggering. The artist is so desperate to sign a contract for an album that the artists' concern for his future financial well-being and possible royalty rights are minimal. The current inclusion of sound recordings in the Works-made-for-hire provision would have a detrimental effect on these struggling artists.

Before sound recordings were included on the list of works-made-for-hire, neither the artists nor the record companies knew of the importance, nor impact of including sound recordings in the category of a work-made-for hire. Therefore today, I will listen to the debate with a balanced view of what the impact is to both the artists and the record labels. Hopefully I will receive a better understanding of the facts and ramifications of the 1999 amendment to the 1976 Copyright Act.

Thank you again, Mr. Chairman, for studying this issue a second time. I am confident that both sides representing this issue will be fair in their assessments of the impact the work-made-for-hire classification has on their respective industries. I look forward to hearing both sides of this issue.

Mr. COBLE. I thank the gentlelady and I thank all the members for their opening statements.

Folks, I must remind you again that we must clear out of here by 1:30.

Marybeth, it is good to have you here. As Howard Berman said previously, you are our very able Register of Copyrights. Ms. Peters served as acting general counsel of the Copyright Office and as chief of both the examining and information and reference divisions.

Ms. Peters also served as a consultant on copyright law to the World Intellectual Property Organization and authored the General Guide to the Copyright Act of 1976. The subcommittee has copies of Ms. Peters' testimony.

Madame Register, you are familiar with our 5-minute rule. And folks, I want to remind the subsequent witnesses of this as well. We have written statements of every witness. I am asking each witness to confine his or her oral testimony to 5 minutes. You will know when the 5 minutes have elapsed when the red light illuminates in your eye. Ms. Peters has a good track record of staying within the 5 minutes.

It is good to have you with us, Ms. Peters.

STATEMENT OF HON. MARYBETH PETERS, REGISTER OF COPYRIGHT, COPYRIGHT OFFICE OF THE UNITED STATES, LIBRARY OF CONGRESS

Ms. PETERS. Thank you, Mr. Chairman.

I want to thank you for those kind remarks. I certainly am pleased to be here. Given the interest of the committee in the second topic, work made for hire, I am going to keep my statement with regard to the Copyright Office rather brief and rely on the rather full statement that we submitted for the record.

This morning I am accompanied by three people from the Copyright Office, our very able General Counsel, David Carson, our Assistant General Counsel, Marilyn Kretsinger, and Sayuri Rajapakse, an Attorney Advisor in our Policy and International Affairs Office.

Obviously, the last 2 years—because of all of you—have been very busy ones for the Copyright Office. During the period between October 1998 and December 1999, you passed five bills, including the Digital Millennium Copyright Act, which actually made it very hard for us to keep up with one of our jobs, which is to publish the copyright law. Every time we were ready to publish it, you enacted new legislation. But at the moment, we are caught up and we have added sound recordings to section 101 as part of the work made for hire. So we will see whether we stay caught up.

Obviously, the Digital Millennium Copyright Act was the most far-reaching legislation in copyright in the past 2 decades and it gave the Copyright Office many new duties and responsibilities which are really outlined in my testimony as Appendix 1. We found we were dealing with new issues with regard to web casting, that we have issues with regard to the anti-circumvention provisions of the DMCA, and that for the first time we are registering designs for vessel hulls. Despite our current staffing levels, we managed to take on all these responsibilities and I think to discharge our duties well.

Obviously, we completed our task in delivering the study on digital distance education where we had hearings across the country and had statements from more than 175 parties. And you held a hearing, as did the Senate.

We are currently involved in a very controversial and very interesting task of determining whether or not any particular class is or is not likely to be adversely affected by the technological protections that are used by copyright owners to control access to their work. We will be making a recommendation to the Librarian well before the deadline that he has to make a decision which is October 28th.

And with regard to the designs for vessel hulls, you have already amended that statute to make the legislation permanent. And I can tell you, as a result of making it permanent, the number of registrations have increased. So we now have 23, which you can look on our web site and see.

We are pleased that we have been able to continue to advise the Congress and the Nation on our issues and to provide valuable and timely assistance to the United States Trade Representative and other Executive Branch agencies. Obviously, we have worked fairly hard to try to get the two new WIPO treaties not only implemented

and ratified in this country, but in other countries of the world. And we participate in many, many programs around the globe.

Obviously, our main job is to create and maintain the official public record of copyright registrations and recorded documents and to administer various compulsory license and statutory obligations and, of course, oversee the Copyright Arbitration Royalty Panels. We have been busy in the past year. We registered over 600,000 claims that represented more than 800,000 works. We recorded almost 17,000 documents that contained hundreds of thousands of titles.

One of our jobs is to acquire works for the Library of Congress and we forwarded many copies of works that had a value of $36 million to the Library to be used in its collections and exchange programs.

As you can see from my written statement, the Copyright Office unfortunately continues to experience serious processing delays, especially in the examining and cataloging division. We have developed all kinds of plans to try to deal with this. We are basically trying traditional methods of overtime. We are hiring more people. We are in a reengineering process to streamline our processes. And of course, we are continuing to develop our electronic registration and recordation system.

Much time is spent with administering the Copyright Arbitration Royalty Panels. We have seven proceedings that are going on. Four involve the setting of rates and terms under various compulsory licenses. Three deal with distributing the royalty fees. And I can say in the recent past we have distributed more than $1 billion in royalties.

Our big thing in the past year has obviously been to implement the new fee schedule that we spent more than a year working on. We submitted a report to you in which I explained why we did not bring the basic registration up to full cost recovery, because we wanted to meet the goals of the copyright law and to make it fair and equitable for all copyright owners to be able to use the system.

Obviously, we focus on our web site, trying to make as much information as we possibly can available to the public. As you can see, we have made a number of contributions that I am proud of. And I am proud of the employees of the Copyright Office. Obviously there is much to be done and we look forward to working with you in the years ahead.

Thank you.

What I would like to do now is turn to my statement on sound recordings as works made for hire.

Mr. COBLE. And for the record, Ms. Peters is being allowed 10 minutes because she is wearing two hats.

Please proceed, Ms. Peters.

Ms. PETERS. Thank you.

I am pleased to testify on the issue of sound recordings as works made for hire.

When I was first asked about a possible amendment last year, my immediate reaction was that performers would not be pleased because works made for hire is always an emotional issue. But I thought that the amendment would actually reflect existing industry practice. Having had the opportunity to reflect on the issue,

and having had the opportunity to hear the views of virtually everyone, I can now assure you that the issues are far from simple and straightforward, and the amendment has stirred up passions beyond anything I could have imagined.

Let me begin with some of the historical and legal context behind the amendment and also my views on whether the amendment was appropriate and whether further legislative action should be taken.

The issues are complicated and involve several principles of copyright law. I refer you to my written testimony for a more complete account.

I believe that the amendment was a substantive change in law, as we have heard this morning, not a technical amendment as some have claimed. However, I believe the amendment was a reasonable and good faith attempt to address genuine problems faced by record companies' concerns about possible threats to their ability to continue to exploit the sound recordings they have invested in and distributed.

I also believe that the amendment prospectively deprived performers of important rights that authors have always enjoyed. Termination rights are the reason people care whether a sound recording can be a work made for hire. The issue is whether performers, whose performances are recorded and distributed by record companies, should have a right to terminate their contracts 35 years after the sound recording is released.

The copyright law gives authors the right to terminate their grants of rights in their works after 35 years in furtherance of an important goal of copyright law to protect the author against unfavorable transfers by giving him the opportunity to renegotiate his contract if the work has been successful in order to obtain a greater share of the profits. This right has its origin in the longstanding concept of a renewal copyright term, which was replaced in 1978 with a right of termination.

Although most works are subject to rights of termination, works made for hire are not. Works made for hire historically have been works created by employees in the course of their employment. In such cases, the employer of the person who creates a work is deemed the author. Because the employer is the author in the eyes of the law, the person who actually created the work does not enjoy a right of termination.

Courts broadly construed the concept of employment for hire before 1978 and generally included commissioned works within that definition. The 1976 Revision Act substantially cut back on work made for hire by dividing the definition of such work into two prongs: those done by employees within the scope of their employment, and the second category, specially ordered or commission works, which could be works made for hire if the work falls within one of nine categories, which include among other categories, motion pictures, contributions to collective works, and compilations, but only if all the parties agree in writing that it is a work made for hire.

Although sound recordings were not among these nine categories, record companies and recording artists typically have signed agreements providing that they are works made for hire. Record companies and some recording artists have registered sound recordings

as works made for hire. One theory that record companies say they have relied on is that sound recordings are released in the form of albums and therefore qualify as works made for hire because they are contributions to collective works.

Despite this longstanding practice and despite the collective work rationale, the addition last year of sound recordings as a tenth category is a substantive change. I understand the reasons why record companies sought the amendment. If a sound recording is not a work made for hire, there will usually be a number of people who could be considered authors of any single sound recording. Each author would have a right to terminate the record company's rights after 35 years. This is a qualified right. Among other things, unless all the authors join in the termination, the record company can continue to exploit the work.

However, the terminating author would also have the right to license his rights to another record company. In that case, the first record company might lose all incentive to continue distributing the recording, since there would be another company who could also distribute the identical work.

While I don't oppose the amendment, per se, I am not persuaded that it achieves the appropriate balance. I believe that those who contribute substantial authorship to a sound recording should not be deprived of the right of termination. I agree that an unfettered termination right enjoyed by all performers and co-authors may well be unworkable and make many sound recordings unmarketable after 35 years. But a carefully calibrated termination right, restricted to the major contributors of authorship in a sound recording—such as featured artists and possibly the record producer—should have relatively little negative impact and would retain an important right that authors generally enjoy.

I therefore recommend that the subcommittee consider refining the recent amendment by excluding the contributions of these key contributors from work for hire status.

Thank you.

[The prepared statements of Ms. Peters follow.]

PREPARED STATEMENT OF HON. MARYBETH PETERS, REGISTER OF COPYRIGHT, COPYRIGHT OFFICE OF THE UNITED STATES, LIBRARY OF CONGRESS

Mr. Chairman and Members of the Subcommittee: I appreciate the opportunity to testify at this Oversight Hearing. My statement reviews our operations, major accomplishments and challenges.

The last two years have been very busy ones for the Copyright Office not only because of increased legislative mandates but also because of the changing nature of activity in certain areas of title 17. The adoption of new fees also increased the Office's work load. Despite the fact that its staffing levels remained about the same, the Office managed to make great strides in accomplishing these new responsibilities.

The Office responded aggressively to new Congressional directives including those contained in the Digital Millennium Copyright Act of 1998. This legislation, the most far reaching copyright bill in two decades, gave the Office new duties and responsibilities in the areas of liability limitations for infringement of copyright in a digital environment, for digital performance rights in sound recordings, and protection for vessel hull designs. In addition, the Office continued its role of advisor to Congress on national and international issues, and provided valuable and timely assistance to the United States Trade Representative and other executive branch agencies. The Office also continued to create and maintain the official public record of copyright registrations and recorded documents, administered the various compulsory licenses and statutory obligations, and provided technical, legal, and edu-

cational copyright assistance throughout the world. The Office took major steps forward in its systematic development and implementation of the CORDS system, a fully automated registration and deposit system, successfully implementing during the past year an innovative system-to-system communications capability for electronic submission of copyright claims and deposits for digital dissertations from the office's largest remitter. Additionally, the Office continued to make progress in providing a higher level of security for materials submitted for copyright registration.

In fiscal year 1999, the Copyright Office received approximately 619,022 claims to copyright representing over 800,000 work, of which 594,501 were registered. It recorded a total of 16,447 documents covering hundreds of thousands of titles. It forwarded more than 603,000 copies of works, with a value of more than $36 million dollars to the Library of Congress for its collections and exchange programs.

The Office processed 21,299 filings from cable operators, satellite carriers, and manufacturers and importers of digital audio recording devices and media, and processed claims to the various royalty pools. The Licensing Division collected a total of $214,888,724.96 in royalty fees (almost 85 percent in the form of electronic funds transfers through the automated Clearing House of a Fedwire transfer), and distributed royalties in the amount of $172,284,737.60,

When we last reported to you in 1998, we stated that we had lost ground in providing some essential copyright services, and observed that we had a significant arrearage with registration in some cases taking between six and eight months. We outline in part III of this statement what steps the Office is taking to reduce this arrearage.

Our focus this year is on:

1. Progress in fulfilling legislative directives;
2. Implementation of new fees;
3. Improving our service by providing more timely registration of claims and recordation of documents;
4. Making more information available to the public electronically;
5. Acquiring materials through mandatory deposit; and
6. Administration of compulsory licenses and CARP's.

I. PROGRESS IN FULFILLING LEGISLATIVE DIRECTIVES

During the period between October, 1998 and December 1999, Congress passed five bills, some of them addressing separate acts, concerning copyright. Several of these acts gave the Office major new responsibilities in developing and implementing new procedures and regulations and conducting studies or reports for Congress on critical and often controversial new and emerging areas of copyright law. The Office finds itself faced with new and challenging legal questions about webcasting, anticircumvention, and design protection for vessel hulls.

A. Overview of Certain Recently Enacted Legislation

Recently enacted legislation that has had a major impact on the Copyright Office's workload includes:

1. The Digital Millennium Act (DMCA).

The DMCA allowed the United States to ratify two new international treaties. It also confirms and clarifies the historic and vital role of the Copyright Office by affirming in statutory language the Copyright Office's longstanding role in copyright policy and international matters.

- Title I of the DCMA added a new chapter 12 to title 17 United States Code, which among other things prohibits circumvention of access control technologies employed by or on behalf of copyright owners to protect their works. Specifically, new subsection 1201(a)(1)(A) provides, inter alia, that "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." Subparagraph (B) limits this prohibition. It provides that anticircumvention "shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title" as determined in a rulemaking by the Librarian of Congress acting upon my recommendation. This prohibition on circumvention becomes effective two years after the date of enactment, on October 28, 2000.

- Title II of the DMCA limits certain online infringement liability for Internet service providers. Specifically, subsection 512(c) provides limitations on service provider liability with respect to material residing, at the direction of a user, on a system or network that the service provider controls or operates, if the conditions set forth in subsection 512(c)(1) are satisfied.
- Title V of the DMCA, establishes a new chapter 13 to title 17 which creates *sui generis* protection for certain original designs of vessel hulls and sets the terms, conditions, and limitations of design protection, including the rights granted to the designer or owner of the design, mandatory registration of designs with the Copyright Office, and enforcement of rights. Protection for registered vessel hull designs lasts for a period of ten years measured from the earlier of the date of registration with the Copyright Office or the date on which the design is first made public, and concludes at the end of the tenth calendar year. Unlike copyright law where registration is not a prerequisite to protection, registration of an otherwise eligible vessel hull design must be made with the Copyright Office within two years of the design being made public. Failure to make timely registration results in loss of protection. Notice must be attached to a protected design, and while failure to attach proper notice does not terminate protection, it does affect remedies in an infringement action.

2. The Sonny Bono Copyright Term Extension Act.

This Act extends the term of copyright for most works to the life of the author plus 70 years. It similarly extends for an additional 20 years the terms of anonymous and pseudonymous works, works made for hire, and works in their renewal terms.

- It addresses concerns of libraries and researchers about the unavailability, for 20 additional years, of works that are no longer commercially available. A new exemption allowing libraries and archives to use the works for preservation, scholarship, or research during the last 20 years of the copyright term is embodied in section 108(h) of the copyright law.
- This same legislation also contained the "Fairness in Music Licensing Act of 1998" which broadens existing exemptions to the public performance right in broadcast music (sec.110(5) of title 17, United States Code) for qualifying establishments, primarily restaurants, bars, and retail businesses depending on their square footage or total number and size of loudspeakers or audiovisual "devices," and provided the business does not charge the customer to listen to the broadcast.

B. New Procedures and Regulations.

The Copyright Office has aggressively undertaken these new responsibilities. Our progress is discussed more fully below and the status of each responsibility is illustrated on a separate chart.[1]

1. Anti-circumvention Rulemaking (Title I of DMCA)

The Librarian of Congress is required to make a determination as to whether or not particular classes of works are to be exempted from the anti-circumvention prohibition on access. This determination is to be made upon the recommendation of the Register of Copyrights in a rulemaking proceeding. The determination thus made will remain in effect during the succeeding three years. In making her recommendation, the Register of Copyrights is to consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on the Assistant Secretary's views. 17 U.S.C. § 1201(a)(1)(C).

The Office published a Notice of Inquiry seeking comments and held hearings early this month in Washington, D.C. and last week at Stanford University Law School in Palo Alto, California. Post hearing reply comment are due June 23, 2000. The Office will then evaluate and assess the evidence gathered.

2. Designation of Agent for Online Service Providers (Title II of the DMCA)

To take advantage of the Online Copyright Infringement Liability Limitation Act, service providers must designate agents whom copyright owners may notify if the owners believe their work is being infringed. The name and address of the agent must be filed with the Copyright Office and also posted on the service provider's website. Title II of the DMCA became effective on enactment; consequently, the Office had to act immediately. It published interim regulations on November 3, 1998,

[1] *See* App. I.

on an emergency basis, and stated that it would publish a Notice of Proposed Rulemaking at a later date. 63 Fed. Reg. 59233. In later meetings with the parties using the system, they indicated that the interim system was operating effectively, and the Office has continued to operate under these regulations. The Copyright Office maintains a list of the filings which are accessible on its website. As of May 12, 2000, approximately 2,121 agents had been designated.

3. Vessel Hull Design Protection (Title V of DMCA)

Shortly after passage of the DMCA, the Copyright Office began establishing the registration system for vessel hull designs. Recognizing the need for immediate implementation (because enforcement of rights under the new chapter 13 requires first obtaining a registration), the Office quickly took steps to establish a workable registration system. It established an internal task force to determine what needed to be done. The Office also consulted with representatives of the marine manufacturing industry, academics, and the Coast Guard. A new registration form, Form D–VH, to be used for all applications for registrations of vessel hull design was created and interim regulations were published on July 7, 1999. 64 Fed. Reg. 36,576 (1999). We received our first application for registration on July 29, 1999. So far the Office has received 23 design claims and registered 21. Most of the 23 were submitted after protection was made permanent on November 29, 1999.

4. Notice for Libraries and Archives (Copyright Extension Act)

While granting libraries and archives an exemption under § 108(h)(1), the law makes it clear that a library or archive may not use a work under this subsection if: (A) the work is subject to normal commercial exploitation; (B) a copy or phonorecord of the work can be obtained at a reasonable price; or (C) the copyright owner or its agent provides notice to the Copyright Office in accordance with Copyright Office regulations that either of the conditions set forth in (A) and (B) applies. The Copyright Office published interim regulations with requests for comments on December 30, 1998. 63 FR. 71785. Comments were due by February 15, 1999 and reply comments by April 1, 1999. The Office has not yet published final comments; no notice has been recorded under the interim regulation.

C. Completion of Reports Requested in DMCA

1. Report on Copyright and Digital Distance Education

The DMCA required the Copyright Office to prepare a report for Congress on the promotion of distance education through digital technologies, including interactive digital networks. To assist the Office in analyzing the relevant issues and in preparing its recommendations, on December 23, 1998, the Office requested comments from all interested parties, including representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives (63 FR 71167). In addition, a series of three public hearings were held in Washington, D.C. (January 26–27, 1999), Los Angeles, CA (February 10, 1999), and Chicago, IL (Feb 12, 1999). Over 175 individuals and interest groups responded in writing or in person at the hearings.

The Copyright Office released its report on "Copyright and Digital Distance Education" at a hearing of the Senate Judiciary Committee held on May 25, 1999. On June 24, 1999, this Subcommittee held its hearing on the report. The report is available on the Office's website and through the Government Printing Office.

The Office made several recommendations including: (1) that section 110(2) be updated to permit digital transmissions over computer networks; (2) elimination of the physical classroom requirement permitting transmissions to students officially enrolled in the course, regardless of their physical location; (3) adding language that focuses more clearly on the concept of mediated instruction; (4) adding safeguards to minimize the greater risks of uncontrolled copying and distribution posed by digital transmission; (5) retaining the current "nonprofit" requirement for education institutions seeking to invoke the exemption; (6) adding a new provision to the Copyright Act to allow digital distance education to take place asynchronously; and (7) expanding the categories of works exempted from the performance right beyond the current coverage of non-dramatic literary or musical works, adding other types of works but allowing performances of only reasonable and limited portions. The Office further recommended that Congress provide clarification of the fair use doctrine in legislative history to confirm that the doctrine applies in the digital environment, and to explain the function of fair use guidelines. No legislation has been introduced implementing the Office's recommendations.

2. Report on Effects of Encryption Research

The DMCA also required the Copyright Office and the National Telecommunications and Information Administration (NTIA) of the Department of Commerce to prepare a report for Congress on the effects on encryption research of section 1201(g) of title 17. Section 1201 establishes a prohibition on the act of circumventing technological measures that effectively control access to a copyrighted work. Subsection 1201(g) provides an exemption for this prohibition for certain acts of encryption research. The prohibition is scheduled to go into effect on October 28, 2000. The Office and NTIA solicited and received public comments. This joint report has been sent to Congress. It is now available on both the NTIA's and the Copyright Office's websites.

3. Report on Protection for the Designs of Vessel Hulls

The Office had been required to prepare a joint report with the Patent and Trademark Office evaluating the effects of the Vessel Hull Design Protection Act at one year and two year intervals after the effective date of this legislative. The Copyright Office had completed a draft of the first report which was being reviewed when Congress amended this Act on November 29, 1999, and rescinded the requirement. Under this amendment the Act is no longer set to expire in two years, and the Office is not to issue a report until November 1, 2003.

Report on Effects of Title I and Development of Electronic Commerce

Section 104 of the DMCA directs the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce to submit to the Congress no later than 24 months after the date of enactment a report evaluating the effects of the amendments made by title I of the Act and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code, and the relationship between existing and emerging technology and the operation of those sections.

A Notice of Inquiry initiating this study has been completed by the Office and the Department of Commerce and should be published in the Federal Register in the near future.

4. Conditions in Motion Picture Industry

The Comptroller General in consultation with the Register of Copyrights is to study the conditions in the motion picture industry that gave rise to § 4001 and the impact of § 4001 on the motion picture industry. GAO has begun its study. The Office has engaged in consultation with the GAO and expects that these consultations will continue.

D. Ongoing Legislative Concerns

In its exhaustive review of title 17 in order to update the Copyright Office's publication of this title in its Circular 92, the Office identified a number of areas where amendments, most purely technical, should be made. It has forwarded these amendments to the Senate and the House.

E. International Activities

1. *Ratification of two new international World Intellectual Property Organization (WIPO) treaties.* The DMCA allowed the United State to ratify both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Both of these treaties known as "the Internet Treaties," deal with significant digital issues. The Copyright assisted the Congress and the Executive Branch in the efforts necessary to implement and notify these treaties. The United States deposited its instruments of ratification with the World Intellectual Property Organization on September 14, 1999.

2. *Dispute brought in World Trade Organization.* Office staff provided technical assistance to the U.S. Trade Representative in the defense of a claim against the United States brought in the World Trade Organization by the European Union. The dispute concerned section 110(5)(a) and (b) of the U.S. Copyright Act, which the European Union alleged violated the U.S.'s international treaty obligations. Staff from the Copyright Office assisted in drafting the written submissions to the Dispute Settlement Body of the WTO, and participated in consultations and oral arguments before the Dispute Resolution Panel on behalf of the United States. In May of this year, the Panel issued a decision in the case, finding that section 110(5) subsection (a) of the U.S. Copyright Act was in compliance with all of the U.S. obligations, but that subsection (b) violated certain provisions of the TRIPs Agreement and the Berne Convention. The United States has two months from the date of formal publication of the decision (which has not yet occurred) to decide whether it will appeal the Panel's findings.

3. *Law Enforcement Coordination Council.* In September, 1999, President Clinton signed into law the Treasury/Postal Appropriations Bill, which created the "National Intellectual Property Law Enforcement Coordination Council ("NIPLECC"), which is comprised of executive branch law enforcement agencies, as well as the Department of Commerce's, International Trade Division, the Patent and Trademark Office, the U.S. Trade Representative and the State Department. It is chaired by the Patent and Trademark Office and the Justice Department. By statute, the NIPLECC is required to consult with the Register of Copyrights on law enforcement matters relating to copyrights and related matters. The Register and her staff have been involved at all levels of the NIPLECC's development, including discussing the appropriate scope of responsibility and action plan of the NIPLECC, drafting proposals and participating in meetings of the principals.

4. *Continued Effort to Advise and Train Others to Improve Copyright Protection.* The Office continued to participate in many international activities including the meeting of the Governing Bodies of the World Intellectual Property Organization and that organization's meetings of the Standing Committee on Copyright and Related Rights. In the Standing Committee discussion has focused on a new treaty for performers of audiovisual works (screen actors) and on potential new treaties for broadcasters and for producers of databases. Additionally, the Office assisted the United States Trade Representative in its many bilateral and multilateral activities.

The Office continued its program of international development cooperation through its International Copyright Institute, by meeting with many foreign delegations and high level officials and by participating in many programs on copyright and related rights held in countries all over the world.

The International Copyright Institute and the World Intellectual Property Organization's Worldwide Academy jointly hosted a "Worldwide Seminar on Copyright and Related Rights" in Washington, D.C. for participants from fifteen countries during the week of March 17–24, 1999. The objectives of the program were to discuss current and future copyright protection and to exchange experiences among the participants and U.S. experts. In particular the seminar focused on the new WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, and the impact of new technology on the protection and enforcement of copyrights. Experts from both government and the private sector presented a series of talks on United States copyright law and practice. In addition, participants presented reports on the state of intellectual property protection in their countries.

The Office participated in WIPO seminars in Kazakhstan, Kyrgyzstan, Namibia, Australia, and in New Delhi, Calcutta and Hyderabad, India; and in USAID and Department of Commerce programs in Kyrgyzstan and Egypt.

The Office was also represented at the meeting of the Global Business Dialogue in Paris where the Register commented on the Intellectual Property Draft Paper and at the WIPO International Conference on Electronic Commerce and Intellectual Property and at MIDEM.

II. IMPLEMENTATION OF NEW COPYRIGHT OFFICE FEES AND THEIR IMPACT ON THE OFFICE

A. Implementation of New Fees

In July, 1997, anticipating enactment of a new fee system, the Copyright Office began the process of determining the costs of registering claims, recording documents and providing related services. It hired two consulting firms with expertise in cost accounting and the new Federal Managerial Coast Accounting Standards and established a Copyright Office Fee Analysis Task Group.

As enacted by Congress, the new fee provisions contained specific directions as to how the Copyright Office should adjust its fees. They were:

1. The Register shall conduct a study of the costs incurred by the Copyright Office for the registration of claims, the recordation of documents, and the provision of services. This study should also consider the timing of any increase in fees and the authority to use such fees consistent with the budget.
2. On the basis of the study, and subject to congressional approval, the Register is authorized to fix fees to recover reasonable costs incurred for the services provided plus a reasonable adjustment for inflation.
3. The fees should also be fair and equitable and give due consideration to the objectives of the copyright system.
4. The Register must then submit a proposed fee schedule with the accompanying economic analysis to Congress for its approval. The Register may institute the new fees 120 days after the schedule is submitted to Congress un-

less Congress enacts a law within the 120 day period stating that it does not approve the schedule.

The Office contacted representatives of interested parties to invite them to discuss the forthcoming fee increases and identify their members' concerns. A number met with the Register; others submitted comments. The Office published a Notice of Proposed Rulemaking (NOPR) with two or more possible fee schedules and formally sought public input through a public hearing held on October 1, 1998, and a comment period. After considering the studies, the operational and policy issues and the input from the public, on February 1, 1999, the Register sent Congress a detailed analysis and proposed fee schedule. This report explained why careful evaluation of all relevant data led the Office to conclude that the basic registration fee could not be set to recover the full cost of registering a work, if it is to be reasonable, fair, and equitable and consider the objectives of the copyright system. It recommended recovery of Copyright Office costs for most other services. After receiving the report, Congress had 120 days to enact legislation rejecting the proposal, or the fees could go into effect. No such legislation was enacted; therefore, the Office published a new fee schedule on June 1, 1999, which went into effect July 1, 1999.[2] The Office announced that this fee schedule would remain in effect for at least three years.

B. Operational Impact of the New Fee Schedule

As detailed fully in the Office's Annual Report for 1999, the Office made significant efforts to inform the public of the fee change. Despite these efforts, 90 percent of the cash receipts received in the first week after the new fees went into effect contained insufficient funds. This percentage was reduced to about 50 percent by the end of the fiscal year. Currently, almost a year after the new fees went into effect, almost 15 percent of cash receipts are still insufficient.

C. Relationship to Copyright Office Appropriation.

The Copyright Office collects fees for registration of copyright, recordation of documents and other services. Since fiscal year 1998 the Office has used its authority to earn interest on its Deposit Accounts(prepaid fees), which is deposited into a no year account. These funds are available to fund authorized activities within the level of appropriation. Effective July 1, 1999, the Office increased the cost of filing a basic registration from $20 to $30.

In fiscal year 1999, the Office collected $16,699,846 in copyright fees. The fees earned by the Copyright Office are deposited in a Copyright Office account in the U.S. Treasury. Earned fees are included when determining the level of appropriations for the Copyright Office. In fiscal year 1999, the Copyright Office received $34,891,000 in direct appropriations and authority to spend receipts. For fiscal year 2000 this level is $37,485,014. This appropriation supports 478 permanent staff and 23 temporary employees.

III. IMPROVING OUR SERVICE BY PROVIDING MORE TIMELY REGISTRATION OF CLAIMS AND RECORDATION OF DOCUMENTS.

As noted above, the Copyright Office continues to experience serious processing arrearages, particularly in the Examining and Cataloging Divisions. The Office has developed and initiated a plan to streamline its registration and recordation processes through business process re-engineering. Further development of the Copyright Office Electronic Registration, Recordation and Deposit System (CORDS) will also help. In the short term, the Office has used overtime and hiring of temporaries to reduce arrearages in its examining and cataloguing divisions in order to expedite the registration of copyright claims and recordation of transfers and other documents pertaining to copyright. More importantly it is in the process of hiring new permanent staff in those areas. Such action is critical to further reduction.

A. Business Process Re-engineering of Copyright Office Registration and Recordation Processes

In fiscal year 2000, the Copyright Office initiated plans to re-engineer its processes. Authors, other copyright owners, users of copyrighted works, copyright industries, libraries, and members of the public rely on the Office's records of registered claims in copyrighted works and recorded documents concerning ownership of works. The value of the records is greatest when up-to-date information on new works is available to the public in a timely manner. Copyright owners also need timely issuance of certificates.

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[2] A chart showing new fees for basic services in comparison with the old fees is attached as App. II. All current fees can be found in our regulations. 37 CFR § 201.3 (1999).

Re-engineering will accomplish the following objectives:

- Improve operations and service to achieve better processing times and create timely public records;
- Improve response times to requests from the public;
- Enhance operational efficiency through use of new technologies;
- Contain costs of registration, recordation and other services;
- Strengthen security within the Copyright Office; and
- Use staff and space more efficiently.

The Copyright Office prepared a Request For Quote (RFQ), received bids, convened an evaluation panel to rate them, and made a selection which has been submitted to the Library's Office of Contracts and Logistics for negotiation. The firm that is selected will provide for the Office a project plan, a baseline of existing operations, an analysis of current workflow, alternative plans for re-engineering of business processes, an implementation plan for the process selected by the Office, and procedures manuals. A Project Manager, who is an expert in Copyright Office procedures, will be responsible for working with the contractor, Copyright Office managers, staff and labor organizations during the study to coordinate the day-to-day implementation of the agreed-upon changes.

B. Further Development of CORDS

There was noteworthy progress in the Office's major automation initiative, CORDS, which enables electronic copyright registration and deposit of works in digital form. The CORDS system facilitates copyright registration and deposit process for online works by copyright claimants, helps the Copyright Office streamline its internal registration processes, improves efficiency, through-put time and internal security, and will provide the Library of Congress with new copyrighted works in electronic form for its digital collections. Almost 15,000 claims were received and processed electronically through CORDS during calendar year 1999. They were received from CORDS test partners: the University of Phoenix (study guides), American Geophysical Union, American Mathematical Society, and MIT Press/Journals Division (Ejournals), Adobe Systems (computer programs) and American National Standards Institute (standards).

CORDS testing and implementation during the year focused on successful establishment of system-to-system communications with the Office's largest copyright remitter—UMI Company (recently renamed Bell and Howell Information and Learning corporation)—for electronic receipt and processing of claims for digital dissertations. This was a significant CORDS milestone; there was fully automated processing—both front-end preparation by claimants and full back-end electronic processing by the Copyright Office, with complex interfaces to six other major systems. In 1999, the Corporation for National Research Initiatives (CNRI) continued its research and development work on CORDS with support from the Copyright Office and DARPA (Defense Advanced Research Projects Agency) which funds a small part of the associated research to evaluate and refine the architectural components that can be applied to digital libraries and any registry system. In January of 1999, a three-year Extension of the Memorandum of Agreement with DARPA was approved for continued CORDS research and development work by CNRI during 1999–2001.

In the year 2000, the Copyright Office is initiating another major CORDS partnership with the Harry Fox Agency, a subsidiary of the National Music Publishers Association, for electronic claims and deposits of musical works on behalf of music publishers. Other CORDS partnerships are being planned and developed as well.

The Office is continuing to develop "Mixed CORDS," for receipt of electronic claims with hard copy deposit; more than two dozen potential test partners are eagerly awaiting test implementation of Mixed CORDS which is scheduled for later this year.

IV. IMPROVING COMMUNICATION TO THE PUBLIC

A. Overview

In fiscal year 1999, Copyright Office staff handled over 426,800 requests for information. The Office is continuing to implement a number of improvements to enhance public service including making more information available electronically. These improvements move the Office forward to a future that will permit instant access to its records and informational material and reduce distribution of paper copies. The Office also increased its acceptance of Electronic Fund Transfers.

A good example of the Office's electronic communication is seen in the way the Licensing Division and the General Counsel's Office responded to inquiries regard-

ing various aspects of the Satellite Home Viewer Act in anticipation of satellite carriers "shutting off" satellite service of network stations to subscribers as a result of an injunction. The federal order required satellite carriers to drop certain network signals received by nearly 1.5 million subscriber by October 8, 1998.[3]

A "hotline" for callers was established to obtain a copy of the Copyright Office's Satellite Network Television factsheet. The factsheet was made available via the internet, FAX-on-demand, or by mail. This approach provided immediate information to the public, utilized staff in an efficient and effective manner, and was widely publicized in trade publications. A similar method was used upon passage of the Satellite Carrier Improvement Act.

B. Improvement in Communication with the Public

1. *Website.* The Copyright Office's website played an increasingly important role in the dissemination of information to the copyright community and the general public. During the year, the website was redesigned to enable faster and easier information retrieval by users. Selected as one of the nation's top websites by *PCNovice/Smart Computing* magazine, the website had over 5.6 million hits during the year, almost a threefold increase over the prior year.

The website continued to expand and provide the public with electronic access to all publications. A major improvement is the providing of all the application forms electronically as a fill-in version to enable the public to complete their applications directly on their PC terminals. More records were made available electronically to the public with the inclusion of the Vessel Hull Design registrations and the Online Service Providers directory of designated agents. In an effort to provide wider public participation in and dissemination of Copyright Office studies and rule makings, the Office solicited and posted comments from the public on the website for public viewing, as well as find studies and regulation, e.g., the distant education study, and the rule making on exemptions from prohibition on circumvention of technological measures that control access to copyrighted works. The Office is also posting streaming audios of its public hearing in the anti-circumvention rulemaking, pursuant to 17 U.S.C. § 1201(a)(1).

2. *NewsNet.* In November of 1997, the Office developed *NewsNet*, an electronic publication, distributed via the Internet. *NewsNet* issues periodic e-mail messages to alert subscribers to hearings, deadlines for comments, new and proposed regulations, new publications and other copyright-related subjects of interest. The Office has a solid readership of over 4,000 subscribers to NewsNet, and it published 41 issues in fiscal year 1999.

3. *E-mail.* E-mail information requests increased by 25 percent over the last fiscal year to [10,405.] In addition to the Public Information Office, the Licensing Division and two additional offices that deal directly with the public, the Reference and Bibliography Section and the Certifications and Documents Section of the Information and Reference Division began responding to public e-mail inquiries.

4. *Fax on demand.* Through its automated Fax-on-demand system the Copyright Office continues to provide to the public via fax copies of various Copyright Office publications, with over 4,500 requests annually.

5. *Circular 92.* In April the Office published a revision of circular 92, "Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code." With this revision, circular 92 is now a completed up to date edition of all of title 17. It is available online at the Copyright Office's website and in print through the Government Printing Office.

V. ACQUIRING MATERIALS RECEIVED THROUGH MANDATORY DEPOSIT

The Copyright Office is a service unit within the Library of Congress and works with the Library in fulfilling the Library's mission of service to Congress and the American people. The Copyright Acquisition Division (CAD) staff works very closely with the service units of the Library to acquire copyrighted materials that have not been deposited through voluntary registration through the mandatory deposit requirement, 17 U.S.C. § 407. Section 407 is an invaluable avenue for the Library to acquire needed and often expensive resources. CAD librarians communicate with more than 100 Recommending Officers to identify those works to be acquired via the mandatory deposit requirement.

During fiscal year 1999, the Copyright Office transferred to the Library an additional 349,713 pieces with an estimated value of $6,097,550, received from publishers under the mandatory deposit provisions of the Copyright Act.

[3] This was later extended to January 1, 1999.

VI. OVERSEEING THE COMPULSORY LICENSES AND CARP PROCEEDINGS

A. Rate Adjustments

The Copyright Office continues to be involved with the administration of seven CARP proceedings. Three of the seven proceedings involve setting rates and terms for the cable compulsory license, 17 U.S.C. 111; the mechanical license, 17 U.S.C. 115; the digital performance right in sound recordings license, 17 U.S.C. 114, and the ephemeral recording license, 17 U.S.C. 112. The other three proceedings deal with the distribution of royalty fees collected in accordance with the Satellite Home Viewer Act of 1994, 17 U.S.C. 119, the Audio Home Recording Act of 1992, 17 U.S.C. chap. 10, and the cable compulsory license, 17 U.S.C. 111.

The proceeding to set rates for digital phonorecord deliveries (DPDs) and "incidental" DPDs under section 115 began in 1996 with the announcement of the voluntary negotiation period. With the assistance of the Office, certain parties with an interest in setting these rates reached a settlement agreement setting the rates and terms for DPDs but deferred until the next scheduled proceeding further consideration of the rate for an incidental DPD. On February 9, 1999, the parties' rates and terms were adopted in final regulations after the required notice and comment proceeding. The rates and terms announced on February 9, 1999, are effective through December 31, 2000.

On July 20, 1999, the Office announced the voluntary negotiation period for the next proceeding to adjust the rates and terms for the digital component of the section 115 license. The negotiation period ran from the date of publication of the announcement in the *Federal Register* to December 31, 1999. On January 24, 2000, Capital Bridge Co. Ltd. filed with the Copyright Office a petition to convene a CARP to set new rates and terms for DPDs and incidental DPDs. Later this year, the Copyright Office will publish a notice in the *Federal Register* seeking comment on whether Capital Bridge Co. Ltd. qualifies as a party with a significant interest in setting the applicable rates and terms and requiring all interested parties to file their notice of intention to participate in a rate adjustment proceeding.

The Copyright Office has also begun another rate adjustment proceeding to establish rates and terms for the public performance of sound recordings by means of eligible nonsubscription transmissions (the section 114 license as amended by the Digital Millennium Copyright Act) and the making of ephemeral recordings in furtherance of the permitted public performance of sound recordings (the section 112 license) for the period 1998–2000. The Copyright Office announced the six-month voluntary negotiation periods associated with these licenses on November 27, 1998. The voluntary negotiation period concluded with no proposed settlement being filed with the Copyright Office.

Consequently, the Office announced the schedule for the arbitration proceeding to set the rates and terms for these two statutory licenses on September 27, 1999. The Office vacated the schedule announced in the *Federal Register* at the request of the parties in order to allow more time to negotiate a settlement.

The Office was about to announce the schedule for the CARP proceedings to set rates and terms for the 1998–2000 time period when, on March 1, 2000, the Recording Industry Association of America (RIAA) filed a petition for rulemaking with the Office asking that the Office determine the scope of the section 114(d)(1)(A) exemptions; specifically, asking the Office to adopt a rule "clarifying that a broadcaster's transmissions of its AM or FM radio station over the Internet . . . is not exempt from copyright liability under section 114(d)(1)(A)." In response, the Office published a Notice of Proposed Rulemaking in the *Federal Register* on March 16, 2000, requiring initial comments to be filed by April 17, 2000, and reply comments to be filed by May 1, 2000. The Office has decided to defer setting a schedule for the current CARP proceeding and to defer ruling on the motion to consolidate until the rulemaking proceeding has been completed, probably within the next several weeks. On May 23, 2000, the Office published a Notice of Inquiry in response to a petition filed by the Digital Media Association seeking clarification of the exclusion of "interactive services" from the section 114 compulsory license.

Pursuant to 17 U.S.C. §§ 112(e)(7), 114(f)(2)(C)(i)(II), the Office announced the initiation of the voluntary negotiation period for determining reasonable rates and terms for the amended section 114 and section 112 licenses for the time period 2001–2002. The negotiation period began on January 13, 2000. If the parties are unable to reach a settlement, any party with a significant interest in establishing reasonable terms and rates for these licenses may file with the Office, during a sixty-day period beginning on July 1, 2000, a petition to initiate a CARP.

In January 2000, the Joint Sports Claimants and the Program Suppliers filed petitions asking the Office to commence a cable rate adjustment proceeding. On February 28, 2000, the Office published a notice in the *Federal Register* seeking com-

ment on the two petitions and requesting that all interested parties file a notice of intent to participate in the rate adjustment proceeding. Several parties filed such notices on April 6, 2000. Later this year, the Office will set a schedule for the proceeding.

Distribution Proceedings

The Office also administered various phases of three different CARP proceedings to determine the distribution of the royalty fees: 1) the distribution of the 1992, 1993, 1994, and 1995 satellite royalty fees, Docket No. 97–1 CARP SD 92–95(a); 2) the distribution of the 1995, 1996, 1997, and 1998 royalty fees collected for the distribution of digital audio recording technology, Docket No. 98–3 CARP DD 95–98(b); and 3) the distribution of the 1993, 1994, 1995, 1996, and 1997 cable royalty fees. The specific distribution figures are as follows:

1. *Satellite*

100% of the 1992–1995 satellite royalties, totalling $71,478,402.00 has been distributed.

2. *DART*

(a) Sound Recording Fund:

100% of the 1995–1997 DART Sound Recording royalties, totalling $777,866.00, has been distributed.

98% of the 1998 DART Sound Recording royalties, totalling $922,984.00, has been distributed.

(b) Musical Works Fund:

21% of the 1995 DART Musical Works royalties, totalling $26,297.00, has been distributed.

100% of the 1996 DART Musical Works royalties, totalling $220,587.00, has been distributed.

43% of the 1997 DART Musical Works royalties, totalling $92,697.00, has been distributed.

84% of the 1998 DART Musical Works royalties, totalling $453,395.00, has been distributed.

(3) *Cable*

100% of the 1993–1996 cable royalties, totalling $756,605,110.00 has been distributed.

82% of the 1997 cable royalties, totalling $158,912,749.00 has been distributed.

CONCLUSION

There is much work going on at the Office. We have a talented and dedicated staff, whose efforts I sincerely appreciate. I and the entire Copyright Office deeply appreciate the tremendous support received from members of this Subcommittee, and your exceptional staff. Without you, our tasks would be much more difficult. Thank you for all of your assistance. We look forward to working with you on the many important copyright issues the Congress is addressing.

APPENDIX I

Status of Tasks to be Performed by the Copyright Office Under the Digital Millennium Copyright Act and the Sonny Bono Term Extension Act

Section DMCA	Task	Statutory Responsibility	Status
103 (17 USC 201(a)(1))	Rulemaking on exemption to prohibition on circumvention of access control technologies	Librarian of Congress on recommendation of the Register of Copyrights in consultation with the Assistant Secretary of Commerce for Communications and Information	Ongoing. Hearings held and comments received. Post Hearing comments due June 23

Status of Tasks to be Performed by the Copyright Office Under the Digital Millennium Copyright Act and the Sonny Bono Term Extension Act—Continued

Section DMCA	Task	Statutory Responsibility	Status
103 (17 USC 1201(g)(5))	Study on encryption research (effect of 1201(g) exemption)	Copyright Office and NTIA, jointly	Forwarded to Congress May, 2000.
104	Study on the effects of Title I of the DMCA and the development of electronic commerce and associated technology on the operation of §§ 109 and 117; relationship between existing and emergent technology and the operation of §§ 109 and 117	Copyright Office and NTIA, jointly	Notice of Inquiry completed. Publication pending.
202 (17 USC 512(c)(2))	Prepare regulations and maintain current directory of designated agents for online service providers; set fee	Copyright Office	Interim Regulations published on November 3, 1998. Directory being maintained.
403	Study on distance education.	Copyright Office	Report issued May 1999.
405(a)	Revise regulations (37 CFR part 260) with respect to notice and recordkeeping and initiation of CARP proceedings regarding the use of sound recordings in digital transmissions under the DPRA compulsory license	Copyright Office	Interim regulations published June 24, 1998. Interim regulations amended on September 20, 1999.
405(a) (17 USC 114(f)(2)(A))	Publish Federal Register notice of initiation of voluntary negotiation proceedings to set royalty rates for eligible nonsubscription transmissions under DPRA compulsory license	Copyright Office	Notice of initiation of voluntary negotiation period for rates/terms for 1998–2000 published Nov. 27, 1998. Notice of initiation of voluntary negotiation period for 2001–2002 published January 13, 2000.
405(b) (17 USC 112(e))	Issue new regulations regarding the new statutory license for ephemeral recordings	Copyright Office	Notices of Intent to Participate filed in November 1999. Proceeding currently stayed pending resolution of rulemaking proceedings regarding definition of a "service" for purposes of statutory license governing public performance of sound recordings by means of digital audio transmissions.
405(b) (17 USC 112(e))	Publish Federal Register notice of initiation of voluntary negotiation proceedings under the new statutory license for ephemeral recordings	Copyright Office	Notice of initiation of voluntary for negotiation period for rates/terms for 1998–2000 published November 27, 1998. Notice of initiation of voluntary for negotiation period for rates/terms for 2001–2002 published January 13, 2000.

Status of Tasks to be Performed by the Copyright Office Under the Digital Millennium Copyright Act and the Sonny Bono Term Extension Act—Continued

Section DMCA	Task	Statutory Responsibility	Status
406 (28 USC 4001(h))	Study on the conditions in motion picture industry that gave rise to § 4001 and impact of § 4001 on motion picture industry	Comptroller General, in consultation with Register of Copyrights	GAO initiated and has consulted with the Register.
502 (17 USC 1317	Issue new regulations regarding registration of vessel hull designs, cancellation proceedings, and recordation of instruments of transfer; set fees	Copyright Office	Interim regulations implementing a new system with a new application form published July 7, 1999. Notice of Inquiry on cancellation. published July 8, 1999.
504	Evaluation of the effects of the Vessel Hull Design Protection Act	Copyright Office and PTO, jointly	Initial report, due October 28, 1999, completed but requirement rescinded. Report now due November 1, 2003.
108(h)	Sonny Bono Copyright Term Extension Act	Copyright Office to issue regulations	Interim Regulations published on December 30, 1998.

APPENDIX II

Comparison of New and Old Fees for Basic Registration and Recordation Services

Service	New Fee	Old Fee
(1) Basic registrations: Form TX, Form VA, Form PA, Form SE, (including Short Forms), and Form SR	$30	$20
(2) Registration of a claim in a group of contribution to periodicals (GR/CP)	$30	$20
(3) Registration of a renewal claim (Form RE) • Claim without Addendum • Addendum	 $45 $15	 $20 —
(4) Registration of a claim in a Mask Work	$75	$20
(5) Registration of a claim in a group of serials (Form SE/Group) $30 minimum.	$10 per issue	(Min. was $20)
(6) Registration of a claim in a group of daily newspapers, and qualified newsletters (Form G/DN)	$55	$40
(7) Registration of a restored copyright (Form GATT)	$30	$30
(8) Registration of a claim in a group of restored works (Form GATT Group) $30 minimum	$10 per claim	(Min. was $20)
(9) Registration of a correction or amplification to a claim (Form CA)	$65	$20
(10) Providing an additional certificate of registration	$25	$ 8
(11) Any other certification, per hour	$65	$20
(12) Search—report prepared from official records, per hour	$65	$20
(13) Search—locating Copyright Office records, per hour	$65	$20

Comparison of New and Old Fees for Basic Registration and Recordation Services—Continued

Service	New Fee	Old Fee
(14) Recordation of documents (single title)	$50	$20
• Additional titles (per group of 10 titles)	$15	$10

ADDITIONAL STATEMENT

Mr. Chairman, members of the Subcommittee, I am pleased to testify today on the issue of sound recordings as works made for hire, and I commend the Subcommittee for holding this hearing and providing those most interested in this contentious issue the opportunity to present their views.

Late last year, an amendment incorporated into the Satellite Home Viewer Improvement Act of 1999, enacted as part of Pub. L. No. 106–113, 113 Stat. 1501 (1999), added sound recordings to the list of commissioned works that may be considered works made for hire. Performers are concerned about this change because a grant of rights may be terminated by an author at a time specified in the Copyright Act *unless* the author's contribution is considered a work made for hire. Before the stated date of termination, the author or performer can renegotiate for a better deal with his original record company, or upon termination he can make a new deal with a new record company. Performers argue that their contributions to a sound recording, when made as a result of a contract as opposed to an employment relationship with a record company, should not be considered works made for hire. The record industry believes that the amendment simply clarifies what was existing law, and confirms that a record company will not be held hostage by one of many performers or others who may be joint authors of a sound recording, who may terminate his or her rights even though all of the other contributors have no desire to terminate.

What I would like to do today is to provide the Subcommittee with the historical and legal context relevant to the recent amendment and to offer my evaluation of the merits of the amendment. In order to understand the significance of the amendment, it is necessary to understand the nature, purpose and history of the concept of works made for hire, the author's right to terminate transfers of rights in copyrighted works, copyright protection for sound recordings, and some other important copyright law doctrines. It is also necessary to understand developments in the recording industry over the past few decades.

It is understandable why the recording industry desired the enactment of this amendment. The amendment was designed to address the prospect that the rights of record companies to continue to exploit many popular sound recordings would be in doubt—and indeed, that it would be unclear who would have the right to exploit those sound recordings. However, for reasons that I will discuss later, this was a substantive amendment to the law, not a technical amendment as some have claimed. I believe that on reflection it is also apparent that the solution offered by the recent amendment was an imperfect one, and that Congress should consider further amendments that would create the proper balance of rights among record companies, performers and others involved in the creation of recorded musical performances. In the 20th Century, there have been two comprehensive revisions of the copyright law. The first revision, the Copyright Act of 1909, was in effect from 1909 through 1977. The second revision, the Copyright Act of 1976, went into effect in 1978 and made many fundamental changes in copyright law. The 1976 Copyright Act has been amended many times and remains in effect today.

The revision process that led to the enactment of the 1976 Copyright Act spanned many years, beginning in 1955 with studies by the Copyright Office. To understand the status of sound recordings in the 1976 Act, it is necessary to review the history of that revision process. But first, one must understand certain principles of law that were in effect during the era of the 1909 Act.

Sound Recordings as Copyrightable Subject Matter

Under the 1909 Copyright Act, sound recordings were not protected under the federal copyright law. They were protected, if at all, under state law. In the revision process that led up to the 1976 Act, the status of sound recordings was the subject of much discussion. As early as 1961, the Register of Copyrights recommended that sound recordings "be protected against unauthorized duplication under copyright principles."[1] This topic was controversial, and sound recordings were not included

[1] *Copyright Law Revision Part 1: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, House Comm. on the Judiciary, 87th Cong., 18 (Comm. Print, 1961).

in the 1963 preliminary draft. However, they were included as copyrightable subject matter in the 1964 revision bill.[2] Congress, although reluctant to carve out any portion of the general revision bill which would eventually result in the 1976 Act, responded to the increasingly urgent complaints made by the recording industry regarding widespread record and tape piracy. A bill extending limited copyright protection to sound recordings was passed by Congress and signed into law on October 15, 1971.[3] It took effect four months later on February 15, 1972.

It is important to note that the 1971 Act did not fix the beneficiaries of protection in sound recordings. The legislative history states:

> The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, etc.) where only the record producer's contribution is copyrightable. As in the case of motion pictures, the bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.[4]

Works Made for Hire

The work made for hire doctrine provides that under certain circumstances, the law will deem the employer of the person or persons who actually created a work to be the "author" of the work. The consequence of the work made for hire doctrine was and is that the employer can exercise all the rights of ownership of the work and avoid the consequences of other provisions of copyright law that have permitted the persons who actually created the work to recapture those rights. I will discuss those other provisions in a moment.

The 1909 Copyright Act stated that "the word 'author' shall include an employer in the case of works made for hire."[5] The Act did not expressly address commissioned works, which left a broad scope for interpretation. In the cases regarding commissioned works decided under the 1909 Act, rights were generally held to vest with the hiring party.[6]

The 1976 Act, however, made a clear distinction between works prepared by employees in the course of their employment and works prepared on commission, a distinction that is still maintained today. Works prepared by employees in the course of their employment are categorized as works made for hire, with authorship, and thus ownership as well, recognized in the employer. In contrast, commissioned works can only be considered works made for hire if they fall within certain specified categories, and even then, only if the person commissioning the work and the person or persons accepting the commission agree in writing that the work to be created will be considered a work made for hire.

In the 1976 Act, the types of commissioned works which may be considered works made for hire under section 101 were limited to: a contribution to a collective work, a part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, and an atlas. The first four categories were agreed upon in 1965, early in the copyright law revision process. Compilations, instructional texts, tests, and atlases were added by the House Committee on the Judiciary in 1966.[7] "Answer material for a test" was added upon the enactment of the 1976 Act. I will discuss how the 1976 Act's approach to works made for hire came about in a few moments.

The Termination Right

The Copyright Act permits an author to transfer any or all of his exclusive rights. Typically an author would do so in return for financial compensation—perhaps a

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[2] *Copyright Law Revision Part 5: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1964 Revision Bill*, House Comm. On the Judiciary, 89th Cong., 7 (Comm. Print, 1965).

[3] Pub. Law. No. 92–140, 85 Stat. 391; *see Omnibus Copyright Revision: Comparative Analysis of the Issues* 64–65 (Arthur B. Hanson, ed.) (1973).

[4] H.R. Rep. No. 92–487, at 5 (1971); S. Rep. No. 92–72, at 5 (1971).

[5] Act of March 4, 1909, ch. 319, 35 Stat. 1075 (codified in 1947 as 17 U.S.C. §26; repealed 1978).

[6] *See* Melville B. Nimmer and David Nimmer, *Nimmer on Copyright*, §5.03[B][2][c].

[7] H.R. Rep. No. 89–2237, at 116 (1966).

single payment or a continuing royalty. As a protection to authors, the law requires that the transfer be made by means of a signed written conveyance.

Under the 1909 Act, copyrights could be renewed, after 28 years, for a further 28 years, resulting in a total of 56 years of protection for works whose copyrights were renewed. An important feature of renewal was that even if an author had assigned all of his rights to a publisher or a record company or somebody else during the first term, by operation of law the author reacquired those rights at the beginning of the renewal term. Case law qualified this right to recapture the copyright in some circumstances, but as a general proposition the renewal copyright belonged to the original author or his heirs as specified in the copyright statute.

Renewal copyright served an important goal of copyright law: to protect the author against unfavorable transfers by giving the author of a work the opportunity to renegotiate his contract and enjoy the fruits of his creative labors. An unknown author might sell a publisher all the rights in what might become the Great American Novel for a pittance; the renewal term provided him with the opportunity to renegotiate those rights and obtain a greater share in the success of the work. Most works were not renewed presumably because they had not increased in value during the 28 year first term of copyright or they were no longer being commercially exploited; however, for those works that did increase in value or still had commercial viability, the author or more frequently his widow and/or children did use their second chance to share in the increased value of the work.

Although the general rule was that the author was entitled to renew the copyright, there were some exceptions. The most important exception was for works made for hire. The renewal copyright in a work made for hire belonged not to the person who created that work, but to the proprietor of the copyright at the end of the first term, who would be either the original employer or someone who had obtained the copyright from the employer.

The 1976 revision of the copyright law abandoned the two-term copyright for all works created in 1978 and thereafter, and adopted a single term running for the life of the author plus fifty years. In the case of a work made for hire, which was not deemed to have a natural author, the term was 75 years from the year of the work's first publication or 100 years from the year of its creation, whichever expired first. In 1998, these terms were extended by an additional 20 years.

In abandoning the renewal copyright, Congress did not intend to deprive authors of the right they had always had to recapture their rights years after their works were originally exploited. In place of the author's right to renew the copyright after 28 years, Congress gave the author (or his widow and children) the right to terminate grants of copyrights made by the author and reclaim those rights at certain points in the life of the copyright. These termination rights can arise in two contexts.

Section 203 of the 1976 Copyright Act provides that a grant of a transfer or license of a copyright that was made by an author in or after 1978 may be terminated by that author (or his widow and/or children) after 35 years (or up to 40 years in certain circumstances.). This ability of an author to terminate his grant of rights is critical to the scope of his protection under the Copyright Act. The legislative history of the 1976 Act recognized the importance of the termination right to all authors:

> The provisions of section 203 are based on the premise that the reversionary provisions of the present section on copyright renewal should be eliminated, and that the proposed law should substitute for them a provision safeguarding authors against unremunerative transfers. A provision of this sort 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.[8]

With certain exceptions, section 203 provides that transfers executed on or after January 1, 1978 may be terminated 35 years after the date of the grant. Authors must give notice of their intent to terminate not less than two or more than ten years from the intended termination date. Termination of grants made in 1978 could begin, therefore, in 2013, with notices first served in 2003.[9] An author has a five-year window from the end of the 35-year period of the grant in which to exercise

[8] H.R. Rep. No. 94–1476, at 124 (1976).

[9] It should be noted that the provisions of section 203 do not affect the ability of the parties to terminate a contract before the 35-year grant period has expired. Any new grant of rights by an author would trigger a new termination right.

his termination right.[10] If he fails to do so, all the rights covered under the existing grant will continue for the term of the copyright.

A second termination right, set forth in section 304, applies to transfers executed before January 1, 1978. The 1976 Copyright Act extended the copyright term for pre-1978 works by 19 years. Congress decided that the beneficiary of that 19-year extension should be the author, rather than the assignee of rights in a work. Congress accomplished this by giving the author (or his heirs as specified in the statute) a right to terminate a pre-1978 transfer of the renewal copyright effective at any time within a five-year period commencing fifty-six years after the copyright had been secured. The author must give notice of his intent to terminate between two and ten years before the effective date of termination. Because sound recordings were first eligible for copyright protection in 1972, the first date terminations under this provision could be effective will be in the year 2028, and the first notices of such terminations can be served in 2018.[11]

Joint Authorship

Typically, a commercial sound recording will be a work of joint authorship by a number of contributors. Section 101 of the Copyright Act defines a joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." Section 201, on ownership of copyright, states that "authors of a joint work are co-owners of copyright in the work." Legislative history elaborates: "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."[12]

Although joint owners of a copyright may independently and concurrently license any of their rights in the work, such licences are necessarily nonexclusive unless all of the joint owners join in the grant. Thus, in the absence of contractual restrictions, each of the joint authors of a sound recording could grant a different record company the right to distribute the sound recording, subject only to a duty to account to the other joint authors for their share of the profits. Of course, the general practice in the record industry is for all the performers and other contributors to sign work-made-for-hire agreements as well as to assign all of their rights to a single record company, which then has the exclusive right to distribute and otherwise exploit the sound recording.

The exercise of termination rights in works of joint authorship presents special problems. If each of the coauthors of a work has the independent right to terminate a grant of rights, the grantee who originally received exclusive rights from all of the coauthors will be transformed into a nonexclusive licensee when even a single coauthor exercises the termination right and the other coauthors do not.

In recognition of the problems that might result if any one of a potentially large number of coauthors terminates a transfer, the drafters of Section 203 limited the right of termination in such situations. Section 203 specifies that "[i]n the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it." For example, in the case of a rock band, if five band members were to sign a single transfer agreement, as is standard practice in the recording industry, at least three out the five members would have to agree to terminate for the termination to be effective. The minority members would be bound by the decision of the majority to terminate and would receive a proportionate share of the reverted rights whether or not they had signed onto the notice of termination. Legislative history explicitly acknowledges "the dangers of one or more beneficiaries being induced to 'hold out.'"[13]

However, the members of the band could be joint authors with a producer as well, although he likely would have transferred his rights in a separate document. If that transfer was not in the same document as the transfer from the members of the band, the producer would have an independent right to terminate his transfer. But as long as at least one of the coauthors (or, in the case of coauthors who jointly assigned rights, a group of coauthors) has not terminated his rights, the record company could, irrespective of the termination of a co-owning artist or producer, continue to exploit the work. If one but not all artists or producers who jointly authored a work chose to terminate with the original record company and negotiate terms

[10] However, the law provides that a derivative work prepared under the original grant can continueto be utilized under the terms of that grant.

[11] A similar termination right was recently added with respect to the 20-year extension of the term of copyright enacted in 1998. Pub. L. No. 105–298, 112 Stat. 2827.

[12] H.R. Rep. No. 94–1476, at 120 (1976).

[13] H.R. Rep. No. 94–1476 at 125 (1976).

with a new company, multiple versions of a single sound recording could in theory be on the market simultaneously, competing with each other.

In contrast to the Section 203 termination right for transfers executed in or after 1978, the termination right under section 304 may be exercised by *any* of the co-authors of a joint work, even if all the coauthors executed the same original grant of rights. Such a termination shall affect only that "particular author's share in the ownership of the renewal copyright." 17 U.S.C. § 304(c)(1).

The Copyright Act offers limited guidance as to who may qualify as a joint author. Section 101 defines a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." The trend in recent cases has been to limit the number of people who, when contributing to the creation of a copyrightable work, can claim to be joint authors. For example, in *Childress* v. *Taylor*, 945 F.2d 500, 509 (2d Cir. 1991), the court held that "equal sharing of rights should be reserved for relationships in which all participants fully intend to be joint authors. The sharing of benefits in other relationships involving assistance in the creation of a copyrightable work can be more precisely calibrated by the participants in their contract negotiations regarding division of royalties or assignment of shares of ownership of the copyright. . . ." The court concluded that a prerequisite of joint authorship is a mutual understanding among the contributors that they are to be regarded as joint authors. 945 F.2d at 508. The importance of control over the finished work has also been emphasized in determining authorship.[14] To the extent that there is a trend that limits the nature or number of contributors who can claim joint authorship, the courts are indirectly ameliorating the problem caused by the existence of concurrent rights of termination among coauthors.

Sound Recordings as Works Made for Hire in Legislative History of the 1976 Act

As already mentioned, during the Copyright Law Revision efforts of the 1960s, the old work-for-hire doctrine of the 1909 Act was revamped. After extensive negotiations supervised by Congress and the Copyright Office, representatives of authors, composers, book and music publishers and motion picture studios succeeded in redefining the concept of works made for hire. They settled upon the two-pronged approach to works made for hire discussed above, which encompassed both traditional works made by employees in the course of their employment and certain classes of specially commissioned works.[15]

With respect to specially ordered or commissioned works, each category was proposed by a particular copyright industry and each proposed category was fully debated. The question considered was why should a particular type of work be treated as a "work made for hire." Works included in these categories tend to be works done by freelance authors at the instance, direction, and risk of a publisher or producer where it was argued that it would be unfair to allow such authors to terminate assignments of rights. Other exceptions (contributions to collective works, parts of motion pictures), were based on the fact that the resulting work involved numerous authors and that permitting terminations of grants of rights to such works would cause chaos.

Although sound recordings were being contemplated as copyrightable subject matter contemporaneously with the mid-1960's debate over works made for hire, they were never proffered as a category to be added to the list of commissioned works.[16] Thus, sound recordings were never considered for inclusion as a category in the specially ordered or commissioned work made for hire provision. Had the recording industry suggested inclusion of sound recordings, it is unclear what the result might have been given that work made for hire is an exception to the general rule of recognizing the creator as the author. When they were discussed in a work-for-hire context at all, it was peripherally.

Recording Industry Practice

Although the recording industry has changed considerably since the 1960s, the contracts signed between record companies and performers appear to have changed very little. Most contracts contain clauses specifying that the works produced by performers are works made for hire. Such contracts generally contain an additional

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[14] *See, e.g., Aalmuhammed* v. *Lee*, 202 F.3d 1227 (9th Cir. 1999).

[15] The 1963 preliminary draft defined a work made for hire as "a work prepared by an employee within the scope of the duties of his employment, but not including a work made on special order or commission." The last phrase was vehemently opposed by book publishers and others. The 1964 bill attempted to solve the problem by including in the definition "a work prepared on special order or commission if the parties expressly agree in writing that it shall be considered a work made for hire." This approach was rejected by representatives of authors.

[16] Telephone interview with Barbara Ringer, former Register of Copyrights, (May 16, 2000).

clause providing that if the work created is found by courts to fall within neither prong of the definition of works made for hire, that the performer assigns all his rights to the record company.

Under the law as it existed before the 1999 amendment, courts assessing whether an individual sound recording was a work made for hire had to determine whether sufficient evidence existed of an employer/employee relationship to qualify the sound recording under the first prong of the definition or whether the sound recording could be placed within one of the categories of commissioned works which could be considered works made for hire under the second prong.

In the 1960s, record companies exercised a great deal of control over the creation of a sound recording, employing back-up singers and engineers and owning the studio space in which featured artists would record. In this framework, record companies uniformly asserted an employment for hire relationship with featured artists.[17] It seems possible that because of this employment relationship, record companies did not seek to include sound recordings as a category in the specially ordered or commissioned prong of the work made for hire definition.

That level of involvement by the record companies in the creation of sound recordings has generally diminished over the last few decades, so that now, in many cases, record companies simply provide funds at the "front-end," and distribution at the "back-end," of a sound recording's production. By hiring or acting as producers, by retaining back-up singers, musicians and engineers, and by recording in their own studios or at independent studios, featured artists have increasingly come to control the creative elements of a sound recording, making it considerably more difficult now for record companies to characterize artists as employees producing works within the scope of their employment. This is particularly true given the factors used by the Supreme Court to distinguish between employees and independent contractors in *Community for Creative Non-Violence* v. *Reid*.[18]

Another trend in the record industry that may just be beginning, but which may have an equally significant impact on the issue of sound recordings as works made for hire, is a possible change in the way in which sound recordings are distributed. For most of the period since sound recordings were given federal copyright protection, sound recordings have been distributed predominantly in the form of albums, first as long-playing vinyl records and later as compact disks. That distribution model may be changing with the advent of the internet and other means of digital distribution of sound recordings. Consumers may no longer purchase sound recordings in the form of albums containing performances of a dozen or more songs. Instead, they may purchase individual performances by downloading them from the internet or by copying them onto a compact disk at an electronic kiosk in a record store, perhaps in the form of customized albums containing a selection of performances chosen by the consumer. This trend may have serious implications for a theory that record companies relied on before the recent amendment to support their claims that specially commissioned sound recordings qualify as works made for hire: the theory that a record album is a collective work or compilation.

Pre-November 29, 1999 Recordings

My conversations with representatives of both performers and record companies have confirmed my previous understanding: recording contracts almost always contain provisions which deem the sound recordings and any contributions to them works made for hire. Copyright Office records show that claims to copyright for sound recordings filed by record companies in the 1970's named a record company as author by virtue of the work made for hire doctrine and that today featured artists as well as record companies have filed claims to copyright listing themselves as authors by virtue of the work made for hire doctrine.[19] However, the fact that work-for-hire agreements and copyright registrations as works for hire have been made does not lead to the legal conclusion that the sound recordings that are the

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[17] *See, e.g.,Copyright Law Revision Part 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft* House Comm. on the Judiciary, 88th Cong., 352–358 (comments, Sidney A. Diamond, London Records, writing on his own behalf, February 11, 1963).

[18] *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 751–752 (1989) ("the source of the instrumentalities and tools; the location of the work; duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party . . .").

[19] While most registrations of sound recordings are filed by record companies as employers for hire, some registrations are filed by performers as employers for hire. Bruce Springsteen is an example of a performer who is registered as an employer for hire.

subjects of those agreements and registrations are indeed works made for hire. If a specially ordered or commissioned work does not fall within one of the categories set forth in the second part of the statutory definition, the agreement of the parties cannot transform it into a work made for hire. With respect to copyright registration, the Copyright Office does not inquire whether a sound recording meets all the requirements for a work made for hire. Additionally, the fact that the recent amendment to the definition of works made for hire corresponds to record industry practice does not make it a technical amendment if that industry practice did not correspond to the legal requirements for works made for hire.

Record companies have argued that even under the law as it existed before last November, the vast majority of commissioned sound recordings qualified as works made for hire because they were contributions to collective works or compilations, two categories of works included in the statutory definition. This theory may well be valid under traditional distribution models. A record album may well be considered a collective work, and a sound recording of each performance included on the album therefore may well be a contribution to a collective work. The courts have not yet addressed this issue, although several courts have stated that sound recordings as such are not among any of the nine categories of specially ordered or commissioned works.[20] Some representatives of performers have rejected the theory that an individual sound recording on an album can usually be considered a contribution to a collective work, arguing that an album of songs by the same artist, delivered by that artist to a record company, does not qualify as a collective work.

Even if most sound recordings do qualify as contributions to collective works, it does not make the recent amendment, which added sound recordings as a new category in the definition of works made for hire, a technical amendment.[21] In fact, if the future distribution models that may abandon the concept of the album come to pass, the amendment adding sound recordings to the list of candidates for work-make-for-hire status will prove to be anything but technical.

In any event, I take no position today on whether sound recordings will usually qualify as contributions to collective works. It will be up to the courts to resolve that issue. It is certainly likely that at least some contributions to sound recordings will be deemed to be contributions of individuals who did not work for hire. In such cases, these authors will have the right to terminate their contracts and may elect to do so in the exceptional case where the value of their rights has substantially increased.

Analysis of Amendment and Recommendation

As I have just stated, I do not consider the recent amendment to have been a technical amendment. It changed existing law by *adding* sound recordings as a category of commissioned works which may be considered works made for hire.

However, because that amendment has already been enacted, the more important question is whether it has substantive merit. I believe that there is much merit to the amendment. Most sound recordings will have a number of potential coauthors, including all of the musicians who perform on the recording, the producer of the recording, and perhaps others. There could easily be a dozen or more potential coauthors of a single sound recording. If the sound recording was not a work made for hire, any one of those coauthors (or, in the case of coauthors joining in a single grant, any group of coauthors) would have a right to terminate pursuant to section 203. Even where many of the performers have joined in a single grant, there are likely to be a number of other contributors to the performance who were not parties to the same contract and who could independently exercise the right of termination.[22]

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[20] *See, e.g., Staggers* v. *Real Authentic Sound*, 77 F. Supp. 2d 57 (D.D.C. 1999); *Ballas* v. *Tedesco*, 41 F. Supp. 2d 531 (D.N.J. 1999); *Lulirama Ltd.* v. *Axcess Broadcast Services, Inc.*, 128 F. 3d 872 (5th Cir. 1997).

[21] Representatives of performers have expressed concern that the fact that the recent amendment was labeled a "technical amendment" might influence some court in the future to conclude that Congress must have intended sound recordings to be a category of works eligible to be commissioned works made for hire even before the amendment was made. I do not believe that the fact that this amendment was labeled as "technical" carries any weight in interpreting the state of preexisting law. In determining whether sound recordings were intended to be an eligible category for works created from 1978 through November 29, 1999, it is the language of the 1976 Copyright Act and the intent of the 94th Congress that enacted that law that is relevant.

[22] The termination right under section 304 gives each coauthor a right to terminate, whether or not the coauthor joined in a single grant. But because that right pertains only to grants made before 1978, when most if not all sound recordings probably were works made for hire under the more liberal definition of the 1909 Act, the section 304 termination right is not likely to be significant for sound recordings.

If any one of a number of coauthors has the right to terminate the grant of rights, the record company might be faced with a situation in which it can be held hostage to the demands of the individual artist who knows that he can deprive the record company of the exclusive right to exploit the work simply by assigning his nonexclusive rights to another record company, or by exercising those rights himself, despite the fact that the original record company continues to enjoy its grants of rights from his coauthors. The original record company's incentive to continue to exploit the work under such circumstances will be greatly reduced if somebody else is also in a position to exploit the identical recording.

Thus, record companies have legitimate grounds to fear that even if only one of the many potential claimants to the status of "author" of a particular sound recording elects to terminate the assignment of his interest in the copyright, neither the original assignee nor anybody else will be able to exercise exclusive rights in the work, and the existence of a multiplicity of owners of nonexclusive rights is likely to make many if not most works unmarketable when a single coauthor terminates. The addition of sound recordings to the list of works eligible to be commissioned works made for hire offers a solution to this problem.

However, I am not persuaded that the recent amendment achieves the proper balance. It is a basic principle of copyright law that authors should be able to terminate their initial grants of rights. Consistent with the 1976 Act, in the absence of a specific reason for making sound recordings works made for hire, the right to terminate should remain with authors. With respect to works other than sound recordings, authors have already terminated grants under section 304, and the practice seems to have achieved Congress' goal and not caused undue harm.

The Copyright Office believes that those who contribute significant authorship to a sound recording should have the right to terminate. I will refer to these persons as "key contributors." I use the term "key contributors" because, as the recording industry has correctly emphasized, permitting every contributor to a sound recording to exercise termination rights could make the exploitation of a sound recording unworkable. I do not proffer this term as a proposed statutory term, nor do I offer any specific legislative language at this time. Rather, I offer it as a concept that should seriously be explored.

Who is a "key contributor"? It is someone who has made a *major* contribution of copyrightable expression to a sound recording. Ordinarily, it would include the featured performer or performers. For example, Frank Sinatra and Madonna would clearly be key contributors of authorship to the sound recordings on which they perform. Each of the members of the Beatles and Metallica would also be key contributors. In contrast, a background musician would not be a key contributor. Exempting those key contributors from the work made for hire provisions should result in only a limited number of potential terminations. This could be accomplished by retaining the inclusion of sound recordings among the categories of works eligible to be commissioned works made for hire, but excluding the contributions of these key contributors from work-made-for-hire status. The result would be that the sound recording would be a joint work that is in part a work made for hire and in part a work of individual authors.[23]

This concept is similar to the approach that has been suggested to me by representatives of performers; the language shown to me would exclude a featured recording artist who is defined as ". . . an artist, whether an instrumentalist or vocalist, who has a royalty contract with respect to the distribution of the sound recording." This definition may not sufficiently limit the class with termination rights because secondary performers may also receive royalties.

Consideration should also be given to whether producers of sound recordings should, at least in some circumstances, also be able to terminate as key contributors. There are many examples of producers, such as Quincy Jones, Phil Spector, and Babyface, whose contribution of authorship to a sound recording can equal or even exceed that of the featured artist. The voices of record producers have not yet been heard in this debate, and their views and contributions should be considered.

I believe that this approach could address both the record industry's understandable concern that rights to sound recordings may be placed in limbo due to the multiplicity of potential claimants with a right to terminate, and the performers' complaint that the recent amendment has deprive them of the right enjoyed by all other authors to recapture the value of their creative contributions. It should the exception rather than the rule where there will be so many key contributors to a sound recording that record companies and performers will experience great difficulty in

[23] This would be nothing new. Already it is possible for two or more persons to collaborate on a work, and for one of the collaborators to be contributing as an employee for hire and another to be contributing as an author in his own right.

sorting out the consequences of a coauthor's exercise of the right of termination. And those performers who common sense tells us are, as a practical matter, the real "authors" of sound recordings would be able to exercise the termination rights enjoyed by all other authors.

If the Subcommittee finds that my suggestions are worth exploring, I would be pleased to work with the Subcommittee and with representatives of the record companies, performers, producers and other interested parties in an effort to resolve this contentious issue.

Mr. COBLE. Thank you, Ms. Peters.

Ms. Peters, can you give the subcommittee an update on last year's fee increase?

Ms. PETERS. There wasn't an outrage with regard to the raising of the fees because we listened to everybody and we met the objectives of the statute to be fair and equitable. Despite all the work that we did in announcing the fees, the very first week more than 95 percent came in with the wrong fee. It has been very much of an extra workload for the office to try to get the correct fee. But now I can say that 9 or 10 months later we are down to only 15 percent of the people sending the wrong fee. We are in a 3-year period with regard to this fee. Except for the basic registration fee, most of the fees are close to recovering what it costs for us to operate.

What people fail to realize is that many of the things we do are really not on a cost recovery basis. One of our primary purposes is to obtain works for the Library of Congress, and we certainly can't charge people who register and deposit their works to run the operation to claim works that publishers have not deposited with us.

So all in all, I think that our raising the fee is a good thing. It has helped the Copyright Office. We still only are 70 percent funded by fees; 30 percent of our expenses are basically the result of a direct appropriation and we rely on that direct appropriation.

Mr. COBLE. Is staff adequate to accomplish your duties?

Ms. PETERS. At the moment, we have the ability to hire staff that we need. The problem is that sometimes it isn't easy to bring people on quickly and as soon as we bring people on we have other people retiring. So it is a constant battle to keep a fully trained staff on board so that you can accomplish the goals that you need to for the copyright communities.

Mr. COBLE. Let me shift now to the works for hire question. Let me put a two-part question to you, Ms. Peters.

Is it true that since 1972 the Copyright Office has customarily registered sound recordings as works made for hire? That is question A.

Question B. Regarding the amendment adding sound recordings to the list of works eligible for work for hire status, were you consulted about the amendment? And what was your response?

Ms. PETERS. Let me start with the first part.

Obviously, when sound recordings were added to the law in 1972 and the work made for hire definition was broader than it became in 1978, we registered all the sound recordings that met the test for eligibility of the statute and all major sound recordings that contained musical composition that came from companies were registered as works made for hire. And that pretty much continues today, except today we see some performing artists relying on work made for hire and therefore submitting claims in their names. For

example, Bruce Springsteen and Prince have registered as employers for hire.

With regard to the second part of your question, Was I consulted before? I think I reflected that in part in my statement.

I did receive a call. As I said, it was my understanding that because of the contracts and because of the registration the existing practice was that these were considered works made for hire. In truth, I had participated in an international diplomatic conference concluding a treaty to protect producers and performers of sound recordings and the position paper of the United States was that basically sound recordings were works made for hire and that performers were protected through that agreement.

Yes, I was consulted. I did basically say that I thought it reflected existing practice. For the record, I did note that I had some concerns and I recommended against putting it in without a full hearing.

Mr. COBLE. Thank you, Ms. Peters.

My red light is about to appear, so I will recognize the gentleman from California.

Mr. BERMAN. Thank you very much, Mr. Chairman.

I think the first thing I should do in my allotted time is not actually ask you one of the questions I intended to ask you. We have watched what happened as a result of acting quickly, and I think with good intentions. I want to make sure that even at this hearing things don't get taken out of context and distorted.

We had a funny situation in the opening statements. I said my goal is to restore the law to what it was a year ago. Others said—I endorse what the ranking member said and I support repeal of the law—some people think the implications and inferences that come from simply repealing the law means that it is not restored to the gray area that existed before, but that it now decides the issue just as this amendment decided the issue in favor of the record companies' perspective, that such action on a simple repeal would now decide it in a way that advantages unfairly the recording artists.

We have two separate questions. One is, Did by our actions last year we go beyond a technical change to actually alter rights? And if want to clean that up, how do we clean that up?

And the second question is the more ultimate question, How should the rights be apportioned between the parties? If the law is in fact—and we will hear from professors and others in our hearing that there are different interpretations of what the law is—do we want to now step in and clarify at some future time—and separate from the act of rectifying the corrections—do we now want to clarify the gray area by coming down on one side or the other or moving somewhere along the spectrum? It could very well be that the courts will find, when they start ruling on these cases, that in 2013 some sound recordings are works made for hire and other sound recordings aren't works made for hire and some sound recordings are contributions to a collective works or a compilation and others aren't.

I will be darned if I know. But I think there should be two separate stages. And maybe we don't want to do anything after we rectify any substantive change we made in November. Maybe we want

to let the courts settle it, or maybe we want to let the parties settle it.

That is why, even in this particular effort, we have to take great care to understand, see if we have a common goal and if we are achieving that goal. It is tricky.

The other part that I didn't get to make in my opening statement was, If we come to a world in 2013 where it doesn't matter who has the rights to music because nobody is getting compensated for those rights, this becomes a pretty small issue. So there are technology questions and other issues that you are very familiar with that came up initially in the Digital Millennium Copyright Act. We read about them all the time—NAPSTER, Metallica, law suits, litigation—huge questions of how will the creative artists of our time and the people who market their works get compensated for their creativity. And if they aren't, then who is going to spend the time to engage in the creative arts?

Those questions are really much larger questions, in some ways, than this. But this one is complicated in itself.

Where is this red light I am supposed to watch?

The one thing that I believed when I supported what I thought at the time was a technical amendment—which I now believe isn't a technical amendment—was since you were registering these things as works for hire, the change was technical. Is there a process where people could have objected to that registration? What is this act of registration? What is its significance?

I understand going for a copyright and going for a patent. What is the legal effect of registering a work for hire?

Ms. PETERS. I will start with that and go back to some of the other questions you raised.

The Copyright Office actually examines claims but it basically starts on the theory that what applicants are telling you is the truth. Remember, when you have a claim in a sound recording and it says work for hire, there are two potential categories that it could fit in. One is that it could be an employment relationship. We don't know. The second one is that it could be one of the categories. Where you have an album, you have no reason to believe that it isn't other than a collective work and that the sound recordings were made as contributions. We don't go behind that.

So on the fact of the application, we just put it through. There is no reason to question it. Ultimately, whether or not a work is made for hire is a legal question that courts will decide. Was it within the scope of employment made by employees? Was it a specially ordered or commissioned work? Did it fall within those categories?

And the truth is, although there have been three cases that have looked at sound recordings and work made for hire, none of them have really examined the categories. They have said that sound recordings are not covered in specially ordered or commissioned works, but nobody has fully basically argued the contribution to a collective work issue.

With regard to what you do and where all this is, I firmly believed—and I said it at the time—that the amendment that was made November 29th is prospective only. It doesn't do anything to solve the situation between 1978 and November 29, 1999. Maybe

if you argue it is a technical amendment, then by saying that you are arguing that this is what the law was all along. But I will say that it can't be what the law was all along because in the new economy there aren't going to be albums on which the basis of the distribution model is. It is going to be much more that there will be individual tracks, individual songs that people select. I want to hear this song, I want to download this song—make a CD for me and here is what I want on it.

So it is very clear that if you had one song and you were making it available over the Internet, that is really not a contribution to a collective work. It hasn't come up today, but it will come up in the future.

It is clear that it wouldn't have been covered before the law was amended. It is clear that it could be covered after the law was amended.

I ultimately believed that whatever the law was, that was what the courts were going to have to look at. It is clear that it wasn't one of the categories. It was never proffered by the record companies as a category. Perhaps that is because at that time the record companies were so in control of the whole process that it clearly was an employment relationship. And that has changed over the years.

What you did in 1999 was to add a separate category so that from that day forward the contracts have a different theory on which to base a specially ordered or commissioned work. That termination right won't come up until 35 years after 1999.

Mr. BERMAN. Mr. Chairman, my time has expired.

I just will say that we will hear from people who I think will argue—and I don't know if you are right or they are right—but they will argue with the notion that simply because something is an album it is automatically therefore a contribution to a collective work.

Ms. PETERS. And they well may be right. I don't disagree with that. But I think it is going to depend on the facts of the putting of an album together.

Mr. COBLE. I thank the gentleman.

In order of appearance, I recognize the gentleman from the Roanoke Valley, Mr. Goodlatte.

Mr. GOODLATTE. Mr. Chairman, thank you very much.

Ms. Peters, welcome. We are very pleased to have you with us.

Let me start by asking a question that I don't know the answer to.

Does this recent amendment that we are here today to talk about affect composers and music publishers?

Ms. PETERS. No. Some recordings and musical compositions are interwoven when you have a recording. There is a composer who basically writes a composition. That composition has a copyright separate and apart from any recording. Usually there is a music publisher involved so there is a composer and a music publisher.

When a work is recorded, even if the composer is the recording artist, there is a second copyright that is created. That copyright is in the sound that is created. So it does not technically affect the composer or the musical composition at all.

Mr. GOODLATTE. Thank you.

What role do you see the Copyright Office playing in attempting to resolve this contentious issue?

Ms. PETERS. It depends on what you want.

One of the things that is clear is that sound recordings as specially ordered or commissioned works were never debated. That debate was never had as to how the balance should be effected. We clearly believe that there are featured performers who should be recognized as authors.

We also recognize that there are many people who contribute to a sound recording who, under a traditional definition, might be authors. So if you wanted to split it and say that some contributions should not be part of work made for hire, we could assist in trying to draw that line.

Mr. GOODLATTE. I heard you mention that in your initial testimony and I wanted to ask a little bit more about that.

If we were to take that approach, do you encounter some difficulties in defining who the primary artists are? For example, what if you have a group of recording artists in a band with five or six members. At the time a particular hit is created, no one of them stands above the others in terms of public recognition. But as time evolves, one of them does become better known than the others.

How would you handle that particular type of situation?

Ms. PETERS. Well, obviously if there were a simple definition, we would have proffered it. We struggled and we obviously didn't come up with anything.

With regard to a band where you have multiple people, actually the 203 termination anticipates that every one of these people shouldn't be terminating. So I don't think you really ever have to go to that question. If the band is the featured artist as a whole, they are going to sign one contract. In order to terminate, you need a majority of those people to terminate. In our testimony, we say that if you have a band of five, you need three members in order to terminate. If you had four, you need three of the four.

So I think that for record companies who are dealing with terminations, that really wouldn't become a problem. Termination is determined by grants. So you would look at the grant. If it is a grant from featured artists—which I would argue would be the band—there may be some featured artists who are more featured than the others. I would hope that maybe parties could come and help with defining that.

We saw a definition that talked about the contract being a royalty contract. But from my experience, I think that is too broad. There are secondary performers who also have royalty contracts.

So I don't know how to draw the line. I believe that featured artists basically are major contributors. Featured artists are why people buy records. Therefore, they should be able to terminate unremunerative transfers.

Mr. GOODLATTE. I agree with that, but I am also concerned about that. Featured artists are generally those that have more market power, if you will, who can renegotiate their contracts more readily than some of the more secondary artists involved in creating a work that has a collective contribution to it.

Are we going to impair the rights of those artists who may not have that ability to get in and say, "I want a better deal," or "I want a different deal"?

Ms. PETERS. I would agree that well-known featured artists have a better opportunity to get a deal that they like. But I was told that all featured artists, except a very few, sign these work made for hire agreements.

New artists, who would be featured artists but who don't have bargaining power, would nevertheless be in the category that I am talking about, would be the ones who might have a reason to want to renegotiate. But new artists' albums also sometimes are the very kinds of albums or selections that the record company had the most direct control over because they are forming the new artist. So it is a very, very difficult issue.

I have listened to both sides and said they are right.

Mr. GOODLATTE. We certainly agree with you on that observation.

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

The gentleman from California, Mr. Rogan?

Mr. ROGAN. Mr. Chairman, thank you.

I don't really have a lot of substantive questions. I really have just a few clarifying and technical questions.

I preface this by saying that had I taken Professor Nimmer's copyright class at UCLA, I wouldn't have to bore you with any of these questions right now. My failure to do so requires it.

I came into this hearing, Ms. Peters, under the general assumption that the law of contract prevailed, that a sound recording was not automatically a work for hire, the amendment merely codified that they were eligible for work for hire but the contractual provisions prevailed. When I was reading your prepared testimony—and if it helps, I would invite you to turn to page 14 toward the bottom—let me just read a couple of paragraphs.

"Most contracts contain clauses specifying that the works produced by performers are works made for hire. Under the law as it existed before the 1999 amendment, courts assessing whether an individual sound recording was a work made for hire had to determine whether sufficient evidence existed of an employer/employee relationship to qualify the sound recording under the first prong of the definition or whether the sound recording could be placed within one of the categories of commissioned works which could be considered works made for hire under the second prong."

And then on page 16, under the caption "Pre-November 29, 1999 Recordings" it goes on to explain that a little more in-depth.

It sounds like the courts are not relying simply on the contractual provision in and of itself, that the recording is a work made for hire—it sounded like that is almost an automatic provision in virtually all contracts. If the courts are going behind the contract to actually delve into the employer/employee relationship——

Ms. PETERS. Yes, and I would argue that they would have to.

If the contract prevailed, then you would have a very unfair situation because every publisher would basically say it is a work made for hire, and it is. What the intention of copyright law was that where there is a genuine employment relationship—and the Su-

preme Court in a case called *Community for Creative Non-Violence* v. *Reid* adopted the agency factors for employment to determine whether or not a work is made for hire.

So when a court looks at that, they look at the factors. Is there a continuing relationship? Do they withhold taxes from that employee? Does the person get benefits such as vacation and things like that?

So it really is always determined, even with regard to employment, on what the situation actually was.

What I didn't say was that when I was asked about sound recordings I was also asked about computer programs. What I said with regard to computer programs is that there have been many cases with regard to computer programs with programmers fighting companies on whether or not there really was an employment relationship and that was a very controversial topic.

With regard to specially ordered or commissioned work, what the Congress intended—works that Congress felt should not be works made for hire, and they talked about—serious musical compositions could not be turned into work made for hire by a contract. Therefore, they limited the categories.

So the law does in fact override whatever someone signs in a contract. I am sure from the performers' perspective, they say that that contract says three things: it is a work made for hire because of employment. If it's not, it is a specially ordered or commissioned work. And it says that if it's not that, I assign all rights. So guess what? I assigned all rights.

The way the contract is set up, it has three separate ways of looking at it.

Mr. ROGAN. Back in the dark ages when I was in law school, I have this vague recollection in first-year contract of a concept known as contracts of adhesion where somebody essentially has to sign a contract to get the job and they really have no negotiating power.

Are the courts essentially treating this language as a contract of adhesion?

Ms. PETERS. I think that's a question the courts would have to look at. A number of performing artists are bargaining and there are other things that they may be negotiating for. And they have this provision that has all three things in it. They may be selecting which one they are relying on. I don't know enough about it. I have to tell you that my entire career of 35 years has been with the Copyright Office, so I have never worked outside the Government.

Mr. ROGAN. My deepest sympathies. [Laughter.]

I yield back the balance of my time, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

The gentleman from Michigan, Mr. Conyers?

The gentlelady from California, Ms. Lofgren?

Ms. LOFGREN. I don't have any questions at this time. I am eager to hear the next panel, Mr. Chairman.

Mr. COBLE. I thank the lady.

The gentlelady from California, Ms. Bono?

Ms. BONO. Thank you, Mr. Chairman.

I, too, don't have questions at this time but I would like to thank Ms. Peters for spending hour after hour with me trying to explain this issue one-on-one over the past few weeks.

Thank you and I yield back.

Mr. COBLE. I thank the lady.

The gentleman from Florida, Mr. Wexler?

Mr. WEXLER. Thank you, Mr. Chairman.

I would like to ask you if I understood what you said correctly that it is your view that the changes that were made would be in fact applied prospectively. If that, in fact, is the case—and I think that is a very reasonable position—then I am trying to understand what the outrage is in terms of its application. If, in fact, it is a prospective application—and that prospective application, of course, is contingent upon a contract being negotiated and reached—then I assume you would agree then that each and every party to that contract would, in fact, know exactly what he or she was contracting for and they could choose—based on the marketplace, based on who has what bargaining power at the time—to contract or not to contract.

Is that a fair statement?

Ms. PETERS. I think you really need to ask the performers that question. I think there is more to it than that.

Mr. WEXLER. I understand that there is more to it than that, but in fairness, I think the strongest argument that the recording artists would have would be if it wasn't prospective, because then at least—I am not saying I agree with it—they could argue that there is some unintended result that occurred as a result of congressional action that I, the recording artist, never could have dreamed of when I signed my contract. But if in fact—and I agree that your position is very reasonable that it is prospective—then the position is that we know what we are doing, we did it anyway, we got compensated for it, and now we are complaining because we don't like the deal we struck.

Ms. PETERS. I could argue that there are different interpretations on whether or not sound recordings constitute contributions to collective works. And that has not been litigated.

Mr. WEXLER. I agree entirely.

But if in fact what was done last year is prospective only, then everyone will have that knowledge going into the contract, and then based on their legal advice or their contractual or economic position, can factor in what it is you are saying into their analysis of what they should be paid or not paid, or what they should agree to or not agree to.

There is no uncertainty in terms of whether or not this applies. There may be an uncertainty as to what a court says.

Ms. PETERS. You mean for contracts made after November 29th?

Mr. WEXLER. Yes, for contracts made after the time that this——

Ms. PETERS. Yes, I agree that after November 29th there is a problem because it has sound recordings as a category. There is no way to escape it.

Mr. BERMAN. Will the gentleman yield on that point?

Mr. WEXLER. Certainly.

Mr. BERMAN. But the perverse aspect of that is that the right of termination was really mostly for the new artist who had no idea

what the value of that particular song would be. The 35 years was a second bite at the apple. So in effect, the artist with the clout to not have the work for hire provision in the contract is the artist who has the greatest sense of the value of the album, and the artist who doesn't have the clout to keep that out of the contract is the artist who most may really be needing the right of termination in 35 years because no one has compensated him for the possible big hit.

Mr. WEXLER. Agreed, and reclaiming my time, but certainly the gentleman from California would agree that the artist without the economic clout at the beginning is the artist probably that benefits the most from the service that the recording company provides. That's what contracts are all about. That is capitalism.

I return my time.

Mr. COBLE. The gentleman from Massachusetts, Mr. Delahunt?

Mr. DELAHUNT. Just listening to the colloquy between Mr. Berman and Mr. Wexler and your own comments, I guess it reinforces what I said in my opening remarks.

I think that however we got here, we are here. I think it presents an opportune time to really review where we are going. Rather than see a plethora of litigation occur as a result of—as you describe it—a gray area, I am beginning to think that Mr. Berman's admonition about a recommendation that the stakeholders begin or commence some discussion makes a lot of sense.

As you can tell from our questions, nobody on this panel really understands the marketplace. We don't know how the marketplace works. And it is clear to me that—I am still back in the days when they had the 78s—it was a huge jump to go to a cassette, let alone a CD. But from what we hear over the course of our contact with these issues, we don't even know if there are going to be recordings by the year 2013.

It is difficult enough to legislate for a marketplace that exists now. But to attempt to legislate for a marketplace that we can't even envision really is extraordinarily difficult.

Again, I am sure that there are some secondary contributors who would like a place at the table, so to speak. I think the point Mr. Wexler was referring to was the whole concept of the contract.

I have never examined one of these contracts. I presume that the performers would describe them as adhesion contracts or simply a contract that was presented to them. But maybe a new standard contract that would incorporate provisions for the success of a particular record or performance at some point in time might solve these problems. I just don't know. And I don't think you have those answers.

Ms. PETERS. Oh, absolutely not.

Mr. DELAHUNT. Do you have the same questions in your mind that I do, Ms. Peters?

Ms. PETERS. Certainly. When sound recordings were not included as specially ordered or commissioned works, and as the record industry started to change, and as the Supreme Court acted in *CCNV*, you could anticipate that there were going to be issues. And you have two groups of people with very legitimate concerns with very different interpretations of what the law is.

Mr. DELAHUNT. I think the whole concept of termination rights is really something that ought to be a principle that we should continue to embrace in the sense that presumably the rationale when it was enacted was to provide not necessarily a second bite of the apple but to confer upon the artist some leverage, some bargaining power if something should occur.

I think what we are really talking about here is trying to create a marketplace that ensures fairness, that ensures equality in terms of bargaining-rights with an end result being an equitable solution. It is almost as if we could start from scratch and devise a new concept. But I think we have to take direction from the artists and the industry and listen.

But again, I don't even know if they have the answers because—are there even going to be recordings?

Ms. PETERS. But there will always be sound recordings. So there will always be grants of rights. So the issue doesn't really go away.

And I will just add with regard to the termination rights, it was a hotly debated topic in the 1960's, but the record companies really weren't very much involved in that. The 35 years was a compromise because the original was 20 years, so they negotiated with the number of years.

Mr. DELAHUNT. I yield back.

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

The gentleman from California, Mr. Gallegly?

Mr. GALLEGLY. Thank you very much, Mr. Chairman.

I couldn't help but take a step back when my good friend, Bill Delahunt, was referring to the 78s because if everyone relied on their entertainment as I do on my 1015 Wurlitzer, we probably wouldn't be dealing with some of these problems. But I guess progress is something that is a fact of life.

Ms. Peters, thank you for being here today. I have just a couple of questions because I know in your capacity you review international developments in copyright law.

Could you give us a little assessment on what Europe and other nations do in terms of the work for hire doctrine and copyright? And what are the international consequences of this change in U.S. law?

Ms. PETERS. The United States is unique in recognizing the employer in a work for hire as the author. Many countries have doctrines that vest ownership in the employer in a work made for hire. So we really don't have that equivalent. And to be honest, sometimes it is a real irritant for foreign countries. Those like France who believe in natural rights of authors find the work made for hire doctrine abhorrent. But those very same countries recognize that in certain instances rights should vest in a particular person. And it is very typical with regard to performers that when there is a recorded performance those rights are going to vest in a record producer.

Mr. GALLEGLY. Does the addition of sound recordings in the definition of works made for hire contravene the WIPO Performance and the Phonograms Treaty?

Ms. PETERS. My interpretation is that it does not, that what the provisions of that treaty are is to grant both producers and per-

formers certain rights, but one of those rights is the right to authorize certain acts. The contracts in the employment relationships, in my opinion, basically constitute that authorization. It was on that basis that we negotiated that treaty and we basically recommended to the Congress that we were fully compliant.

Mr. GALLEGLY. Thank you.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you.

The gentleman from Tennessee, Mr. Jenkins?

Mr. JENKINS. Thank you, Mr. Chairman.

I have no questions.

Mr. COBLE. I thank you, Ms. Peters. It is always a pleasure to have you.

As Mr. Delahunt, my friend from Massachusetts, said, the work on this issue will not conclude at day's end. We will be talking again.

Ms. PETERS. Thank you.

Mr. COBLE. If the second panel would come forward, I will introduce them: Ms. Hilary Rosen, president and chief executive officer, Recording Industry Association of America, Inc.; Mr. Michael Greene, president and CEO of Recording Academy, National Academy of Recording Arts & Sciences, Inc.; Marci Hamilton, the Thomas H. Lee Chair in public law, Cardozo School of Law; Ms. Sheryl Crow, artist, on behalf of American Federation of Television and Radio Artists, American Federation of Musicians, AmSong, Artist Coalition; and Professor Paul Goldstein, Lillick professor of law, Stanford Law School.

It is a pleasure to have the second panel here. Folks, I hate to be repetitious, but again I want to remind you of the 1:30 hour.

There will be two attorneys who will be sitting with the panel to assist the two sides in answering questions, Mr. Cary Sherman of the RIAA will assist Ms. Rosen if she needs assistance—and rarely does she need assistance—and Mr. Jay Cooper, who is Ms. Crow's attorney, who will assist her.

Folks, permit me to take the liberty of the Chair. We are blessed with several celebrity entertainers in the room today. Time does not permit me to recognize them all, but I want to recognize Earl Scruggs. [Applause.]

Yes, I think applause is in order there.

Earl, I am doing this because I am nearer your age than I am these other youngsters out here.

Earl Scruggs, for the benefit of the uninformed, was recognized as the world's premier five-string banjoist. Mr. Scruggs, I fondly remember you and the late Lester Flatt, Uncle Jake, Cousin Josh, Paul Warren—you have given me many good hours of entertainment. It is good to have you and Louise with us.

And it is good to have the other entertainers with us.

Ms. Rosen, the clock is starting. You all be ever alert to the red light.

STATEMENT OF HILARY ROSEN, PRESIDENT AND CEO, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

Ms. ROSEN. I appreciate the time constraints and I know a lot of people have spent many months preparing for this hearing today. So everybody has a lot to say.

The RIAA is the trade association of record companies. We have large companies and we have small companies who average just a few recordings a year.

Mr. COBLE. For the benefit of the audience, all the witnesses were advised in advance that there would be a 5-minute limitation, so we didn't spring this on them at the last minute.

Please proceed, Ms. Rosen.

Ms. ROSEN. Your over-arching attempts at fairness are well appreciated, Mr. Chairman.

I have a full statement for the record.

It is important to me that we get a chance to make our case. Many in the artist community who felt strongly about this issue have had a chance to make their case. I am surprised, disappointed, and very truly sorry that the rhetoric concerning the issues here today has risen to the level that it has. We have had the privilege to work with the subcommittee many times in the past. It would never be our intention to involve the members of this subcommittee in the cross-fire of artist/record company relationships, which you can imagine are emotional.

It is especially disheartening because there are so many pressing issues in our industry today which this committee is aware of more than most others in the Congress. Issues like the growing culture on the Internet of people wanting to take music for free. I keep thinking to myself that this fight over master recording rights in 13 years will feel irrelevant if in 13 years none of us can find consumers who want to even pay for music.

Nonetheless, the issues that are raised today are important and I am glad they are being heard.

First, I think a little bit of background about the business is important. There is some anti-record company rhetoric. I guess the first and most important question is, Why do artists sign with record companies? Record companies search out artists and help to develop their talent and their image. Much goes into developing artists, maximizing their creativity and helping them reach their audience.

Record companies provide an important service for artists that I tend to sum up in one phrase: creating the demand. No, they don't inspire the magic of the music, although some individual executives have often a collaborative role with artists on their labels. They don't create the heart and the passion of the artist, nor transform their music into reality. Their sphere of expertise is really the marketplace. It is marketing, promotion and creating the demand. Find the fans, sell the music.

So what about the work for hire provision? My testimony is submitted for the record and I will be brief because I am not a lawyer. I can say that the intention of this provision was certainly not to change the law. It was, in our view, clarifying and affirming the marketplace that has existed.

Marybeth Peters said it herself. If there are albums, they can be considered collective works. Most of the companies that we represent have album contracts. That is the only thing we ever thought about in the context of this provision.

Second and most importantly, the amendment doesn't automatically render any work a work for hire. There has to be a contract. If anybody is concerned that their work is a work for hire, it is only because there is a signed contract with that provision in it.

Third, this is just a marketplace issue. From the very earliest days of the recording industry, sound recordings have been considered to be works for hire. I feel a little bit like that guy Louie in Casablanca. When everybody says, "I'm shocked. I'm shocked. I'm shocked anybody ever thought sound recordings were works for hire." In the 15 years I have been in the record industry, never a record company executive, never a manager, never an artist, never a lawyer ever raised this issue about not believing that a sound recording was a work for hire.

Artists can and certainly do own their own masters. They obviously will rely on work for hire status when they do that. If sound recordings were suddenly not eligible for work for hire status, there are artists whose masters would be in jeopardy. So simply because some artists or their representatives choose to prioritize other issues in a recording contract than owning a master doesn't mean that Congress should necessarily step in and make those priorities for them.

The recording industry is a very highly competitive marketplace. How else can you explain multi-million dollar advances when the chance of real profit or success are statistically so low. Even a new artist who gets an advance from a record label is still likely to have several times that amount of money spent on the marketing and promotion of that album because that is what the record companies want to do. That is where they believe and that is why artists sign with record labels in the first place.

If that is not the deal that they want today, in my view, there are many alternatives in the marketplace to go. Never has the marketplace provided a greater opportunity for artists today. Never has the marketplace before provided the opportunities it does today.

Everybody knows that the Internet is transforming the music industry landscape. This committee has worked long and hard on many of those issues. There are other places to go. There are other distribution systems. There are on-line services and the like. But if artists choose to indulge in the ultimate sell-out and actually sign with a record label, then it seems to me, regardless of their environment—whether it is their own web site, whether it is Yahoo, whether it is SONY Music—everybody is going to have to find some way to collect the rights associated with a single album or song and distribute that into the marketplace. Regardless, there are multiple creators.

Mr. COBLE. Ms. Rosen, can you wrap it up. Your time has expired.

Ms. ROSEN. Yes, Mr. Chairman, absolutely.

I think it is important that we are having this hearing and my hope is that when the emotions are separated from the facts that reasonable heads will prevail.

I appreciate the time, Mr. Chairman.

[The prepared statement of Ms. Rosen follows:]

PREPARED STATEMENT OF HILARY ROSEN, PRESIDENT AND CEO, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

Chairman Coble, Ranking Member Berman, Members of the Subcommittee,

I am Hilary Rosen, President and CEO of the Recording Industry Association of America. The RIAA is a trade association of America's record companies. We have several hundred member record labels that range from large companies with major distribution systems to small independent companies who average just a few recordings a year.

Thank you for giving me the opportunity to testify today about the provision passed by Congress last year adding "sound recordings" to the list of works specifically named as eligible for "work made for hire" status under copyright law.

I encouraged you to hold this hearing today, Mr. Chairman, because I welcomed a thorough review of this issue. In addition, it was important to me that the artists who have expressed concern about it come to the table to share their views.

No one in the music community has spent more time than I have, as my friend Sheryl Crow will surely attest, encouraging artists to present their viewpoints on the important issues of the day—both industry issues and social issues. I have long called for more direct artist participation rather than simply more organizations trying to suggest that they best represent the artist's interest. For the record, Mr. Chairman, neither I nor anyone at the RIAA has ever claimed in the 15 years that I have been at this association, that we represent artists. I think you will find my statements to this Subcommittee and other Committees of the Congress over the years to be quite clear on that point.

What I have always done and will continue to do is to find common interest with artists on many important issues. You know the struggles we are having in maintaining respect for copyrighted works on the Internet. High profile litigation and other activities of artists and the record companies have been very much in sync.

I suppose it is worth saying as a way to remind all of us of our continued common interest that today's discussion over master recording rights 13 years away will be irrelevant if no one pays for music when they get on-line.

I am surprised, disappointed and truly sorry that the rhetoric concerning the issue of works made for hire has risen to the level that it has, and that so many accusations have been made. We have had the privilege to work with this Subcommittee many times over the years and it would never be our intention to have its Members caught in the crossfire of artist-company relationships.

So with all the anti-company rhetoric you've heard or will hear today, why do artists sign with record companies?

Record companies search out artists and help to develop their talent and their image. Much goes into developing artists, maximizing their creativity and helping them reach an audience. In addition to providing advance payments to artists for use by them in the recording process, a record company invests time, energy and money into advertising costs, retail store positioning fees, listening posts in record stores, radio promotions, press and public relations for the artist, television appearances and travel, publicity, and Internet marketing, promotions and contests. These costs are investments that companies make to promote the success of the artist so that both can profit from the sale of the artist's recording. In addition, the record company typically pays one half of independent radio promotions, music videos, and tour support. If a recording is not successful, the company loses its entire investment, including the advance. If a recording is successful, the advance is taken out of royalties, but the other costs I mentioned are the responsibility of the record company.

In short, record companies provide the key important service for artists that I sum up with one phrase—they create the demand. No, they may not inspire the magic of the music, although individual executives often have a very collaborative role with artists on their labels—witness the recent Grammy award for Clive Davis, President of Arista; they don't create the heart and the passion of the artist nor transform their music from ideas to reality. Their sphere of expertise and value added is the marketplace. Find the fan, sell the music. Create the demand.

Statistically, this is a very risky business. Typically, less than 15% of all sound recordings released by major record companies will even make back their costs. Far

fewer return profit. Here are some revealing facts to demonstrate what I'm talking about. There were 38,857 albums released last year; 7,000 from the majors and 31,857 from independents. Out of the total releases, only 233 sold over 250,000 units. Only 437 sold over 100,000 units. That's 1% of the time for the total recording industry that an album even returns any significant sales, much less profit. Fortunately, when it hits, it can hit big. That's what goes to fund the next round of investments to develop and nurture new artists.

Record companies have operated under the work made for hire doctrine since before its codification under the 1976 Copyright Act and have operated under its existence in the statute since it took effect in 1978. When sitting down to negotiate with artists (unlike with publishing rights for which there is typically a fee to make the publishing company whole after a reversion of the copyright), the record company operates in the market with the expectation that it will bargain for ownership rights. Some artists have the determination to own their own masters in their recording agreements. They make it a priority in their negotiations. Others choose to take a larger advance, and give up ownership of the master. The point is, the issue of ownership is allowed to be decided in the marketplace. This was acknowledged by Congress in the enactment of the statutory copyright for sound recordings in 1971 when it stated in the Committee Report that "[a]s in the case of motion pictures, the bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved." S. Rep. No. 92–72 at 5 (April 20, 1971).

Needless to say, despite the symbiotic relationships that exist between labels and artists, these relationships are not always perfect. In that respect, the music industry is no different than many creative industries, in which artists and their agents, or their managers, or their studios, or their galleries, or their labels have interdependent love-hate relationships. So here is the not-so-secret, always presumed stereotype of the relationship.

In this stereotype, each side looks at the other through the prism of their own perspective. To an artist, a record label can be the devil incarnate. If you want a shot at the brass ring, you have to sell your soul and become a slave to the system—climbing aboard the train of the required and difficult music videos, high-powered promotion and expensive marketing accompanied by the flashy tours and special effects. You're often in debt to the record company, working off the advances that you negotiated to get paid up front. You have to time your creative output to the demands of the marketplace; and even worse, you have to tailor your music to popular tastes.

Labels sometimes feel that artists want the financial rewards of mass-market appeal, but they want the freedom to express themselves without regard to public demand. The label takes a substantial risk when it signs them (as the statistics I just gave you illustrate so dramatically). The label makes not only a significant financial investment in the artist, but also in terms of its time and its very special expertise in creating a career. And of course, if an album is successful it is because it was a great record. If it isn't successful, it is the record company's fault for poor marketing and promotion. And in the end, as soon as the artist achieves the success that the label worked so hard with them to deliver, the artist feels entitled to walk away.

These are the stereotypes. The good news is, they are only stereotypes. The actual relationships are much more complex and much more collaborative. But the bad news is, the perceptions persist—often because of press stories that thrive on keeping the sterotypes alive. And it is against this perceptual backdrop that artists learned of the "work made for hire" amendment to the copyright law.

Is it any wonder, then, that artists would regard the "work made for hire" amendment as a "sneak attack;" as a midnight maneuver to disadvantage their interests?

Add to that

- the mystery and extraordinary complexity surrounding the work made for hire provision, one of the most arcane provisions in the already arcane area of copyright law, and
- a sensationalist media that simply could not resist adding fuel to the fire, fanning the flames of misunderstanding with a misleading but juicy story that had everything in it but sex,

and it becomes even more understandable why the artistic community would react as it did.

No matter that the press reports were inaccurate and misleading. No matter that the characterizations were false. It is a sad commentary that I could not even get one of our most prominent industry trade weeklies to accept for publication a one-page letter to the editor I wrote rebutting the allegations. I knew then that the purveyors of these stories did not want to be bothered with the "facts."

That is why I am so grateful to Chairman Coble and Congressman Berman for calling this hearing. It appears to be the only way to get the facts out on the table, in the open, where everyone can examine them. And it is the best way to give the artists who feel burned by this amendment the opportunity they deserve to be heard, to disagree, to challenge.

Please understand: I am not here to downplay or diminish in any way the concerns of our artists over the way things work in our industry. But I *am* here to say that, whatever the legitimacy of their issues; *they have nothing to do with the work made for hire amendment to the copyright law.*

Let me tell you why:

First, the work for hire amendment was intended to clarify the law, not change it. I'm not a lawyer, let alone a copyright scholar, so I will defer to Professor Paul Goldstein of the Stanford Law School to address this point. But the takeaway message is this: *Sound recordings were already eligible for work for hire status under pre-existing law. An amendment was not needed to make them so. Thus, the amendment did not change, and could not have changed, the relative bargaining positions of artists and labels.*

Second, the amendment does not automatically render sound recordings works made for hire. It merely confirms that they are eligible *for such treatment. A sound recording becomes a work made for hire only if the creators expressly agree in writing that the work for hire doctrine shall apply. If an artist is concerned that a work for hire clause would apply to their contract, it is only because they have signed a contract with such a provision.*

Third, there is nothing new about treating sound recordings as works made for hire. From the earliest days of our industry, sound recordings were agreed to be works for hire in contract after contract after contract. Virtually every copyright registration for sound recordings on file in the Copyright Office claims work for hire status—regardless of who filed the claim. *Record labels, record managers, and recording artists themselves—they all file their copyright registrations as works made for hire.*

Fourth, and probably the most important point of all, is that work for hire status benefits everyone *involved in the creation and distribution of recorded music—including artists and producers, as well as record labels—because work for hire status is essential to preserve the marketability of highly collaborative works like sound recordings.*

And as Professor Goldstein explains in his statement, that's why Congress exempted works made for hire from the termination right otherwise granted to authors. If highly collaborative works were subject to the termination right, they would get tied up in endless disputes and negotiations over copyright ownership among any and all of the individuals who had any colorable claim of authorship (not to mention their various heirs, assigns and employers). And almost *everybody* who participates in the creation of a sound recording would have a bona fide claim of authorship under U.S. copyright law—including the producer, the engineers, the mixers, the background vocalists, the owners of samples used in the recording, and others—along with each member of the group of featured recording artists. Regardless of whether the artists' representatives testifying today believe that is a proper interpretation, the fact is that "author" is not defined in the copyright law, and we're likely to see years of litigation over which creative participants are entitled to ownership rights in the work—exactly the result the work for hire doctrine was created to avoid.

Think about the disruption that would ensue if, 35 years after its creation, each of the multitudes of authors involved in each and every track of an album could reclaim copyright ownership of that track".

- Each of such claims would have to be researched, and litigated. Imagine trying to reconstruct the facts on each such claimant 35 years after the fact.
- Rights in the recordings of a single group would differ from album to album if there were changes in band membership.
- Disagreement over the rights to a single track on an album could prevent the entire album from being sold.
- In most cases, every co-author would have an undivided right to license the sound recording on a non-exclusive basis. Thus, one of the co-authors interested in a quick buck could collect a one-time fee from a record distributor, preventing the other authors from negotiating a better deal with a competitor.
- Or one of the co-authors could grant a cheap license to an Internet music service to distribute the recording for free in order to attract site traffic, leaving the other artists with dramatically reduced prospects for future royalties.

- Since the traditional way to maximize commercial revenues is by granting exclusive licenses, any one author could hold up all the others for a greater share or higher price as a condition of agreeing to join in a single exclusive license.
- Moreover, the absence of a central administrator and the practical inability to get all joint authors to sign a license could prevent certain meaningful deals from being consummated.
- Equally significant, the featured artist would lose control over the commercial exploitation of the recordings in compilation albums, in advertising, and in motion pictures or television. As an industry lawyer recently put it to me, "An artist might suddenly find his recording in a commercial for toilet cleaners because a disgruntled ex-band member suddenly wanted to earn some extra money." These are controls which artists fight for aggressively in their contract negotiations.
- Whoever purported to grant a license would always have to worry that another co-author would come out of the woodwork later, claiming rights and royalties.

In short, litigation would flourish, while commercial exploitation in the marketplace would wither.

None of these risks actually exist because sound recordings are eligible for work made for hire status. And that is why the work for hire doctrine—which guarantees the continued ability to exploit the work commercially—is so ingrained in industry practice.

We looked up several artists in the Copyright Office database of sound recordings. Artists such as REM, Dave Matthews, Metallica, Quincy Jones, the Rolling Stones, Trent Rezno, and more, own their own masters and have registered them as works for hire. They obviously rely on work for hire status. If sound recordings were suddenly not eligible for work made for hire status, those artists rights would be in jeopardy, and unfairly so. Simply because artists or their representatives choose to prioritize other issues in a recording contract than the "work made for hire" issue is not a reason for Congress to assume that responsibility.

I realize that some are proposing that the law be repealed. More often lately I hear that the law should be changed to make featured recording artists, or royalty-bearing artists, the "authors" for copyright purposes, in other words, to change the law. But that particular cure is worse than the disease, pitting creator against creator, extending the benefits of authorship to some and excluding it from others. Who is to decide who are the "lesser" contributors? Defining who is the "featured artist" on a particular album may be doable but defining the featured artist in the copyright law would require consideration of many types of works. Is it the performer singing the songs, or was it the producer who brought it all together and created the "sound" of the band? That would certainly differ depending on the artist.

The problem becomes especially acute in the hip-hop genre, where the foundation of many recordings is *another* recording that has been digitally sampled (like a rap on top of "Stayin' Alive" or "Gangster' Paradise"). Who is the "featured artist" in that situation? The marketplace (rather than the courts) has always been able to parse out licenses and royalty sharing in these situations, but let's face it: Congress cannot legislate a "one-size-fits-all" approach to authorship in the highly variable, fact-specific circumstances of hundreds of different recording arrangements.

Moreover, no matter how fractious our music industry family may appear from time to time, these are marketplace issues. And in fact, all those "intractable" conflicts get worked out, deal by deal, in marketplace negotiations. And that's the way it should be.

The recording industry marketplace is highly competitive. How else can you explain advances of $10 million, and $30 million, and $60 million? An artist who doesn't like an offer from one label can shop his talent to a second, or a third, or a hundred others. Even a new artist who may get a $1 million dollar advance from a record label is still likely to have several times that amount spent on the promotion and marketing of their first album. These are costs that the artist never pays. Indeed, that is what they depend upon when they sign with a record label. Otherwise, they would take their music into the marketplace another way.

And never has the marketplace given artists a greater number of choices than it does today. As everyone knows, the Internet is transforming the music industry landscape, making it possible for anyone—whether an entrepreneur or the artist himself—to promote and distribute music directly to the public. Artists who don't like the old way can readily avail themselves of the new way, indeed a countless number of new ways, of doing business. I this new world, however, artists will de-

pend on the work made for hire doctrine to protect their works, whether they distribute them through an online service or on their own website.

I spend half of my life these days agreeing with the most anti-record company artist I know, the incomparable Chuck D. I agree with him when he says that when an artist today is considering signing with a record company, they should think long and hard about the alternatives. The value of the services record companies offer will be proven in the marketplace.

The music industry is an emotionally charged industry. Our artists, our managers, our label executives—their normal conversation consists of yelling at each other. It's intense; but it thrives.

Emotion is an integral part of our industry, and it's a vital part of the music our artists create. But it has no place in deciding sensible copyright policy or law.

When the facts are separated from the emotion, the conclusion is clear: work for hire eligibility is the right public policy. The work for hire provision of the copyright law was designed to balance ownership by essential contributors with marketplace availability. Sound recordings were eligible for such status before last November. They should be eligible for that status for the future as well.

Thank you.

Mr. COBLE. Professor, we have a vote on, but why don't you start? We will hear from you and when the second bell rings we may have to interrupt you in the middle.

Professor Goldstein?

STATEMENT OF PAUL GOLDSTEIN, LILLICK PROFESSOR OF LAW, STANFORD LAW SCHOOL

Mr. GOLDSTEIN. Thank you, Mr. Chairman.

I am pleased to have the opportunity to testify before you today on behalf of the Recording Industry Association of America in connection with sound recordings as works for hire.

I would like to confine my brief comments today to three themes that have emerged in the statements and testimony for these hearings and to put them in the legal context of the 1976 Copyright Act.

First, clause 2 of section 101 of the 1976 Copyright Act, from its effective date, provided clear means by which specially commissioned works, including sound recordings in record albums, may qualify as works for hire so long as there is a signed contract to that effect by the creating party and the commissioning party.

Second, the 1976 Copyright Act has no preconception at all about who that commissioning party will be. It may be the artist herself, it may be the producer of the sound recording, or it may be the record company.

Third, the legislative intention behind the work for hire provision since 1976 has been centrally to reduce transaction costs. It has in part been about termination of transfers, but that should not obscure the fact that its primary purpose has been to reduce transaction costs. Let me go over each of these points.

First, a sound recording that is specially ordered or commissioned for use as a contribution to a CD album will be a work for hire if both parties so agree in a written, signed instrument to that effect. It makes no difference that all the contributions to that work are by the same author. Indeed, beyond a bare minimum, it makes no difference how many works are in the album. They will qualify. The law is clear to that effect. The legislative history behind the 1976 act is clear to that effect. And there is no authoritative case law to contradict it. What authoritative case law there is, supports this proposition.

Second, the 1976 Copyright Act does not predicate that the commissioning party for a work for hire must be a record company. Rather—as Ms. Crow's statement well indicates and as Register Peters' testimony clearly showed—the employer or commissioning party of a work for hire may very well be the creative author herself who brings together the people to create a CD track or album. It may also be the producer of the album. I haven't seen much testimony on this, although Register Peters did allude to registrations by producers. In fact, the act is absolutely neutral about who the commissioning party will be.

Finally, third, there is a good reason for the act's neutrality in this respect. The work for hire provision, historically, has not been about divesting rights from one party and giving those rights to another. That is a matter of contract law, not work for hire law. Rather, and centrally, the work for hire provision has been about reducing the transaction costs that might otherwise hobble the dissemination of sound recordings in the marketplace.

To take an example, let us say that 10 years hence a producer wants to take a portion of a sound recording album and include it in a motion picture, or include it in a commercial for running shoes, or produce a new album—"The Hits of the 1990's"—whom does the producer go to to get these rights? If the work is a work for hire, the transaction costs of getting those rights are relatively low. The producer will go to the single entity that owns the copyright as a work for hire.

If the work is not a work for hire, however, the default principle for collaborative works such as these multi-author works is that it is a joint work, in which case, in order to obtain the exclusive rights that in the entertainment industry are almost invariably necessary to support this kind of dissemination, the producer must identify every single joint author and obtain an assignment or license from that joint author. That would be fine and transaction costs could stay relatively low if all co-authors were easy to identify.

Life may be short, but copyright is long, as witness the Sonny Bono amendments to the term of copyright. There was talk in testimony about the year 2013. But we are talking today about copyrights that may not expire until the year 2113. The definition of who is a joint owner has already changed in a single circuit over the past several years, since the passage of the 1976 act. The point is that, 120 years in the future, we are going to be asking, Who is the joint owner? As I have said, the definition has already changed several times in one circuit and it may change again. How does the potential licensee identify who the joint owners are?

Similarly, there is the question of heirs. Over the course of 100 years heirs multiply. The number of people to identify will increase.

In a word, the cost of identifying each interest holder and getting a license from her or him may well exceed the value of the intended use.

Mr. COBLE. Wrap up, Professor. Thank you.

Mr. GOLDSTEIN. Thank you.

The genius of the work for hire concept is to consolidate ownership in a single entity that will in the marketplace pay for the

privilege of being the owner of the work for hire, rewarding the creative authors accordingly, enabling consumers to receive entertainment and information goods at the lowest possible cost, and advancing the purpose of the copyright system overall.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Goldstein follows:]

PREPARED STATEMENT OF PAUL GOLDSTEIN, LILLICK PROFESSOR OF LAW, STANFORD LAW SCHOOL

Section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, P.L., 106–113, 113 Stat. 1501 A–544, amended section 101 of the 1976 Copyright Act, 17 U.S.C. §§101 *et. seq.*, to add sound recordings to the categories of specially ordered or commissioned works that will qualify as works made for hire if "the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." The present analysis, prepared at the request of the Recording Industry Association of America, explains what section 1011(d) did and did not accomplish against the legal, historical and economic background of the work for hire concept in American law.

As described in greater detail below, the 1976 Copyright Act sought to reduce the transaction costs uniquely associated with collaborative works by designating categories of collaborative works, such as collective works and motion pictures, that can specially qualify as works made for hire under Clause (2) of section 101's definition of "work for hire". The contribution of an individual sound recording as one of several selections on a CD or other album will typically constitute a "contribution to a collective work" under the terms of Clause (2), with the result that it will qualify as a work for hire if the parties so expressly agree in a signed instrument. In fact, these albums were regularly registered as works made for hire even before the 1999 amendment. Because questions, however groundless, have been raised about the status of sound recordings as collective works, it was logical for Congress to add sound recordings as a tenth category of work for hire, an addition that does not substantially change current work for hire law or allocations of rights. By reducing transaction costs associated with the licensing of recorded music, this express acknowledgment benefits not only record companies and principal performers, which will typically qualify as commissioning parties, but also secondary contributors to sound recordings.

I. BACKGROUND

A. Legal Background

Section 201(b) of the 1976 Copyright Act provides that "[I]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." Section 101 of the 1976 Act, as amended, defines a "work made for hire" in two clauses: "(1) a work prepared by an employee within the scope of his or her employment" and "(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a sound recording, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

For a work to be one made for hire under Clause (1) requires the existence of a traditional employment relationship, and if objective factors indicating such an employment relationship are not present, the parties cannot by agreement confer for-hire status on the work. (The United States Supreme Court listed the principal objective factors in *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989).) By contrast, if a work is specially ordered or commissioned and falls within one of the categories listed in Clause (2), no employment relationship need exist, and the parties can confer for-hire status on the work by a signed, written instrument to that effect.

B. Historical Background

The work for hire doctrine traces to a 1903 United States Supreme Court decision, *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239, 248, which ruled that "[t]here was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs

in their establishment to make those very things." Section 26 of the 1909 Copyright Act enacted the doctrine into positive law, providing that "the word "author" shall include an employer in the case of works made for hire." Although the 1909 Act nowhere defined "work made for hire," the legislative history reflects an intention that, at the least, they encompass "composite" works, the forerunner to the collective works included in Clause (2) of the 1976 Act's definition of work made for hire. House Committee on the Judiciary, 86th Congress 2d Session, Copyright Office Study No. 31, Renewal of Copyright 137–139 (Comm. Print 1961). The 1976 Copyright Act effectively restated the 1909 Act's work for hire doctrine in Clause (1) of its definition: a work made for hire is "a work prepared by an employee within the scope of his or her employment." Clause (2), new to the 1976 Act, listed nine categories of principally collaborative works on which the parties could confer work for hire status by an agreement to that effect signed by both.

C. Economic Background

The economic rationale for the 1976 Copyright Act's work for hire provisions is rooted in the well-documented problem of transaction costs. Clause (1) of the Act's work for hire definition resolves one aspect of this problem. If it were necessary for an employer to negotiate an assignment of copyright with each of dozens, or even hundreds, of employees each time they joined to create a copyrighted work, time and energy that could be better spent on creating new works would instead be devoted to the wasteful task of negotiating, drafting and executing contracts. When taken together with section 201(b), Clause (1)'s solution is to vest copyright initially in the employer; as stated in section 201(b), however, this is only a default solution, and in the relatively unusual case where the parties agree that the employee should own the rights in the work, they may transfer the rights accordingly.

Clause (2) of the 1976 Act's work for hire definition addresses an even more vexing problem of transaction costs: the problem of identifying ownership in collaborative works. With the possible exception of translations, each of the ten categories listed in Clause (2), including sound recordings, characteristically involves collaborative contributions among a large number of authors. Without the agreement contemplated by Clause (2), some of these contributions could take the form of joint works, some could be individual works—and some might even be works for hire under Clause (1). The ownership interests in such contributions would be speculative as well as multifarious, for it would rarely be clear what legal status—joint work, individual work, work for hire—attached to each contribution. By allowing the parties to definitively confer for-hire status on these works, Clause (2) promotes marketability by making it possible for parties to eliminate an otherwise chaotic state of copyright title, centering full ownership in a single individual or entity and thus facilitating the secure and fluent transfer of ownership interests over the life of the copyright.

An example from the motion picture industry will suggest the problems of marketability that collaborative works present. If Film Studio *B* desires to make a sequel to a popular film produced by Film Studio *A*, it must, in the absence of work for hire status, determine which of an indeterminate number of contributors owns rights in the film individually, as joint authors, or as employers. Further, since the joint work doctrine in the United States prevents any single joint owner from granting more than a nonexclusive license—an interest that will rarely, if ever, suffice for a purchaser in the position of Film Studio *B*—the studio must be certain that it has identified, and obtained transfers from, each joint author. One purpose of Clause (2) is to enhance copyright transactions by replacing these uncertainties with a signed agreement designating ownership in the commissioning party as a work for hire. As Judge Richard Posner observed in a decision enforcing Clause (2)'s signed statement requirement, the purpose of the requirement "is not only to protect people against false claims of oral agreements," but also "to make the ownership of property rights in intellectual property clear and definite, so that such property will be readily marketable." *Schiller & Schmidt, Inc.* v. *Nordisco Corp.*, 969 F. 2d 410, 412 (7th Cir. 1992).

Even in the event that all contributors to a collaborative work transferred their interests to a single party by instruments that left no doubt about the scope or term of the transfer, the absence of work for hire status for these works would only postpone the problem of marketability for thirty-five years, when one or more of the contributors terminated the earlier transfer under section 203 of the 1976 Act. For instance, section 203(a) provides that, in the case of a grant executed by two or more authors of a joint work, a majority of the authors who executed the grant may effect termination of the grant. If any of these authors is dead, his or her termination interest may be exercised by a majority of statutory successors specified in section 203(a)(2). To take the simplest possible example, if two joint authors of a sound re-

cording executed a grant and one is dead at the time the termination notice is served, the surviving joint author can effect termination only if he or she is joined by a majority of the interests held by the deceased joint author's widow or widower and children or grandchildren *per stirpes*. By exempting works for hire from the termination of transfer provisions, and by enabling collaborative works to obtain work for hire status under the terms prescribed in Clause (2), Congress effectively removed such obstacles to fluent copyright transactions.

II. WHAT SECTION 1011(D) DOES AND DOES NOT DO

A. What Section 1011(d) Does

Section 1011(d)'s modest but central achievement is to remove any doubt that sound recordings can qualify as works for hire under Clause (2) of section 101's definition of that term, just as do the contributions to such collaborative efforts as other forms of collective works, compilations, motion pictures and instructional tests. Although, as explained further below, such contributions could be—and, before section 1011(d)'s amendment of Clause (2), regularly were—treated as collective works under Clause (2), the failure of two contemporaneous District Court decisions to expressly acknowledge this fact, and the attempt by one article to question it, may have warranted Congressional clarification in the form of section 1011(d). See *Staggers* v. *Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999); *Ballas* v. *Tedesco*, 41 F.Supp. 2d 531, 541 (D.N.J. 1999); Randy Frisch & Matthew Fortnow, *The Time Bombs in the Record Company Vaults*, Entertainment, Publishing and the Arts Handbook 111, 116 (1994).[1]

B. What Section 1011(d) Does Not Do

1. Section 1011(d) Does Not Generally Confer Work for Hire Status on Works that Could Not Previously Qualify for Work for Hire Status.

The contribution of an individual sound recording as one of several selections on a CD or other album will typically constitute a "contribution to a collective work" under the terms of Clause (2) of section 101's definition of "work for hire," with the result that it will qualify as a work for hire if the parties so expressly agree in a signed instrument. Section 101 of the 1976 Copyright Act defines a "collective work" as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." Courts have, for example, protected as collective works a television program that combined several songs and dances created by others, *Apple Barrel Prods, Inc.* v. *Beard*, 730 F. 2d 384, 387–88 (5th Cir. 1984); a television station's selection and arrangement of several television programs produced by others into a "broadcast day," *National Ass'n of Broadcasters* v. *Copyright Royalty Tribunal*, 675 F 2d 367, 377–78 (D.C. Cir. 1982); and a film consisting of excerpts of Charlie Chaplin motion pictures, *Roy Export Establishment* v. *Columbia Broadcasting Sys.*, 672 F. 2d 1095, 1102–03 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982). As indicated by the last-cited decision, it is no bar to classification as a collective work that all of the contributed works originate with the same author.[2]

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[1] Neither of the two District Court cases presented the question whether an album of sound recordings can qualify as a collective work. In *Ballas*, the plaintiff's arguments, based on contract, joint work and work for hire, failed to rebut defendant's presumption of ownership arising from its copyright registration certificate. The court devoted the bulk of its copyright analysis to the joint work claim and gave scant attention to the work for hire claim. In holding that "the sound recordings are not a work for hire under the second part of the statute because they do not fit within any of the nine enumerated categories, and because there was no signed written agreement between the parties," 41 F. Supp. at 541, the court did not specifically address (nor, evidently, did plaintiff argue) the question whether the work could be considered a collective work.

Similarly, in *Staggers*, the court's treatment of Clause (2) works for hire was limited to the conclusory statement that "a sound recording does not fit within any of the nine categories of specially ordered or commissioned works," without any specific examination of whether the sound recording in issue constituted a collective work. The court cited as authority for this proposition only *Ballas*, which was similarly conclusory, and *Lulirama Ltd.* v. *Axcess Broad. Servs. Inc.* 128 F.3d 872 (5th Cir. 1997), which involved neither sound recordings nor the collective works category.

[2] An argument can be made that individual recorded compositions themselves constitute "collective works" since each will often consist of a collection of individual recorded performances, selected and arranged to form a composite work. It can also be argued that individual recorded compositions constitute "compilations" and thus can independently qualify for work for hire status under Clause (2)'s provision for works "specially ordered or commissioned for use . . . as a compilation." Section 101 of the 1976 Copyright Act defines a compilation as "a work formed

Continued

2. Section 1011(d) Does Not Confer Benefits on One Class of Sound Recording Proprietor Over Another.

There is no reason to believe that record companies, as opposed to recording artists, will be the exclusive beneficiaries of work for hire status, including the immunity this status confers from terminations of transfer. In those instances where it is the record company alone that commissions the individual contributions to a sound recording, the company will be the exclusive beneficiary of work for hire status, just as it may formerly have enjoyed commissioning party status under the collective work category of Clause (2). But, in the many instances where the contributions of back-up vocalists, musicians and recording engineers are commissioned not by a record company, but by another entity or individual—they may be commissioned by the featured artist, for example—the immediate transactional benefits of work for hire will be enjoyed by that entity or individual.

An example presented in Frisen & Fortuno, *The Time Bomb in the Record Company Vaults, supra* at 111, although inaccurate, illustrates the benefits that performers can derive from work for hire status:

> Imagine that in the year 2013 Sony Music is planning a boxed set of the greatest hits of Bruce Springsteen. The record company is eagerly anticipating the profits from this release by one of its all-time biggest-selling artists, whose music continues to generate income, much like the Led Zeppelin catalog earns significant revenues for Atlantic Records in 1993. As Sony is about to release the set, the time bomb goes off: a letter arrives from Springsteen's attorney, informing Sony that the artist is exercising his right under copyright law to terminate Sony's ownership of the sound recording. *Upon this termination Springsteen will become the sole owner of the copyrights.* If Sony wants to continue to use the recordings, it must repurchase those rights from Springsteen. [Emphasis added]

Assuming for purposes of analysis that the termination of transfer provisions applied in this situation, it is more than likely that Bruce Springsteen would *not* become "the sole owner of the copyrights." Far more likely, each of the other creative contributors to the sound recording—vocalists, musicians, producer, engineer—each of them a copyright owner in his or her own right, would jockey for position to control the disposition of terminated rights. As a consequence, and as described in the discussion of joint work terminations of transfer above, Springsteen would be in no position to renegotiate with Sony nor to convey exclusive rights to a third party without first coming to terms with each of his several co-authors. As noted above, any such transaction would be seriously vexed from the outset because of the complex and fact-sensitive determinations that would have to be made respecting the joint authorship status, if any, of each participant's role in the creation of the sound recording.

As this example suggests, the benefits of enhanced marketability of title in a sound recording will be spread among all those—record companies, producers and featured performers alike—who enjoy the bargaining power to order or commission works, and to get creative contributors to agree in writing that their contributions are works for hire. Although this result may deprive some creators, particularly background artists and engineers, of the economic benefits of termination of transfers, Congress decided when it introduced Clause (2) into the Copyright Act—well before it passed section 1011(d)—that any possible slight to artists in this position would be more than compensated by the increased revenues available to all creative participants as a result of the increased marketability of copyright titles to collaborative works.

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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." This latter argument, that the recording of an individual song involves the selection, coordination and arrangement of the recorded tracks into a creative whole, may prove too much, however, for most if not all copyrightable works can be dissected in these terms. However, if, as discussed above, Congress's motive in creating the compilation category was to insulate intensely collaborative endeavors from problems of unmarketability, then individual sound recordings—which combine the efforts of vocalists, musicians, producers and engineers—would be a logical candidate for such treatment.

In any event, the practical reality that musical sound recordings are typically created for use in a collective work like an album or CD makes resort to the "compilation" category unnecessary, and thus the focus of this opinion is on the "contribution to a collective work" category.

III. CONCLUSION

The amendment adding sound recordings to the list of works eligible for work for hire status did little more than confirm the eligibility for such status already available to sound recordings as "contributions to a collective work". The benefits of this clarification are likely to be enjoyed not only by featured recording artists, record producers and record companies—the individuals and entities that typically are commissioning parties under copyright law—but also by all of the other contributors to a sound recording who benefit from the increased marketability of the copyrighted work made possible by the work for hire doctrine.

Mr. COBLE. Thank you, Professor.

Professor Hamilton?

STATEMENT OF MARCI HAMILTON, THE THOMAS H. LEE CHAIR IN PUBLIC LAW, CARDOZO SCHOOL OF LAW

Ms. HAMILTON. Thank you, Mr. Chairman, for inviting me to testify today on this very interesting topic.

I am going to start with my constitutional hat.

It is fundamentally understood that anybody holding power is not perfect and that theme ran through the constitutional debate. Let's face it: Congress simply made a mistake last November.

As far as I can understand from what I have heard today and from what I have read of the legislative history, there was inadequate understanding. The answer to the mistake, in my view, is not to increase and prolong debate about an idea that is bad policy for copyright law and bad constitutional policy. What putting this new provision into the act does is to shift the balance of power from authors to the recording industry. We know how work made for hire contracts operate. We have nine categories in the 1976 Copyright Act that have educated us since 1978.

Work made for hire as a commissioned work—those categories mean that the industries go to, almost in the blink of an eye, standardized work made for hire contracts. The notion that there is continued negotiation about whether or not there is work made for hire is a myth. It is a standardization that occurs almost over night.

We are not talking here about choice or about keeping the market open. We are talking about shifting the balance of power to the recording industry. I have yet to hear proof that the recording industry needs this additional tool to assert power in the marketplace.

Under the 1976 act, the history is as follows. There were to be no commissioned works made for hire. Then the industries came into the picture and the number of commissioned work made for hire categories grew from zero to nine categories. There is no question from that legislative history that those nine categories are it. Any new categories added to that list constitute a substantive change.

It is important to understand how copyright contracts operate in the United States. Copyright lawyers use a "belt and suspenders" approach in every part of every contract. They put in "work made for hire" clauses in every contract, whether it is legally enforceable or not. So the fact that work made for hire clauses appeared in contracts is utterly irrelevant to whether or not the law permitted work made for hire to be applied in the relevant circumstances.

This is something that is done all the time. It is done with duration as well. We have many copyright contracts that assign rights in perpetuity. That is not legal under the Copyright Act, and it is not legal under the Constitution.

Sound recordings until November would not have been considered to be a legitimate category under the commissioned works made for hire provisions. Therefore, such contractual provisions would have been void.

My friend and colleague, Professor Goldstein, talks about transaction costs. One thing this committee needs to ask is, Who pays the transaction costs? Transaction costs are paid by the recording industry. What are transaction costs? The transaction costs are the additional costs that assumedly occur because the recording industry must go back and renegotiate 35 years after the date of the deal because of termination possibilities. So what is being complained about is the possibility they will have to renegotiate 35 years into the deal.

With the vast majority of sound recordings and every other kind of work that is made under the copyright law, 35 years after it comes out, no one cares. Termination is rarely exercised. It is only necessary and important in a small number of highly successful works.

So the question we are faced with here is, Should the recording industry have to go back and renegotiate at 35 years when it has a big success on its hands? It seems to me the equities are pretty clear. Why not? The transaction costs simply aren't that large and the lawyers can certainly handle that particular problem.

Let me just close by quickly saying that the commissioned work made for hire provision is constitutionally suspect. We have not yet seen litigation, but we will see litigation on this category of work made for hire because the Constitution's Framers chose to put into the Copyright Clause, article 1, section 8, clause 8, the term "authors." The word is "authors." They could have chosen publishers. They could have chosen guilds, like the Stationer's Company in England. They could have chosen the people. They had all those choices and they chose "authors."

To create a list of commissioned works made for hire, which turned commissioners—not even employers but just people commissioning particular works—to transform them into authors undercuts what the Framers were trying to do, which was to decentralize power over these extremely valuable works. The sound recordings addition to the list of commissioned work sorely exacerbates the problem of centralized control over copyrighted works.

Thank you.

[The prepared statement of Ms. Hamilton follows:]

PREPARED STATEMENT OF MARCI HAMILTON, THE THOMAS H. LEE CHAIR IN PUBLIC LAW, CARDOZO SCHOOL OF LAW

Thank you, Mr. Chairman, for inviting me to testify today on the unfortunate amendment of the Copyright Act's work-made-for-hire provisions to include sound recordings. This substantive change in the law deserves the full attention of this Committee.[1]

[1] Pursuant to House Rule XI, clause 2(g)(4), I disclose that I have not received any federal grant, contract, or subcontract in the current and preceding two fiscal years.

I testify today in my personal capacity as a copyright and constitutional law scholar. I hold the Thomas H. Lee Chair in Public Law at Benjamin N. Cardozo School of Law, Yeshiva University, where I specialize in copyright and constitutional law. I publish and lecture frequently in both fields and have taught copyright law for a decade. I have been especially interested in the work made for hire provisions of the 1976 Copyright Act since the 1980's when I published, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. Pa. L. Rev. 1281 (1987).

I will limit my remarks today to three points: (1) expansion of the commissioned work made for hire categories to include "sound recordings" is a substantive change that dramatically affects industry practice; (2) the experience with the work-made-for-hire provisions under the 1976 Act tells us that inclusion of categories under commissioned works made for hire leads to a dramatic increase in the imposition of work-made-for-hire status on authors; and (3) the work-made-for-hire principle is at odds with fundamental constitutional principles in the Copyright Clause of the United States Constitution, Art. I, sec. 8, cl. 8.

I. THE ADDITION OF "SOUND RECORDINGS" TO THE LIST OF WORKS ELIGIBLE TO BE CONSIDERED AS COMMISSIONED WORKS MADE FOR HIRE CONSTITUTES A SUBSTANTIVE CHANGE

Background: The 1976 Copyright Act designates two means by which a work may become a work made for hire. First, it permits employers, as that term is defined by agency law, to claim authorship of all copyrightable works of their employees. 17 U.S.C. sec. 101; *see also Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989). Second, it permits those commissioning copyrightable works that fall into a discrete set of categories to attain work-made-for-hire status. *Id.*

When a work is declared a work made for hire under the 1976 Copyright Act, the actual author of the work is no longer the author for legal purposes. Rather, the employer or the commissioner of the work steps into the shoes of the author and attains all the rights and privileges of an author. The owner of a work made for hire is in a significantly better position than if he had obtained all rights through an assignment of rights, because the actual author may not exercise termination rights (17 U.S.C. sec. 203) over a work designated as a work made for hire.

When Congress revised the copyright law through its comprehensive deliberations lasting twenty-two years and culminating in the 1976 Act, the original plan was to limit work made for hire to situations involving employers and employees. As a result of lobbying by various industry groups, however, several categories of commissioned works were added. By the end of the negotiations over the Act, nine categories had been added: works commissioned as a contribution to a collective work, as part of a motion picture or audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as answer material for a test, and as an atlas. *See Commissioned Works as Works Made for Hire*, 135 U. Pa. L. Rev. at 1294 *(describing legislative history of commissioned works-made-for-hire provisions).*

The list of categories under the commissioned works made for hire provision is exclusive. Some of the categories are generic in the sense that they could include types of works otherwise not named. For example, "contributions to collective works" could include a collection of short stories, even though literary works are not included in the list. 17 U.S.C. sec. 101(2). In that circumstance, the short stories are "contributions." Any work that falls outside the designated categories, may not be considered a commissioned work made for hire.[2]

I will repeat this point to make sure that it is clear: the statute prohibits any work from being designated as a commissioned work made for hire unless the work fits under the categories enumerated. As a result, an agreement that designates as a commissioned work made for hire any work that does not fall under any of the named categories is void and unenforceable.

Sound Recordings. Sound recordings were not included in the Act at the time of its passage. It follows ineluctably that the addition of sound recordings to the commissioned works made for hire categories renders a substantive change in the law.

Most agreements that designate sound recordings as commissioned works made for hire (i.e., works made for hire in an arrangement that is not an employer-employee relationship under agency law) would have been void until the "sound recordings" category was added to the Copyright Act. See Peter Jaszi, *Letter of Law Pro-*

[2] For all those works that fall outside the commissioned works list, the most that one other than the author can hold is an assignment of all rights (with the concomitant risk that the author will terminate in the future).

fessors Opposing Addition of Sound Recordings to Commissioned Works Made for Hire Provisions.

A caveat is in order: some sound recordings arguably fall under existing commissioned works made for hire categories. For example, a Christmas album involving different artists would fall under the "collective works" category. But there is no indication in the plain language, the legislative history, or common sense that the original categories enacted in the 1976 Act would encompass any and all sound recordings, including albums.

As a practical matter, the introduction of "sound recordings" will have enormous impact on the music industry. Before "sound recordings" was added to the commissioned works made for hire provisions, featured artists were the center of the agreements necessary to make a sound recording. The featured artist contracted with the producer, the musicians, and the sound engineers. Many of those working for the featured artist would have been considered employees of the featured artist (and therefore their creativé contributions belonged to the featured artist as author), assigned all rights, or agreed that their contribution was a work made for hire. By making the featured artist now subject to a commissioned work made for hire agreement leveraged by the recording industry, the addition of "sound recordings" to the commissioned works made for hire provisions throws a monkey wrench into standard industry practice. It takes power away from the author and centralizes power over these creative works in the already powerful recording industry.

If the featured artist is creating a work made for hire, then the power of the artist to engage in these subsidiary contracts may be questioned. As the recording industry steps into the shoes of the featured artist, the featured artist's power over the mix of creative people for each work will be dramatically reduced.

II. EXPERIENCE WITH THE WORK-MADE-FOR-HIRE PROVISIONS UNDER THE 1976 ACT SHOWS THAT THE CODIFICATION OF CATEGORIES UNDER THE COMMISSIONED WORKS MADE FOR HIRE PROVISION LEADS TO A DRAMATIC INCREASE IN THE IMPOSITION OF WORK-MADE-FOR-HIRE STATUS ON AUTHORS

Although it was not the intent of those authors' groups that conceded to the works-made-for-hire provisions in the 1976 Copyright Act, the practical effect of naming particular categories under the commissioned works made for hire provision was the standardization of work made for hire across many industries, from photography to magazines to the motion picture industry. While the authors and artists who agreed to the provisions believed that Sec. 101 would do no more than permit current practices to continue (which involved the use of work made for hire in a relatively small number of agreements), in fact the Act was read by copyright lawyers as a license to insist on work-made-for-hire status for every commissioned work that could conceivably fall under one of the categories and a concomitant broad reading of the definitions of each category. Photographers, free lance writers, and many other artists and authors were harmed by the industry shift toward standardized work-made-for-hire agreements following the enactment Sec. 101. Whatever small leverage they had had under the pre-1976 Act regime was wiped away, and they were presented with take-it-or-leave-it work made for hire status. This is due in no small part to the inequality in bargaining power between most authors of copyrightable works and the publishing industries, an inequality that was abetted by the commissioned works made for hire provisions. The same will be no less true for sound recordings.

III. THE EXPANSION OF WORK MADE FOR HIRE INTO COMMISSIONED WORKS IS AT ODDS WITH THE COPYRIGHT CLAUSE, ART. I, SEC. 8, CL. 8

The literal language of the Copyright Clause brings into doubt the constitutionality of letting commissioners displace authors' copyright rights through the operation of work made for hire. It grants Congress the power to "[t]o promote 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." The Framers of the United States Constitution, familiar with the monopolies, including the Stationers Company, of England, chose to vest copyright in "authors," not publishers or any other industry. This was a conscious decision that was consistent with the Framers' general distrust of centralized or monopolistic power. *See* Marci A. Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, Occasional Papers in Intellectual Property #5 (Benjamin N. Cardozo School of Law 1999).

By permitting various industries, for example, the motion picture industry and the recording industry, to displace authors and to become authors as a legal matter, the commissioned works made for hire provisions fly in the face of the constitutional requirement that "authors" hold exclusive rights and fundamentally violate the

Framers' intent. In this era when the communications and entertainment industries have been permitted to become huge, multi-national corporations largely immune to the antitrust laws, those holding copyright are becoming increasingly centralized and monopolistic. This is a move directly contrary to the Framers' vision.

By adding "sound recordings" to the already overly long list of works that may be commissioned and transformed into works made for hire, Congress moved the United States further away from the original design. Centralized and monopolistic control over creative works is a threat to liberty and opens the door to tyranny. The Framers' way—placing control over creative valuable works into the hands of individual authors—was the better way.

Thank you for this opportunity to testify. I would be happy to answer any questions now or in the future.

Mr. COBLE. Thank you, Professor.

Ms. Crow?

STATEMENT OF SHERYL CROW, ARTIST, ON BEHALF OF AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AMERICAN FEDERATION OF MUSICIANS, AMSONG, ARTIST COALITION

Ms. CROW. I would like to apologize, Chairman Coble, right off the bat by saying that I am no Earl Scruggs. Nonetheless, I am very happy to be here. I appreciate the committee hearing this.

My name is Sheryl Crow and I am a recording artist. I am actually here today to represent the Artist Coalition, which is newly formed concerning issues like this and future interests that will be coming up, and artist members of AFTRA and AmSong.

While we as artists appreciate the hard work and concern given on behalf of the artists, with regard to the cybersquatting bill, it is undeniable that the addition of these four words "as a sound recording" to the Copyright Act will change the future of our work. Although the addition of these words is thought to be a confirmation of an understanding that already existed, it is not true.

Mr. Berman, I appreciate your willingness to find an agreement, even if we don't return to the original place, but maybe to create something that is more acceptable to all sides. I was relieved to hear that.

I am one of many recording artists, some who are present—Deana Carter is here, Mary Chapin Carpenter, Earl Scruggs, Ronnie Spector, and probably a few others. Also, I am representing artists who wrote letters, which I have brought today and which I would love you to read, from Bruce Springsteen, Billy Joel—a lot of people wrote letters and they are in a box somewhere behind me.

Mr. COBLE. Ms. Crow, do you want those letters to be made a part of the record?

Ms. CROW. It would be great. I brought 100 copies.

Mr. COBLE. Without objection, those letters will appear in the record.

Ms. CROW. That would be great. There is also list of the members of the Artist Coalition, which is growing day by day.

[The referenced documents follow:]

R.E.M./ATHENS, L.L.C.,
Athens, GA, May 23, 2000.

TO WHOM IT MAY CONCERN: We live in a time of rapid technological innovation that is changing the business and legal realities of all entertainment industries.

With regard to recent legislature changes on the "work made for hire" provision of the Copyright Act as it pertains to Sound Recordings, we support deeming Featured Artist as the Author for purposes of Copyright Law.

PETER BUCK,
MILE MILLS,
MICHAEL STIPE.

C/O JON LANDAU MANAGEMENT,
New Canaan, CT, May 22, 2000.

DEAR MEMBERS OF THE HOUSE JUDICIARY COURTS AND INTELLECTUAL PROPERTY SUBCOMMITTEE: I would like to add my voice to that of Sheryl Crow's and my other fellow artists in order to urge that you reconsider the new "work for hire" rules. I believe that every creator should have the opportunity to one day be the holder of the copyright of his or her own creation. To invent new "work for hire" rules that have the effect of making the record company the permanent holder of those copyrights is unjust. To have done so without any public debate or discussion that included the people most affected by the changes—namely, the artists—was, in my judgement, unreasonable. I therefore respectfully urge that this issue be given the fair and open reconsideration that it truly deserves.

Sincerely,

BRUCE SPRINGSTEEN.

May 22, 2000.

I've made my living in the music business for 28 years. For 13 of those, I was a struggling staff writer in Nashville living on a draw against future royalties ranging from 75 to 300 dollars a week. I raised my oldest son on food stamps for the first three years of his life and I was genuinely grateful for the assistance. Since those days I've had my share of ups and downs but currently I make more than a good living as a songwriter, producer, and recording artist. I also co-own and operate an independent record label.

I've seen a lot of changes in this business, some for better, some for worse, but none nearly as disturbing as the idea of a "work for hire" system replacing royalty payments to artists and writers. Presently, all of the major record labels are owned by a handful of the largest most powerful corporations in the world. Are we as artists expected to believe that these telecommunication giants are in need of relief at our expense in a time of record profits? Well we don't. What's more is the corporations know we don't. That's why this travesty was hidden away in totally unrelated legislation. Well, we caught 'em and we aren't going for it. Artists work for years, for little or nothing, in hopes of someday hitting a lick that translates into some semblance of a career. When, and if, that happens the money we make is a drop in the bucket compared to the huge profits that the corporations enjoy from the fruits of our labor. They own our recordings, in most cases, forever and our royalty payments are our ONLY equity and our ONLY pension.

The bottom line is accountants and lawyers usually make lousy songwriters. If they want to include our music in their monopoly on intellectual property, they are going to have to pay us, the artists. We vote, we contribute to political campaigns, and we command an audience. Most importantly, we create the music in the first place.

Sincerely,

STEVE EARLE.

DIXIE CHICKS,
Nashville, TN, May 24, 2000.

DEAR MEMBERS OF THE HOUSE JUDICIARY COURTS & INTELLECTUAL PROPERTY SUBCOMMITTEE: Please allow us to join Sheryl Crow and our other fellow recording artists and writers in voicing our feelings regarding the new "work for hire" ruling which was recently implemented without the regard or opinions of any of us who will forever be affected by this copyright law.

As artists and songwriters, we believe that we should have the right and the opportunity to one day own the copyrights of works and creations that come from within our selves.

Never have we considered any song we've written or recorded as a "work for hire" for the label we choose to release this material. The record label is simply a vehicle

to allow the public the opportunity to enjoy our creations. We are not employees of these record companies. They gain from our efforts and that gain should not include the right to own material that was not created by them or for them and for which we have paid.

We respectfully request that this issue be reconsidered and reevaluated and that those of us who are involved in the matters be consulted and allowed to contribute to any decision making process.

Sincerely,

MARTIE SEIDEL,
EMILY ROBISON,
NATALIE MAINES.

Ms. CROW. This amendment, in our estimation, truly undermines what the architects of the copyright law intended. I was raised to believe America was based on the importance of ideas and the freedom to see dreams through. It was founded on hard work and the encouragement and nurturing of creativity. To let the looming presence of large organized special interest groups, working on behalf of film and recording companies, control the fate of the artist community is alarming. In the most eloquent words of Timothy White, who is a writer for Billboard magazine and my good friend, "It is a small change in terms of the number of words in the statute, but it is a very big change by potential implications when the heirs of recording artists discovery they don't have a legacy they might have enjoyed."

As you are aware, the designation of a sound recording as a work made for hire has severe implications for recording artists. The most serious consequence is that featured artists are no longer considered the author of the sound recording and thus are denied the right of termination under the Copyright Act, which is granted to all other authors. I am not going to debate the benefits or the shortcomings of being contracted to a record label. I think my role today is to talk about what it means to be the author of a sound recording.

If anyone in this room sat in a recording studio, you would see that the artist featured on a sound recording functions as the author of the work. Without the creative vision of that featured artist, there would be no sound recording. To legislate that the record label should be recognized and credited as the author of the sound recording undermines what I feel the framers' intent of the Constitution was.

I am the author and creator of my work. Although I appreciate my record label's advice to me, they by no means tell me what to do on my records. For the most part, we work best that way.

I am sure that I share a similar history with my fellow musicians in that a lot of hard work and a lot of years went into my craft even before I was allowed the opportunity to record an album. I grew up in Missouri in a small town and was raised by two people who were amateur musicians who had a strong appreciation for music. I received my degree from the University of Missouri in classical piano. I taught school in the public school system in St. Louis, music elementary.

I played in bands from the time I was 16 on. I worked in a recording studio. I was a side musician. I was a background singer. I wrote songs that got covered by other artists. Then I finally had the opportunity to obtain a record contract. So you can see the journey begins long before a contract is signed.

This brings me to my point that we, as artists, are not commissioned by a recording company to provide a specific work. Such as in the case of Handel in the 18th century who composed the Messiah. He was commissioned by the high courts. I am basically left to my devices in creating a work. I choose what the sound should be by choosing and working closely with a producer, or in my case I produce my own material. I choose the musicians, the engineers, the studio all based on what it is I am striving to express artistically. But the most important factor is that I pay for the recording of my albums and a portion of the marketing of the album out of my own royalties, as do all other recording artists.

This is where we, as authors of our own work, differ from the film industry. Comparisons with regard to the work for hire amendment have been made where it is necessary to treat films as a work made for hire to avoid issues of authorship. The record business is different than the film industry in a fundamental way. In the film industry, the studio pays the production costs, they hire the director, they hire the actors, they come out with a product that they have hired to be fulfilled, and then they own the film. The cost of the production is never charged back to the creative contributors.

In the record industry, as a recording artist I do not receive a fee for making an album. I may receive an advance to cover the cost of the recording process, which I am responsible for paying back in full. In other words, I don't receive a dime from the sale of my records until I have paid for all the costs incurred during production up to the point of distribution.

In short, the sound recording artist is not only the author but is also the person in charge of all facets of production up to the point of distribution. We give the record labels our work to exploit for 35 years. Like other authors, we should be able to reclaim our work as Congress intended.

And I want to acknowledge that I am extremely grateful to be in the position of being in a line of work that I love, and I am one of the lucky ones to have success. But I am here to represent all recording artists at every label that even the least visible artist may regain his work and benefit from the sweat of his labor.

I have aspired to follow in the troubadour tradition of Guthrie and those that believe that music can change the way people think, can inspire people to be a part of something, can give hope to hard-working people. But I would not like to wind up like him with very little to show for his hard work and no legacy simply because he was not allowed to own his own recordings. Is this what we are really returning to?

In conclusion, Mr. Chairman and committee members, I appreciate your taking this into consideration.

[The prepared statement of Ms. Crow follows:]

PREPARED STATEMENT OF SHERYL CROW, ARTIST, ON BEHALF OF AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AMERICAN FEDERATION OF MUSICIANS, AMSONG, ARTIST COALITION

Good morning, Chairman Coble and members of the subcommittee. My name is Sheryl Crow and I am a recording artist. On behalf of my fellow artists, I wish to thank you, Mr. Chairman, for calling this hearing today so that we may express our concerns with the work for hire amendment.

I'd like to take a moment to acknowledge those artists who have come to Washington to attend this hearing? I am also accompanied by letters from artists unable to attend the hearing today but who would like to have their voices heard.

I am here today to ask the subcommittee to repeal the work for hire amendment and to restore to recording artists our rights as authors of our work. As you are aware, the designation of a sound recording as a work made for hire has severe implications for recording artists. The most serious consequence is that featured artists are no longer considered the author of the sound recording and thus are denied the right of termination under the Copyright Act, a right granted to other authors. This surely can't be what Congress intended.

If any of you sat in on a recording session, you would see that the artist featured on a sound recording functions as the author of the work. Without the creative contribution of the featured artist, there would be no sound recording. To legislate that the record label should be recognized and credited as the "author" of the sound recording undermines the framers' intent of the Constitution and goes against my good Midwestern common sense. I am the author and creator of my work.

I am extremely grateful to be in the position of being in a line of work I so love. As the committee deliberates this important issue, I think it might be helpful if I describe the process by which I and other music artists author our sound recordings, for the journey begins long before the recording contract is signed.

Music has been a part of my life for as long as I can remember. I grew up in a small town called Kennett, Missouri, about a hundred miles from Memphis. My mother, who still teaches piano and my father, a lawyer and trumpet player, raised me to appreciate all kinds of music and to never fear the challenge of pursuing my dreams of becoming a musician. I went on to study music at the University of Missouri, where I received my degree in piano performance and music education.

While teaching music in the St. Louis school system, I began playing in local bands. I also began working in a local studio as a jingle singer for commercials. Before I obtained my recording contract, I worked as a background singer, side musician, and wrote songs that were recorded by other artists. After many years of writing my own songs and playing any place that would have me, I finally was offered a recording contract. As you can see, the creative work that goes into making a first album begins long before the record contract is ever obtained.

Because I am a recording artist and not commissioned by a recording company to provide a specified work, (as in the case of the 18th century composer, Handel and his wonderful composition, The Messiah, which was instructed to be written by the high courts), I am basically left to my own devices when it comes to creating a work that best represents what it is I am trying to express in my work and in my life. I figure out what songs I want to record. In almost all instances, I write or co-write my own material, however, I have been known to record the odd Bob Dylan tune.

Although songwriting can be the most rewarding part of the process, it can also be extremely time consuming in what is always a demanding schedule of appearances, concerts, and other work. A song can take hours, months, sometimes years to write and the demo process, in which the basic sketch of the song is recorded, often precedes the actual recording process.

For artists who do not write their own songs, there is a similar process of collecting songs from songwriters that the artists would like to record. Artists may look at over a hundred songs before choosing the ten or fifteen that inspire them.

Continuing on with my process, next there is pre-production. After I have composed the songs that will appear on the recording, I try to define how I want the album to sound. In my own process, I envision the album as a movie, with a beginning, a middle, and an ending. I try to bring a look and a feel to the recording that will take the listener on a journey. Because I produce my own records, I am basically the captain of the ship and ultimately, the decision-maker, I must also decide what musicians I want to perform on each song, given the desired sound I want to attain, what engineering staff to implement my sonic vision, what studio will be appropriate, (in my situation, I own my recording equipment which is set up in my home studio), and how much money I want to spend. The cost is very important because *I pay for the recording of my own albums and a portion of the marketing out of my royalties.*

The third stage is the actual production. This part of the process is perhaps the most difficult but also the most exciting. This is where I translate my vision for my music into a quality recording. To accomplish this, I communicate with and direct the engineer and the musicians. (In the case of an artist who does not produce himself, he will have hired a producer to facilitate the process of capturing his vision, as the artists, on the recording. The producer would have been chosen with the artist's vision in mind and follows the creative lead of the artists.) The studio schedule

tends to be rigorous because the cost of record-making is high. It's not unusual for me to work eighteen-hour days to stay within the budget.

The fourth stage of the recording process is post-production. Once the songs are recorded and mixed, I choose what songs will be included on the album and what the album will be titled. I then deliver the master tapes, completed, fully edited, and ready for manufacturing.

It has been argued that the work for hire amendment was necessary to clarify who is the author of the sound recording. There is no confusion in the record industry as to who creates the sound recording. It is the featured artists. A sound recording is the final result of the creative vision, expression and execution of one person—the featured artist. And, although the artist may respect the fine folks' opinion at the record label and may even solicit advice from them, they are, by no means, involved in the process of defining the music. Furthermore, any claims to the authorship by producers, hired musicians, background singers, engineers would be false.

Comparisons, with regard to the work for hire amendment, have been made to motion pictures where it's necessary to treat films as work made for hire to avoid confusion over the issue or authorship. The record business is different than the film industry in a very fundamental way: financing. In the film industry, the studio pays the production costs. The creative collaborators for a movie'the writer, director and performers—are generally not responsible for the costs of the production and receive fees from the studio for their contribution. They are hired by the film company to get the desired film made and once completed, the studio owns the film. The costs of the production are never charged back to the creative contributors.

As a recording artist, I do not receive a fee for making an album. I may receive an advance to cover the costs of the recording process, which I am responsible for paying back in full. The costs are deducted from and or recouped from my share of royalties. *I do not receive a dime from the sale of my albums until I have paid for all costs incurred during production. I pay for the record—not the label.*

In short, the sound recording artist is not only the author, but is also the person in charge of all facts of production, up to the point of distribution. We give the record labels our work to exploit for 35 years. Like other authors, we should be able to reclaim our work as Congress intended.

In Timothy White's most eloquent article in the May 20 issue of Billboard magazine, Mr. White states, "It's a small change in terms of the number of words in the statute, but it's a very big change by potential implications when the heirs of recording artists discover they don't have a legacy they might have enjoyed. . . . Noah Webster, the father of American copyright, felt it was so compelling to protect his work against contemporary and future claims that he rode from state to state to plead his case for copyright.

In conclusion, Mr. Chairman and distinguished committee members, I ask that you repeal the work for hire amendment and allow recording artists to negotiate with the recording industry to reach an agreement that is fair to all. Thank you.

Mr. COBLE. Thank you, Ms. Crow.

Mr. Greene?

STATEMENT OF MICHAEL GREENE, PRESIDENT AND CEO OF RECORDING ACADEMY, NATIONAL ACADEMY OF RECORDING ARTS & SCIENCES, INC.

Mr. GREENE. Good afternoon, Mr. Chairman and members of the committee.

I want to thank you for the opportunity to appear here today to discuss this issue. If you are not told every single day by the creative community how much we appreciate your work on behalf of the protection of intellectual property rights in the past and your role in keeping creative artists whole, on behalf of all of us thank you very, very much.

Mr. COBLE. Thank you. I appreciate that.

Mr. GREENE. Let me take this moment to explain why I am testifying here today. The Recording Academy is a non-profit, 16,000 rank-and-file musician group that also includes songwriters, producers, and engineers representing diverse musical genres as clas-

sical, blue grass, jazz, polka, rock, rap—it is a very big tent with a lot of folks under it that don't agree on everything. While we are best known for producing the Grammy Awards, we are also a staunch advocate for the creative music community on issues including music education in our schools, archiving preservation, mentoring, and American cultural enrichment.

My greatest legacy, I guess, is that I am the son of my father, who was a big band leader in Atlanta, Georgia. As a recording artist myself and growing up in that home with musicians all over that house, I will tell you that the frequent collision of art and commerce in the rough music seas as we go about developing our dreams and our craft can be very, very difficult. The life of a recording artist is no doubt inspired. It is also very treacherous at the same time.

There is no salary, no pension plan, no 401(k) program, no health benefits. These singers don't even enjoy the rights that songwriters are provided from radio, television, or live reproductions of their vocal interpretations. A royalty that to late Frank Sinatra and Sonny Bono advanced tirelessly. The fact is that after the recording companies have finished mining their talents, the only thing they are left with really is their recordings.

Now with the passing of this amendment, even that has been snatched from them, rendering their children and other heirs powerless to be able to take advantage of their family's recorded legacy. I think that is simply unacceptable.

You may be surprised to know, as Sheryl said, that every penny the record label spends on behalf of the artist—whether it be for recording, marketing the album, touring packaging, or music video expenses to help promote it—is 100 percent recoupable. The artist must pay all of it back.

The labels demanding the ownership of our artist masters after 35 years is much like you or I going to a bank, obtaining a mortgage, paying off the mortgage, and then the bank takes ownership of the property again. It is simply absurd.

The Recording Academy unequivocally believes that Congress should go back to the nine categories of work for hire instead of the ten, because if left to stand the new amendment will have a chilling, detrimental effect on recording artists, who are the constituents we represent today.

We, unlike any other music industry organization because of the diversity of our membership, are qualified to offer you and your colleagues, Mr. Chairman, an informed perspective that you might not obtain from the representatives of the multinational recording conglomerates, who for the most part are owned by foreign corporations. I know that the work of this committee and the Congress is to vigorously protect the interests of our citizens in the Republic, but this amendment transfers copyrights away from many U.S. citizens, such as royalty artists, and puts them permanently in the hands of these foreign conglomerates who control over 90 percent of recorded music in U.S. companies.

These companies, such as Japan-based SONY Music, the Germany-based Bertlesman, the United Kingdom-based EMI, and the Canada-based Seagrams—which owns Universal Music, the largest

record company in the world—I just don't believe that is in the best interest of any of us.

Contrary to the statements made by the labels, the addition of this new category is a major substantive change, as we have heard this morning, that should have required extensive deliberation and debate. Not one organization which represents the rights of artists was consulted, nor were any of the artists you see here before you this morning even notified. We at the Academy have had many artists tell us that they feel particularly bruised by the passage of the new law.

One artist, who feared retribution by her label if she appeared here this morning, told us in confidence that after toiling for the record company, delivering many albums under a largely onerous recording contract, weighted heavily in favor of the label, she felt there might be some light at the end of the tunnel. She would be able to get her recordings back because under the Copyright Act they would revert to her in the future. But her hopes have been dashed by this amendment that requires future works to remain the property of the record company in perpetuity.

These companies and their representatives would have you believe that the new law is set aside and that every creative participant on the album—the producer, the arranger, the engineer, and each background musician and vocalist—would claim co-author status under the copyright law, each with an equal right to authorize the commercial use of that recording. Thus, argue the record companies, terminations would be messy, confusing, and chaotic with multiple parties claiming ownership of the work.

I have headed up over 10 recording studios and produced armies of musicians over my career and I will tell you that this so-called chaos theory the recording companies are advancing is merely confetti being tossed into the air to hide the reality.

All non-featured performers, such as side musicians, backup singers, and engineers are hired to work on a song with a contractual understanding through industry standard agreements that their contributions are made without claims of authorship. This has been the standard practice forever, and anyone who has contracted, recorded, or produced a record certainly knows this.

In conclusion, it is important to note that prior to the amendment an artist could always take some solace in the thought that after a finite period of time his or her treasures—those sound recordings which embodied his or her heart, soul, and spirit—would some day be subject to reversion and made available to his or her children and other heirs as part of their estate. But the new amendment has extinguished those embers of optimism. And it is up to you, Mr. Chairman, and your colleagues to rekindle that hope and return ownership of the sound recordings to the artists and their families where they rightly belong.

Thank you very much.

[The prepared statement of Mr. Greene follows:]

PREPARED STATEMENT OF MICHAEL GREENE, PRESIDENT AND CEO OF RECORDING ACADEMY, NATIONAL ACADEMY OF RECORDING ARTS & SCIENCES, INC.

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear here today to discuss with you the recent amendment to the work made for hire provisions of the Copyright Act, the activities

of the National Academy of Recording Arts & Sciences, and how the recent passage of the amendment to Section 101 impacted not only the members of the Recording Academy, but every member of the creative music community.

The Recording Academy is a non-profit organization comprised of more than 15,000 rank-and-file music industry professionals. These professionals include, among others, artists, songwriters, producers, musicians, and engineers representing such diverse music genres as classical, bluegrass, jazz, polka, rock and rap. While we are perhaps best known for our annual awards ceremony and telecast, the GRAMMY Awards, the Recording Academy is also a staunch advocate for the creative music community on a number of fronts, including music education in our nation's schools, archiving and preservation, and cultural enrichment, such as supporting governmental funding for the arts.

Recognizing the number of important witnesses appearing today, I will make my comments brief, and focus them on the detrimental impact that the 11th hour insertion of an amendment to the Omnibus Budget Bill which added the phrase "sound-recordings" to the Copyright Act will have on the creative music community.

The Recording Academy unequivocally believes the new amendment should be repealed pending further study by Congress, and hearings on this matter should be scheduled as soon as possible after repeal. We believe this in part because of the lack of full discussion and debate which should have preceded the passage of the amendment, and in part because of the detrimental effect it will have on recording artists.

But despite our strong position on the subject, we are somewhat conflicted about our appearance here today.

Our organization is comprised of several strata of the creative and technical community within the music industry. The Academy's constituency is recording artists, songwriters, musicians, producers, engineers and other professionals in the industry. As a result, it would be disingenuous for us to propose that in every instance the performer or producer can enjoy the benefit of termination rights under the Copyright Act.

But what I am here to say is that the Recording Academy, unlike any other music industry organization, is uniquely qualified because of the diversity of our membership, to offer you and your colleagues, Mr. Chairman, an informed perspective that you might not obtain from the representatives of the multi-national recording conglomerates who, for the most part, are owned by foreign corporations.

We are here today to ensure that Congress is informed so that a conscientious and fair debate will ensue. To date, such a deliberative and fair debate has not occurred. The performers and those representing performers were shut out of the process when Section 101 was amended last year. Quite simply, no one consulted or took into consideration the interests and points of view of the performers.

By the time the industry noticed the addition of sound-recordings as a 10th category to definition Number Two of works made for hire under the Copyright Law—in an amendment buried within an unrelated Satellite Home Viewer Improvement Act—it was already embedded in the Omnibus Bill's conference report. And at this point, the bill had already been through all the compromises and negotiations that are part of the legislative process. It's ironic that with all the debate on the bill's other provisions, no one consulted the creative music community on this one.

As you undoubtedly know, Mr. Chairman, a work-for-hire can arise in one of two ways, both of which are described in Section 101 of the 1976 Copyright Act. The first way is through definition Number One: the classic employer-employee relationship scenario. All works created by employees as a part of their duties for the employer become works for hire and are automatically owned by the employer. Definition Number Two is not so straightforward, however, since it applies to non-employees or independent contractors. These persons can only create works for hire when they sign a written contract and when the written contract contains the words "work-for-hire" and, most importantly, where the work being created fits into one of the categories listed in definition Number Two.

Prior to this amendment, definition Number Two did not include a category for sound recordings. Hence, independent contractor artists who signed contracts in which sound recordings were described as works for hire did not give up the copyright ownership in their works even when the contract language stated otherwise.

Case law supports the contention that if a type of work is not specifically mentioned in the law, then it cannot be a work made for hire (except, of course, for the classic employer-employee situation). So without a substantive change in the law, sound recordings could not be works-for-hire. Now, all of that has changed. There is no ambiguity. The addition of the new category of sound recordings as works made for hire is a major substantive change that should have required extensive

deliberation and debate. Without such deliberation and debate, an informed decision by Congress is impossible.

A substantive change of this nature, at the very least, alters the economic equation that underpins the artist's relationship with the record company and tilts the balance even more in favor of the record company. At worst, this change tosses out long-established principles of copyright law that were fully debated and considered.

A repeal of the amendment, and a full debate is what we are calling for today.

While I am not here to discuss the dark-of-night method in which the amendment made its way into law, and the fact that its author, Mitch Glazier, a House Intellectual Property subcommittee staffer, who was later hired by the Recording Industry Association of America—the lobbying group for the major record conglomerates that stand to benefit the most from the new law—it is clear that the new law classifying sound recordings as works-for-hire must be repealed. It is not a technical change, nor is it one that merely clarifies a long-standing industry practice, as Glazier has repeatedly remarked.

Moreover, contrary to assertions offered by the RIAA and others, the addition of sound recordings to the list of works made for hire was not made necessary by an amendment to the cyber-squatting provision added by Senator Hatch. That provision would have created liability for using, without permission, a living person's name as a domain name with the intent to profit by selling the domain name. In fact, there is another section of the bill which creates an exemption for using such a name in connection with a copyrighted work.

Since the passage of the Copyright Act in 1976, the record companies have demonstrated their insecurity over the status of works-for-hire by requiring the musicians whose work they seek to exploit to sign documents declaring every sound recording during the last two decades to be works-for-hire.

These contracts also typically state that if a court of law finds particular works not to be "for hire" as stipulated by the copyright law, then the works are considered to be assigned to the record company. This type of clause has almost invariably been non-negotiable. Only very high-prestige artists would, on rare occasions, ever be granted the right to re-acquire their sound recordings outside of the reversion provision of Section 203. Most artists have simply been forced to sign these agreements. The playing field, as usual, could not have been more tilted in favor of the record labels.

Historically, record company lawyers have registered the songs of artists as works-for-hire with the U.S. Copyright Office, which is why the Big Five record conglomerates—speaking through the RIAA—continue to assert that the amendment to Section 101 merely "clarified" industry practice. However, for the most part, artists are not aware of these registrations. Record companies do not provide the artist with a copy of the copyright registration certificate, or notice thereof, therefore, it is inconsequential that no artist has ever contested the registrations. And in any event, a copyright registration is no more than a presumption, and one which can be rebutted in court. The registration is not the determining factor as to whether a work is or is not a work made for hire. Furthermore, the issue does not come to fruition until 2013, the first year that a sound recording may statutorily revert to the original author under the 1976 Act.

Copyright Office Register Marybeth Peters has said she views the amendment as a substantive change because it adds a whole new category. And Mr. Chairman, the Recording Academy wholeheartedly supports your statements to numerous media outlets that Congress is supposed to hold hearings before passing legislation, not afterwards.

If allowed to stand, the recent amendment will have major consequences for all artists, songwriters, producers, engineers and other rank-and-file talent in the music industry. Some industry observers have described the insertion of the amendment as a preemptive strike by the record companies to further solidify their position that the rights they have obtained to sound recordings are not subject to termination under the Act. But I'll speak more to that later.

We at the Academy have had many artists tell us that they feel particularly bruised by the passage of the new law. One even remarked that after toiling for a record company, delivering many albums under a largely onerous recording contract weighted heavily in the favor of the label, she felt there was some light at the end of the tunnel: She would be able to get her sound recordings back, because under the Copyright Act, they would revert to her in the future. But those hopes have been dashed by the prospect that future works will now remain the property of the record company unless the new law is repealed.

One thing that may not be clear to the casual observer of the music industry when discussing legislation that affects the rights of those in the music community, is that the RIAA and the Recording Academy are not the same. We have different

interests and constituencies. The RIAA predominantly represents the interests of the five major record companies. The Recording Academy, as I have mentioned, represents the creative and technical community—the artists, the producers, the songwriters and other rank-and-file members of the music industry.

As you are aware, the RIAA supports the amendment to Section 101. The Recording Academy does not.

And it should be noted that this is not the first time that the RIAA has attempted to trump the rights of recording artists through legislation.

Last year, the RIAA led the charge for new legislation that would have carved out an exception in the Bankruptcy Law to make it more difficult for musicians to declare bankruptcy. The record companies' desire to change the bankruptcy law was based on their claim that some musicians were declaring bankruptcy as a way to exit from existing recording contracts. Although musicians are more scrupulous than the RIAA gives them credit, this notion on the RIAA's part is a result of how onerous some recording contracts can be.

And the RIAA recently announced it will begin to collect royalties on behalf of recording artists. In essence, the RIAA, with its record conglomerate membership, will control the manufacturing, distribution, media placement of artists' works as well as the collection of royalties.

The passage of the new amendment, the aforementioned bankruptcy law effort and the establishing of a royalty collection business, are just a few examples of the unmitigated power the record companies exert over the creative music community.

It also illustrates how some on Capitol Hill have become accustomed to relying on the RIAA for an artist's perspective on certain issues. And while there are times when the Recording Academy agrees with the RIAA, there are times when we have different positions. As I have stated, the issue we are discussing today is clearly one of the points on which we disagree.

This new law will likely further increase the ranks of destitute artists who either failed to create that memorable blockbuster hit song or whose careers were not effectively marketed by the record label. It also impacts the successful artist whose songs become standards and have a long industry life. By losing the right to obtain control of their recordings and the future stream of income generated by the recording, artists are being sent the message that they are powerless against the big music conglomerates.

Clearly, the playing field between an artist and a record company is very unequal.

While a few artists are powerful enough to insist that ownership of their sound recordings remain outside the work-for-hire position, the overwhelmingly vast majority do not have that power. With the work-for-hire provisions now altered, it will be more difficult for even successful artists to negotiate to regain ownership of their sound recordings and, even if they can, the term of the original transfer from artist to record company will be longer as a result of this amendment.

New artists, those who do not yet know the value of their recordings and the very people the reversion rights provisions were intended to protect, are particularly impacted. They do not have the clout to negotiate favorable ownership provisions and will lose control and ownership of their sound recordings for eternity.

No featured recording artist would ever entertain the notion that he or she works for the record company, no more than a novelist would ever consider that he or she works for a publishing company. It is simply a fiction to even contemplate that the record companies conceive the artists' songs, performances, image, looks, etc., before the featured artists walk through the record company's doors.

The facts are that featured artists often write the song, they write or supervise the music arrangement, and they deliver the performance. For featured artists, the record companies do little, if any, of the foregoing. All featured recording artists know that in contracting with the record company they have, at a minimum, partnered with the record company. No featured artist is an employee of the record company.

And, as the Academy and music fans have observed over and over, many artists see their careers typically take off during the first five years of their notoriety, only to experience a decline in ensuing years. The decline sometimes results in them being cast off by the record labels in favor of the next big thing.

The main purpose of the law giving artists the ability to recapture their works in the year 2013, is to give them a so-called second bite of the apple. Prior to this amendment, artists who signed unfavorable contracts, or artists who found themselves in the position where their original works were no longer being exploited by the recipient of the original copyright grant, could exercise their termination rights. They will be unable to do this for future works unless the change to Section 101 is repealed.

The record companies and their representatives would have you believe that if the new law is set aside, then every creative participant on the album—the producer, the arranger, the engineer, and each background musician and vocalist—would claim "co-author" status under the copyright law, each with an equal right to authorize the commercial use of that recording. Thus, argue the record companies, terminations would be messy, confusing and chaotic with multiple parties simultaneously vying to exploit the work.

This "Chaos Theory" the record companies are advancing is merely confetti being tossed into the air to hide reality: All non-featured performers, such as side musicians, back-up singers and engineers, are hired to work on a song with the contractual understanding through standard industry agreements that their contributions are made without claims of authorship. That has been the standard practice forever.

It is ridiculous to assert, as the record company representatives have, that the recent change in the copyright law was necessary to address this issue. We believe that the copyright law might need a much more narrow amendment taking into consideration the nature of these side artists, producers, and other contributions.

Four of the 10 categories in the work made for hire section deal with textual material. The book industry had these placed in Section 101 to protect them in very limited instances, such as the creation of a translation.

Pre-amendment contractual understandings meant that featured artists could exercise their rights to terminate their record companies' ownership of the sound recordings and become sole owners, giving them the right to sell their works to any other entity.

This work-for-hire issue has actually been stirring for almost a decade in record industry legal circles.

An article published in the 1994 edition of the *Entertainment, Publishing And The Arts Handbook* warned that "record companies must defuse this time bomb—that is, the ability of artists to act on their rights—before it's too late" by lobbying for a work-for-hire sound recording amendment to the Copyright Act. This further supports the premise that this is not a technical amendment. This is a strategic plan that the record companies have been trying to advance for many years.

While the Recording Academy is not promoting this conspiratorial tone, we believe that now is the time to address the many copyright-related concerns that will impact the individual artists in the years ahead.

I am sure you have all heard, Mr. Chairman, the analogy that if a motion picture is widely viewed as a work-for-hire, why then shouldn't a sound recording be held to that same standard. We believe this is a specious comparison.

A film is a huge collaborative effort often involving hundreds of people. A record company often only deals with one recording artist, who frequently writes, performs and produces the work. For a record company to claim, simply because it gives an artist an advance and puts up a little marketing money that it then owns in perpetuity that artist's work and copyright, is a personal affront to all the creative members of the industry, some of whom you see sitting around the hearing room today.

The standard record agreement, as we all know it today, sets forth that all monies advanced to the artist are recoupable from the artist's royalties. There is no guarantee that the record company will effectively or seriously market the product, or that the artist will be paid any benefits. The artist is usually committed to seven or more albums with the same label, with the label being able to stop the process at any time, and with the artist not having that right at all. All in all, this relationship is patently unfair.

Record companies bill the artists for every penny spent; and any monies that the companies have expended are really just loans to the artists, "advances" as they are called in industry vernacular. They are not one-time payments offered at specific work intervals. The predicate of a work-for-hire relationship is that the individual performing the work is paid a one-time fee—and one that's not recoupable. The hallmark of all recording contracts is that all monies paid to the artists are recoupable by the record companies.

Therefore, the artist entitled to termination rights is being paid on the basis of royalties due to him or her, royalties which many times do not exist because the record company has not recouped its advances from sales of the artist's product. We have all heard the horror stories of artists who have sold millions of albums, but have been told by the record company that their projects are still in the red and the label has not yet earned its money back.

As the son of a Big Band leader and as a musician and recording artist myself, I am all too aware of the frequent collision of art and commerce in the rough music industry seas which all artists must navigate while pursuing their dreams and developing their craft. Record companies control every aspect of the artist's destiny—

whether it's deciding how much money to spend on marketing an album, which song to promote to radio stations, or in some instances, whether to release an album at all.

Prior to the amendment to Section 101, an artist could always take some solace in the thought that after a finite period of time, his or her treasures—those sound recordings which embodied his or her heart, soul and sweat—would someday be subject to reversion and made available to his or her children and other heirs as part of their estate. But the new amendment has extinguished those embers of optimism, and it is up to you, Mr. Chairman, and your colleagues to rekindle that hope and return ownership of the sound recordings to the artists.

Artists have very few tangible assets, and it troubles the Recording Academy that the few assets that artists do have—copyright ownership of their works among them—are being tossed aside surreptitiously without debate.

It has been said that artists are a fairly powerless group against the big record conglomerates and I would encourage all of you here today to think about the artist when deciding such earth-shaking legislation like a change in the Copyright Law.

Thank you.

Mr. COBLE. Thank you, Mr. Greene.

And thanks to all of you.

I think we are going to make the 1:30 deadline. In case we don't, panelists, if members of the subcommittee have questions that we do not get to ask you, I assume you all would be willing to respond by mail.

Ms. Rosen, let me put two questions to you.

And folks, if you all could keep your answers terse, as well, because we are on a short time frame.

Ms. ROSEN. Short, but not terse.

Mr. COBLE. Ms. Rosen, does your group, the RIAA, work with artists on any issues or activities?

Ms. ROSEN. Sure, Mr. Chairman. We have actually never said that we represent the artists. We represent the record companies. But my job is to find common interests with artists. Artists are the life blood of the music industry. There is no question about that. The work that we actually spend most of our time doing every day has the inclusion and support of the creative community, and a lot of it at the direction of the creative community on the Internet.

So there is a lot we are doing together. They are very high priorities in that regard. That relationship is extraordinarily valuable to us.

Mr. COBLE. Some have questioned, Ms. Rosen, that if record companies are already confident that the collective works category of works eligible for work made for hire status covered sound recordings, why was this amendment necessary?

Ms. ROSEN. That is the point, Mr. Chairman. It wasn't. We have tried to make that clear. We didn't seek this change because we thought it was necessary.

I am not defending the process, but it did come up in a reasonable way and it was innocently enough determined to be relevant.

We are confident that the albums that are contracted for that record companies are currently concerned with are collective works.

Mr. COBLE. Ms. Crow, is it your position that a sound recording does not qualify as a work made for hire as a collective work?

Ms. CROW. I make an album which is inclusive. It contains maybe 12 or 13 songs, which I look at as chapters. I do not feel like it is a collection.

Mr. COBLE. I would be glad to hear from the attorney.

Ms. CROW. Let me just say that he has worked with many, many artists over 30 years, so he is not just representing me.

Mr. COOPER. My experiences throughout the industry—I have been in this industry over 30 years as a lawyer most of the time on the artist side—by definition, I do not believe that a recording is a collective work. If you look at the simple definition that is exampled in the Copyright Act itself, it says that a collective work is a work such as a periodical issue, anthology, encyclopedia in which a number of contributions constituting separate and independent works in themselves are assembled.

I don't think that a recording falls into that category at all. When an artist goes into a studio to do their recording, they are doing it in the form of a book that has lots of chapters to it. It is no different than a book with a lot of chapters. And certainly a book by itself is not a collective work unless you take parts of this book and assemble it with parts of another book and assemble it with parts of another book.

So it is our belief that a recording that is done by an artist who goes into the studio, does this, and comes out with a finished product is not a collective work.

Mr. COBLE. Thank you, sir.

Professor Goldstein, some groups have argued that the boiler plate language in recording contracts describing the sound recording as work made for hire is meaningless because it is actually a grant or a license. What say you to that?

Mr. GOLDSTEIN. In the context of works for hire, Mr. Chairman, the act under clause 2 has three requirements. One is that the work fall into one of the specified categories. Another is that the contract be signed by both the creative artist and the commissioning party. And the third is that the contract designate the work as one made for hire.

The legal consequence, then, of using the term work for hire in that kind of agreement is to meet the third statutory requirement.

Mr. COBLE. Thank you, sir.

Professor Hamilton, I think you imply—or perhaps you say—that it is unconstitutional for the Congress to create options for parties to specify authorship of a work.

Ms. HAMILTON. It is unconstitutional for Congress to designate as an author someone who is not the creative person, especially if their sole contribution is to commission a work.

Mr. COBLE. Let me try to beat the red light.

Let's assume that featured artists would contend that background musicians and producers can agree to waive their authorship in a work. If authorship recognition is a constitutional requirement, is it therefore unconstitutional for courts to enforce those agreements?

Ms. HAMILTON. The question in the agreement, as I understand it, is whether or not the subsidiary artists are making a substantial enough contribution to constitute the kind of creative contribution and original contribution that the Constitution requires to make it copyrightable.

Where the individual contributions are insufficiently original standing by themselves to constitute a copyrightable work, and

therefore the author, for all intents and purposes, is the featured artist that is putting together the work.

Mr. COBLE. The red light appears.

The gentleman from California?

Mr. BERMAN. Thank you, Mr. Chairman.

And to the panel, your comments were in a way too short, but understandable in the context of the process and very helpful and useful.

Part of why I thought this was technical at the time is I mixed it in my own mind with the notion of a motion picture as a work for hire because it is a collective work—perhaps a collaborative work and a collective work I got mixed up in my own mind. But the issue of whether or not this is a contribution to a collective work—is it a collective work because it is using an album and there are 10 different works, as Jay Cooper said, chapters in a book perhaps, or is it a collective work because a collection of people—a recording artist, musicians, a producer, sound engineer—all get together and put their skills together to produce a sound recording? Could a couple of you real quickly try to address that? Maybe one from this side of the table and one from that side of the table.

Mr. GOLDSTEIN. Mr. Berman, I think you have it exactly right. The definition of collective works under the statute includes a work such as a periodical, et cetera, in which a number of contributions constituting separate and independent works in themselves are assembled into a collective whole. Typically, chapters in a novel, particularly a mystery novel or thriller, will not stand on their own as works of art.

The difference would be in the case of a true collective work you have works that are separate and independent of themselves—cuts on a record, an anthology of short stories to take another example—that would make a collective work.

Ms. HAMILTON. I don't think that is quite an accurate way of understanding the legislative history behind the collective works provision. The collective works provision was intended to accommodate the rights management of works like encyclopedias where there is a stable of authors who are providing individual pieces that are then brought together by another entity. It is much more efficient to have that one entity control all the copyrights.

That is to say that a Christmas album may well be a collective work.

Mr. BERMAN. Let me interrupt because I understand that point. You concede that there are some sound recordings which are collective work. Therefore, when there is a contract for work for hire it should be viewed as a work for hire because they are authorized by the statute.

But then go back to that other thought. It is a collective work because a collection of songwriters, musicians, sound engineers are all—unless it is an a capella song with no——

Ms. HAMILTON. It is not that a "collective work" is a collection of individual creative contributions. It is a collection of distinct copyrightable works. That is the key. And the Commissioner is responsible for gathering them together. All the examples we have in the statute, and in my testimony—a Christmas album or encyclopedia—don't begin to look like the kind of sound recording that an

album is. Under the legislative history, you can be certain albums were never discussed.

Mr. COOPER. I just want to point out that we have to go to the contract. We have to go to the contract that Ms. Crow and most artists sign. And in that contract, it says to Ms. Crow, "You will deliver this album. We are going to pay you in advance. You pay for all the recording costs. If you exceed the advance, it comes out of your pocket. You will hire the producer. You will hire the musicians. You will hire the studio. You will hire the engineer. You will hire the mixer. You will hire all these people."

So Ms. Crow or other artists of that nature—that is what they do. They go ahead and retain all these services and they deliver then a final product to the company. It is not the company that is hiring all these people. It is not the company that goes out and contracts with the producer.

Mr. BERMAN. But hiring isn't the test because that is only prong one. Prong two is not hiring, right?

Mr. COOPER. She goes out and engages all these people to work.

So if there is a work for hire at all, it would be by the artist because the artist is engaging everybody that is concerned with the recording and not the record company.

Mr. BERMAN. I will come back.

Mr. COBLE. We are going to try a second round, if time permits. As you can see, questions are abounding.

The gentlelady from California, Ms. Bono?

Ms. BONO. Thank you, Mr. Chairman.

Mr. Greene, could you please explain the difference between your organization, NARAS, and RIAA.

Mr. GREENE. Our 16,000 members are creative and technical. Ms. Rosen's organization represents the recording companies. To be a member of our organization, you have to have six recordings out that on the back of that recording it says you were the producer, songwriter, engineer, musician, or whatever. So there is a big difference in terms of the creative and technical community versus the label community.

Ms. BONO. Would it be fair to say that your organization as well, has not represented artists until after the fact? I know there is a lot of talk now—and I wholeheartedly agree with the necessity of artists having some sort of representation here in Washington, but up until this, you were not involved either. Correct?

Mr. GREENE. We have had an office here for 3 years, but we are not active in lobbying. Yesterday was a good example.

We had a big press conference about our Leonard Bernstein Center with the Secretary of Education. So we are here doing more cultural things, typically. But because this represents our constituency, this is an issue we felt we should address.

Ms. BONO. And then would you clarify how this amendment is different, perhaps, for older recording artists and those who never enjoyed significant revenues in recordings when originally released?

Mr. GREENE. I think Mr. Berman said it pretty well regarding the second bite. Remember that the recording industry is a pretty tough place when you are 40, 50, or 60 years old. Other than Tony Bennett and a few other folks who have found success late in their

life, really the only thing that remains for them is the recording. I think one of the reasons I am so passionate about this is I want to preserve that right for these individuals who aren't out there selling 3 million records like Snoop Doggy Dogg. That is very, very important, especially if you have spent time with older musicians.

Mr. Berman is working with us to try to build retirement homes for older musicians. I will tell you that many of them don't have any money at all.

Mr. BERMAN. And politicians.

Ms. BONO. Older politician's home, he said? [Laughter.]

Also, can you clarify the cost of recoupable advances? To me, just listening to you all talk about it, it almost sounds like indentured servitude to me. Do the labels encourage artists not to go beyond a certain point? To bring up a personal instance—and I know she will kill me—but Chastity Bono had an album out and I believe she spent up to $1 million getting this album out. Does someone try to rein them in and say, "You are a new artist. Stop at $100,000"? Or are they encouraged to keep on going because the labels have little to lose?

Mr. GREENE. No, the labels are our partners in this. I think it is a terrible thing for anybody to intimate that the labels don't want you to recoup just as quickly as the artists want to recoup. I have never found a situation where a label was anything other than the ally in trying to make sure it was as efficient and cost-effective as possible.

Ms. BONO. Ms. Crow, do you want to respond?

Ms. CROW. I would agree with that. They definitely don't send you out to spend a lot of money that they are not going to make money on. For the most part, you have people around you who are trying to facilitate your process so that you don't wind up with a product that never sees the light of day and winds up being a tax write off for a major corporation. And I think that when a record label signs you they have hopes and dreams for you just like you do, for the most part. It just so happens that most artists feel that record labels make so much more money than they do if there is success being celebrated.

Ms. BONO. But in effect the record companies are not totally demons.

Yesterday, we had a hearing in the Small Business Committee on music on the Internet and Chuck D was one of the witnesses, so it was sort of a different perspective altogether.

So the record labels do serve a very positive role also for the artisan guiding them and protecting them, too. Correct?

Ms. CROW. I have had a really positive experience with my original record label, which was A&M and now with Innerscope. I think the record industry is changing so rapidly and has a lot of people in fear. There are people who have had very negative experiences with the recording labels. I have to say—and I am going to have to be honest—even though I have had a wonderful relationship with my own recording labels, it takes a very, very, very long time as an artist to ever see any money. I had sold maybe 3 or 4 million copies of my first record before I ever saw any money.

You are allowed to audit your record label. You know they are making the money. So there are hard feelings. There is no denying that.

And then there are artists who never have the success that I have had—which is something I talked about earlier—who are counting on being able to have the rights of their recordings. Those are the people I am equally as interested in.

Ms. BONO. Thank you, Mr. Chairman. The red light is on. I thank you for the time.

Mr. COBLE. Thank you, Ms. Bono.

The gentleman from Michigan, Mr. Conyers?

Mr. CONYERS. Thank you, Mr. Chairman.

I apologize to the witnesses. I have been on the Floor working on another matter, and I missed this valuable testimony.

I want to compliment all of you. I think this has been perhaps the most precise inquiry into the industry that has happened. And obviously many of the questions that are coming are really in anticipation of what we do about the provision that has been inserted without the knowledge of most people in the Congress and in the industry itself.

I am trying to figure out whether the RIAA, Mr. Greene, has ever sought the change that has brought us all here today before from either the artists or the Congress, in your view.

Mr. GREENE. I don't think formally they have.

I will tell you that for years they have been registering the copyrights. If you ask 95 percent of the artists if they knew that that was going on, that they were making claims on those and had it in their minds that those were going to be claims in perpetuity, their jaw would drop and they would be very, very confused by that process.

Mr. CONYERS. Ms. Rosen, has the RIAA ever sought this change from either the artists or the Congress?

Ms. ROSEN. No, sir.

Mr. CONYERS. Professor Hamilton, do you have the impression whether Congress, when negotiating the Copyright Act or the work made for hire provision, ever considered including sound recordings as works made for hire?

Ms. HAMILTON. No, they did not. But we need to understand that when the 1976 act, and in particular the work made for hire provisions, were drafted, Congress delegated all the decisionmaking to the industries and told them to go negotiate and to come back with done deals. When the done deals came back, Congress put its rubber stamp on them. So this is the first time that I know of in which there has been deep investigation by the Congress into actually what the work made for hire provisions require and what they result in.

Mr. CONYERS. Did you want to add anything to that, Mr. Goldstein?

Mr. GOLDSTEIN. Thank you, Mr. Conyers. Yes, I would.

First, I think it entirely mischaracterizes what the reform process was like starting in the early 1960's through 1976. There were intensive discussions between the Copyright Office, members of the subcommittee, the precursor to this subcommittee, as well as industry representatives who were negotiating resolutions.

I quite agree with Professor Hamilton that sound recordings were not discussed. One reason for that might well be that sound recordings weren't protected under the U.S. Copyright Act until 1972, and I think it was about 1965 when the qualifying commissioned works specially had been identified. No works were added to the category after 1965.

One could infer from the historical record for that reason that because sound recordings weren't around, and had no reason to be at the table, when these categories were being listed—sound recordings were around, but they were not protectable as copyrighted works at that point—that may be a reason they were excluded.

Mr. CONYERS. Did you have any other feelings about this, Professor Hamilton?

Ms. HAMILTON. I wanted to just reinforce that Professor Goldstein was talking about an efficiency mechanism and an economic mechanism regarding work made for hire. But really what work made for hire is about is Congress' decision as to who holds power over these works. This is all a decision about where to draw the line of power, and that is really how the policy mix has to be decided by this committee.

Ms. ROSEN. Congressman Conyers, could I respond to that?

Mr. CONYERS. Yes.

Ms. ROSEN. I am sorry. I just can't keep listening to Professor Hamilton disparage the work of one of my mentors, Peter Rodino, and Congressman Kastenmaier and others who spent years evaluating the relative merits of the copyright system.

I think that there is no question, just on the bigger picture, that the 1976 Copyright Act has now produced the most significant wealth of intellectual property in the world, the most creative industries, the most significant creative community, the wealthiest artists, the wealthiest companies. This is America's number one trade export.

Mr. CONYERS. But now the companies are all out of America now. What about that? The four biggest ones aren't even in the country.

Ms. ROSEN. The contracts, the artists, the creative output is here. The money is here.

Mr. GREENE. The catalogs are elsewhere.

Mr. CONYERS. We have a little diversity here. They are buying into our system, it seems to me, and are eating our plate. It isn't even American companies anymore, which is a little bit disturbing, considering the kind of issues we deal with.

Mr. COOPER. There is one, Congressman, and that is Warner Brothers.

Mr. CONYERS. Right.

Thank you, Mr. Chairman.

Mr. COBLE. Thank you, Mr. Conyers.

Mr. Cooper, I didn't hear your last comment. What was that?

Mr. COOPER. I said there is one company that is American owned, which is Warner Brothers.

Mr. COBLE. Thank you, sir. I didn't hear what you said.

Mr. Rogan, the gentleman from California?

Mr. ROGAN. Thank you, Mr. Chairman. And I thank all the witnesses for their participation.

I found all the testimony illuminating, which means that it just leaves in a somewhat state of confusion, but with two law professors, I guess that is what you get paid to do anyway.

Ultimately, for me the question really boils down to whether this is substantive or technical change from last year. If it was substantive, then that raises a number of issues as to procedure and whether it should be revisited.

Professor Goldstein, I want to first apologize to you. I was called out of the room during the bulk of your testimony so I didn't get to hear it, although I did have an opportunity to peruse your written statement. But it was certainly my impression from at least the written statement that you viewed the 1999 change as more technical rather than substantive.

Mr. GOLDSTEIN. I wouldn't characterize it as technical in the sense of inserting a semicolon where a comma previously was in the place. It does have substantive consequence, no question about that.

The amount of the substantive consequence is what I question. The fact that sound recording albums under the 1976 act as originally enacted could qualify under the 1976 act as originally enacted—and typically did qualify according to Copyright Office records—as works for hire was the basis for that conclusion.

Mr. ROGAN. It was pretty clear from the Register of Copyrights' testimony, Ms. Peters, that at least from the Copyright Office's perspective, they view this as a significant and substantive change and will deal with it accordingly.

Was there anything about her testimony that caused a change of perception, either from you, Professor, or from Ms. Rosen, or any of the folks that are supporting the 1999 act?

Mr. GOLDSTEIN. There was one reference, or at least implication, in the written testimony—I don't believe the oral testimony included it—characterizing some judicial decisions decided about the time of this amendment as holding that sound recordings could not possibly be collective works that gave me occasion to reread those decisions. I obviously had already read them, they are referred to in my statement. I think the testimony's clear implication seriously mischaracterizes the holding of those cases.

Mr. SHERMAN. Mr. Rogan, as I heard Ms. Peters' testimony, I think she was acknowledging that sound recordings may well qualify as collective works under the 1976 act, and she thought that it could be considered a substantive change because, as the business model for the industry changes, what were collective works—that is, the primary mechanism of albums as a distribution medium—may change. It could go to a singles market on the Internet. Then this could be a substantive change for the future.

Mr. ROGAN. Ms. Crow, I couldn't help but listen to your testimony. It sounds like because of the amount of commercial success you have had your negotiating strength is probably—I don't want to say unique because successful artists have that—I suspect that is not the model for most people that are negotiating with record labels.

Ms. CROW. I think the statistics are very low as to who succeeds and how many people go on to actually have the kind of success I have been lucky enough to have, although it is changing rapidly

because of the Internet, obviously. It is going to change the role of the record labels and also allows young artists who are unknown to get their music out.

Mr. ROGAN. Feel free to weigh in on this, but I guess I should direct the question to Mr. Greene.

In your position as a representative of a number of artists, for those that don't enjoy the type of commercial success that Sheryl Crow has, at what point and in what venue do you think it would be appropriate for that 35-year termination right not to vest? You are not taking the position that everybody who signs a contract should have that 35-year right irrespective of what the contract says, are you?

Mr. GREENE. I really am taking that position. I believe that, as Sheryl said, the preponderance of people in our industry—the artists in our industry—have a very rough time. I know when I was in college waiting for that recording contract, sending tapes to everybody and getting most of them sent back with rejection letters, when that first contract came along I would have signed just about anything. I think that is probably the case with pretty much most of our artists today.

I agree that it is time for probably an international continental congress on copyrights and artist royalties and all of these things. Our organization and other organizations that represent artists are looking forward as we enter this new digital age of coming up with some ways to protect our copyrights and make life a little better for the older music people because they deserve it.

Mr. ROGAN. Mr. Chairman, is that the red light?

Could I ask unanimous consent for 30 additional seconds? I just wanted to ask one quick follow-up question?

I thank my colleagues.

My interpretation of Ms. Peters' testimony is that irrespective of what the four corners of the contract may or may not say, the courts appear to be looking at these on a case by case basis anyway.

Mr. COOPER. There have only been approximately three cases that have used the words work for hire. And those cases, while they have said specifically that a sound recording is not a work for hire, the substance of those cases would not give anybody great help here. They just have mentioned it.

But what it is and what we have in here is virtually all artists—with rare, rare exceptions, no matter what their statute—have signed a contract that says it is a work for hire. But in that contract—and all of them have it—they say "if for any reason we shall not be deemed to be the author of those masters, then it is assignment of copyright." And it says it in a number of places.

And here is another sentence, "You shall, upon a request, cause to be executed and delivered to us transfers of ownership of copyright."

Mr. ROGAN. I don't want to cut you off, but my time is so limited.

What I was really asking was, Are the courts in fact viewing these on a contract by contract basis? Does that offer a measure of protection for the artist or the author, irrespective of what any type of adhesion language might be within the contract?

Mr. COOPER. It would except for this amendment that was passed in November 1999. In other words, all three of those cases were before the amendment in which they said that under the second prong a sound recording is not a work for hire.

So what they will say after that—I would guess that they would now say with the amendment that a sound recording is a work for hire by reason of the amendment.

Mr. ROGAN. Mr. Chairman and my colleagues, thank you for the dispensation. I yield back.

Mr. COBLE. Thank you, Mr. Rogan.

The gentlelady from California, Ms. Lofgren?

Ms. LOFGREN. Thank you, Mr. Chairman.

This has been a very interesting and useful hearing. I wonder if I could do something.

I don't want Mr. Scruggs to think that only people from North Carolina like his music because I have a lot of Flatt and Scruggs albums and I have loved them. Thank you for the entertainment you have provided our family. [Applause.]

If I can ask the chairman's indulgence, I know that Ronnie Spector is in the back. I love "Be My Baby." I don't know how many other artists are here. Could we ask them just to raise their hands, so we will know? Maybe the artists who are here could stand up. [Applause.]

Mr. COBLE. If the lady would yield, I want to thank Ms. Lofgren for doing that because I did not mean to snub the others when I recognized Earl. I am delighted that Ms. Zoe is a blue grass fan. But it is good to have the others in here. I enjoyed meeting with Ms. Carter yesterday.

How about the other lady who stood up over here?

It is good to have all of you here. Thank you, Zoe, for recognizing them.

Ms. LOFGREN. Thank you, Mr. Chairman.

Not only am I a fan of blue grass, I am a former fiddler—though not a very good one, I must say.

I am wondering if I could ask all of the witnesses to do something. There has been a lot of discussion about the nature of these contracts and the boiler plate contracts. After this hearing, would each one of you provide to the committee an example of the boiler plate that you have available to you that is most commonly used, to the best of your knowledge, so that we could look at those contracts. If there is no such thing, you could tell us that, too. But I just think that would help inform us as to the nature of the business.

Secondarily, I was very interested, Professor Hamilton, in your constitutional analysis. Thinking about this whole issue, as a practical matter, if your theory is correct, wouldn't the rights of the creative author be transferred merely by an assignment of rights if the courts were to find that apt? The end result, vis a vis the performer and the record company, would in the end be the same?

Ms. HAMILTON. No, it is not the same because of the termination power.

Ms. LOFGREN. And that trumps the contract?

Ms. HAMILTON. The termination power cannot be contracted away. An author or artist may try to contract everything away.

There are contracts, in fact, which say that the artist is contracting away their termination rights. Such a provision is not effective.

Ms. LOFGREN. They cannot contract away their termination rights?

Ms. HAMILTON. Right, and therefore 35 years later they can go back and regain the work.

Ms. LOFGREN. If I could ask unanimous consent, Mr. Chairman, there has been discussion of some of the cases. I would never argue with law professors as a former part-time law teacher myself—and one who never taught copyright law—but I think we ought to make a part of the record the cases that have been referred to in the testimony today so that everyone can read what we've been discussing.

I don't think the cases are ambiguous. For example, in the *Ballas* case, the court's holding was that plaintiff's argument that a sound recording constituted work for hire is without merit, period. But I think reasonable people can disagree and I think we ought to make this a part of the record. We will all have to do our homework.

Mr. COBLE. Without objection, the referenced cases will appear in the record.

[The referenced cases follow:]

[NOTE: The cases are not reprinted here but are on file in full format with the House Judiciary Committee's Subcommittee on Courts and Intellectual Property.]

Ms. LOFGREN. Finally, before I am out of time as I know we expect to have a vote on the Floor shortly, I am wondering, Ms. Hamilton, if I could ask you this—and it is really not on point for all the artists here, but I represent Silicon Valley. Your theory sort of piqued my interest relative to programmers who are employed in software companies or other high-tech areas.

Could you address that issue how, if at all, the law applies to programmers? Is it the same, in your judgment, as what we are addressing here?

Ms. HAMILTON. We need to understand that there are two provisions. One concerns employee relationships. If there is an employer-employee relationship under agency law, the work is a work made for hire. We are discussing today commissioned works for hire. Either way, there is tension with the Constitution, which places rights in the hands of "authors."

Ms. LOFGREN. So a programmer who is employed would be treated differently.

As I say this, I see that Professor Goldstein is looking nervous.

Ms. HAMILTON. With respect to commissioned works, there is much less of an argument for work made for hire status.

From the language of the Copyright Clause, the work made for hire provisions have to be read narrowly. So if there is a question as to whether or not sound recordings ought to be covered by the pre-November 1999 statute, the answer ought to be "no" because the default position is a strict interpretation against work made for hire status.

Ms. LOFGREN. My time is up, so could I ask you, Professor Goldstein, to address this in writing to me subsequent to this hearing? I am very interested in hearing your viewpoint.

[The information referred to follows:]

STANFORD LAW SCHOOL,
Stanford, CA, June 1, 2000.

Hon. HOWARD COBLE, *Chairman,*
Subcommittee on Courts and Intellectual Property,
Committee on the Judiciary,
House of Representatives, Washington, DC.

Hon. HOWARD L. BERMAN, *Ranking Member,*
Subcommittee on Courts and Intellectual Property,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN COBLE AND RANKING MEMBER BERMAN: Thank you for the opportunity to appear before your Subcommittee at last week's hearings on Sound Recordings as Works for Hire. Pursuant to the request of Representative Lofgren, this letter will provide information on the question of ownership arrangements respecting copyrightable contributions to computer programs.

Companies and individuals involved in software design and production undertake a wide variety of arrangements for copyright ownership. In many cases, a traditional employer-employee relationship exists between the software company and the individuals who write its programs, with the result that the company is the "author" of the copyrighted software—and is initially vested with copyright—under Clause (1) of the Copyright Act's definition of "work made for hire." In other cases, the software company will commission an independent software consulting firm to deliver the required software. Again, a traditional employer-employee relationship will often exist between the consulting firm and the programmers on its payroll, with the result that the consulting firm will be an "author" under Clause (1), and the resulting work will be a work made for hire.

Alternatively, in both these settings, the individuals who write the programs will often be on the firm's premises for substantial periods and will be treated like traditional employees in some respects, but not in others (*e.g.*, tax withholding, employee benefits). Whether these individuals are "employees" under the terms of Clause (1), as explicated by the U.S. Supreme Court in *C.C.N.V.* v. *Reid*, 490 U.S. 730 (1989), will turn on the facts of each individual relationship. Finally, situations recur in both contexts in which individuals act as commissioned consultants rather than as employees, working at home and using their own tool sets and equipment to complete their assignments. I am not aware of any systematic documentation of the legal arrangements that are employed in these situations, but anecdotal evidence suggests that, in some cases, agreements are executed specifying that the resulting contributions constitute a work for hire, while in other cases they are not.

As this pattern of practice would appear to confirm, the work for hire category is less important for commissioning parties in the software industry than in the record industry. Doubtless, the central reason for this is that a piece of software will rarely if ever have more than a few years' economic life, while exceptional sound recordings may continue to possess economic value for the full life of copyright, a term that can last anywhere from 95 to 120 years or more. Consequently, there is less need in the case of software than there is in the case of sound recordings and other artistic works for a "work for hire" classification for commissioned works capable of centralizing copyright ownership in a single entity with which potential licensees can negotiate over the life of copyright, as opposed to a joint work classification that will disperse ownership over an indeterminate number of co-authors and the even less determinate generations of co-authors' heirs.

Professor Hamilton was certainly correct in her testimony to note that record companies would face transaction costs if, through agreements with recording artists or direct employment relationships, they could not avoid terminations of transfers after 35 years. The erroneous implication of this statement is that these would be the only transaction costs that record companies face. In fact, this is only a small part of the transactions cost story because of the disruptive transaction costs that will typically arise each time, over the entire copyright term, a potential licensing agreement is sought for a joint work. It has been my experience representing Internet and multimedia clients that multiplicity of co-ownership interests would have stymied us more than once in our effort to identify copyright owners to whom the client could pay a license fee in order to provide the entertainment goods or services desired by its customers. Where applicable, "work for hire" classification of these works had the effect of reducing search costs to a level at which licenses were practicable—to the benefit of copyright owners and consumers alike.

To advert to another point made at the Subcommittee hearings, I expect that the contemporary experience with copyright protection for computer programs will re-

move any doubt about the constitutionality of vesting copyright protection in corporate "authors." Just as Congress and the courts have rejected literalism and properly construed the constitutional term "Writings" to include such non-literary efforts as computer programs, so they have properly construed the term "Authors" to encompass corporate entities as well as flesh-and-blood creators. This has been the case since passage of the 1909 Copyright Act and, to my knowledge, no constitutional doubts were stirred in Congress in the course of its sustained and intensive efforts in the drafting of the 1976 Copyright Act. Similarly, no constitutional doubts been expressed in the courts, before or since, including in the Supreme Court's landmark decision in *C.C.N.V.* v. *Reid.*

I hope that this letter has answered the question raised. If the Subcommittee has any further questions, I would be pleased to try to answer them.

Respectfully yours,

PAUL GOLDSTEIN

cc: The Honorable Zoe Lofgren

Mr. COBLE. I thank the lady from California.

Mr. Sherman, I noticed your facial anguish just now.

Mr. SHERMAN. Yes. Ms. Lofgren was reading sort of the concluding statement of the court, but in that case there wasn't even a written agreement. It was a case that didn't really need to deal with the work for hire issue at all. If you read the case, you will see that the counsel acknowledged that they didn't have a work for hire claim. And then the court said there was no work for hire, so the cases really don't stand for the proposition.

Those cases clearly did not involve anything remotely resembling a work for hire; and they clearly do not involve the kinds of analyses that would be required of a recording industry contract.

Mr. COBLE. They are now part of the record, so we can look at that.

The gentleman from Virginia, Mr. Goodlatte?

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Greene, the National Academy of Recording Arts and Sciences has registered the 1998 Grammy CD in the Copyright Office as a work made for hire. On what basis does the NARAS claim work for hire status for this CD?

Mr. GREENE. It is a compilation. It comes from many different artists, many different record companies. There is a very unique master agreement which exists with all the record companies who contribute to that one product. They take half of the proceeds. The other half go to the not-for-profit 501(c)(3) charitable education foundation.

Mr. GOODLATTE. Would you agree that CDs of sound recordings can be works for hire under the preexisting categories in the definition?

Mr. GREENE. Sure.

Mr. GOODLATTE. Thank you.

Mr. Cooper, I wonder if you could answer a series of questions for me. We would also invite Ms. Crow to jump in, but as her attorney these are somewhat technical.

After we get through the questions, I will be glad to allow you to elaborate on your responses, time permitting.

First, you represent a lot of artists as they sit down to sign their first recording contracts. Is that correct?

Mr. COOPER. That is correct.

Mr. GOODLATTE. Is a work for hire provision always in those contracts?

Mr. COOPER. Yes, sir.

Mr. GOODLATTE. And you recommend that your clients sign that contract even though you have some questions about whether the work they are agreeing to do really qualifies as a work for hire?

Mr. COOPER. That is not quite the issue.

The record companies have certain boiler plate language, which no matter how much you can negotiate in royalties and how much you can negotiate in advances and how much you can negotiate in delivery requirements, there are certain things that they will not change.

Mr. GOODLATTE. To get through my list—and then allow you to go back—you negotiate the best you can, but sometimes you recommend signing these things?

Mr. COOPER. Yes, that is correct.

Mr. GOODLATTE. Would the record company agree to the deal if it did not contain a work for hire provision? I think you just answered that.

Mr. COOPER. No, it would not.

Mr. GOODLATTE. Have you ever been able to simply strike the work for hire provision from a contract?

Mr. COOPER. No, I have not been successful in doing that.

Mr. GOODLATTE. So it is pretty clear that the work for hire provision is essential to the entity with which you are negotiating?

Mr. COOPER. Again, it contains the alternate provision, which says basically that if it is not a work for hire, then this will be deemed an assignment of copyright.

Mr. GOODLATTE. Do you tell your client that you think the provision is invalid and you expect to challenge its validity sometime in the future?

Mr. COOPER. Yes, I do.

Mr. GOODLATTE. Are there other provisions in the contract that you expect to challenge?

Mr. COOPER. Yes. As an example, it contains language that says that the assignment is in perpetuity. It is not in perpetuity. There are many anomalies in the recording agreement. Many of these agreements say that we do hereby employ you. It is not an employment situation. And in those companies that use that word, you can't get it out of the contract but it is certainly not an employment situation.

Mr. GOODLATTE. Did the initial contract you worked on for Ms. Crow contain a work for hire provision?

Mr. COOPER. Yes, it did.

Mr. GOODLATTE. And once Ms. Crow gained commercial success, I imagine you were able to get a better deal for her.

Mr. COOPER. We were able to get a better deal for her, but the language is still in there.

Mr. GOODLATTE. Did you revise or renegotiate her contracts?

Mr. COOPER. Yes, I did.

Mr. GOODLATTE. Did the renegotiated contract contain the work for hire provision?

Mr. COOPER. Yes, it did.

Mr. GOODLATTE. And did you try to get it taken out?

Mr. COOPER. Yes, we did.

Mr. GOODLATTE. So you know that this provision is pretty important to the companies. Is that correct?

Mr. COOPER. Well, it has been my position, as well as many other of my contemporaries, that that language is not effective any more than employment language is effective or any more than perpetuity language is effective. So by having the alternative in there, we didn't think we were giving away anything that we didn't already have. We were well aware of the fact that the copyright law never provided that recordings would be a work for hire and never listed them as one of the categories.

Mr. GOODLATTE. But nonetheless you could not get that contract negotiated without it?

Mr. COOPER. That is correct. Record companies, like motion picture companies, have a consistent policy of never taking anything out of a contract, only adding things into a contract. [Laughter.]

And that is basically why contracts have grown from three pages when I first began practicing law to 100 pages. They just keep expanding but never removing anything.

Mr. GOODLATTE. Obviously, it means something to them for them to state that in every single contract.

Mr. COOPER. I would assume that it is their honest attempt to try and make it a work for hire, but I do not believe it has been effective as such.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

There is a vote on the Floor. We will return eminently, and by that I mean in about 15 minutes. So you all rest easy.

Before I forget it, I have been asked by representatives from Billboard that we insert articles that appeared in that publication regarding this issue. And without objection, those articles will appear in the record.

[The referenced articles follow:]

"WORK-FOR-HIRE" LAW RATTLES PROPONENTS OF ARTISTS' RIGHTS

(Continued from page 1)

[illegible] artists and record companies.

With support by the Recording Industry Assn. of America (RIAA), the [illegible] was attached to a giant omnibus appropriations bill passed by Congress in the rush to pass spending bills in the last hours of the first session of the 106th Congress (Billboard, Dec. 4, 1999). There were no hearings on the sound recording work-for-hire provision. President Clinton signed the bill into law Nov. 29.

Previously, the Copyright Act did not specifically define sound recordings as works-for-hire. [illegible]

[illegible] "collective works," and "compilation" categories, [illegible]

[illegible]

However, sources say the RIAA has tried to attach the item to various copyright bills for several years.

[illegible]

Adding to the furor in the artists' management community was the discovery that the sound recording definition item was not requested by any member of Congress. Instead, it was apparently inserted into a final conference report of the [illegible] bill by a congressional staffer at the request of the RIAA.

Some congressional leaders say the issue must now be brought before the public.

Rep. Howard Coble, R-N.C., chairman of the House Intellectual Property Subcommittee, tells Billboard that the artist community may be "overreacting" but adds, "I may be wrong, and if I'm convinced of that, we can go back to the drawing board."

> *'Obviously, this was done without input from performers'*
>
> – MARYBETH PETERS –

Top officials at the Copyright Office are bothered that the item appeared in the conference report without a public airing. Register of Copyrights Marybeth Peters says she was concerned "that it was slipped in in the middle of the night." She adds that "obviously, this was done without input from performers."

[illegible]

[illegible]

Hilary Rosen, president/CEO of the RIAA, [illegible]

[illegible]

[illegible] relations with artists."

[illegible]

The Supreme Court reviewed the work-for-hire issue in a 1989 case, Community for Non-Violence vs. Reid. [illegible]

In the industry text "This Business Of Music," co-author M. William Krasilovsky, a veteran music business attorney, writes that "the subject is fraught with uncertainty and complexity."

Krasilovsky, who has represented [illegible]

[illegible] "This wasn't a clarification," he says. "That's fraudulent. There was no intention by Congress in the 1976 Copyright Act [illegible] a substantive change."

Rosen disagrees with concerns over the 2013 reversion. [illegible]

AFTRA [illegible]

The works-for-hire feature was first discovered by lobbyists from AFTRA. However, they were unable to change or kill it, once conference report bills or appropriations bills cannot be amended.

Says music industry veteran and Giant Records president Irving Azoff, "I was assured by the RIAA's Hilary Rosen that this was not any substantive change that would negatively impact any artist with regard to the reversion of their masters. But if the artist community that I'm part of should be advised differently, I'm sure there will be a major series of hearings, complaints, and lawsuits."

Jay Rosenthal, a copyright music attorney who represents [illegible] and others, says, "I think that the performance of an artist on a record is owned originally by the artist, notwithstanding work-for-hire language in a contract. The artist assigns the work to a record company and the record company has the right to release it, but is subject to termination rights."

He adds, "The copyright law specifically states that termination rights will survive in an author even in the face of a contractual provision that says otherwise. That is what Congress intended—they didn't want record companies to move along and say to the artist, 'You waive your termination rights to the copyright in the sound recording.' They have turned the intent of the termination right on its head."

Acts' Reps Decry C'right Clause

BY BILL HOLLAND

WASHINGTON, D.C.—Federal lawmakers, Copyright Office officials, and artists' representatives are concerned about the implications of a new law, quietly inserted as a three-line item into an unrelated appropriations bill and passed by Congress last November, that defines sound recordings for the first time as "works made for hire." They

(Continued on page 74)

Work-For-Hire Provision Sparks Artist Furor, Demand For Change

BY BILL HOLLAND

WASHINGTON, D.C.—A provision that makes sound recordings a "works-for-hire" category in the Copyright Act, which could mean that recordings featured artists could lose the right to regain their authors' copyrights in the future, has caused a furor in the artists' community. [illegible]

[illegible]

(Continued on page [illegible])

WORK-FOR-HIRE PROVISION SPARKS ARTIST FUROR, DEMAND FOR CHANGE

(Continued from page 1)

The amendment was inserted in legislation by a House staffer in the last days of the first session of the 106th Congress at the request of the Recording Industry Assn. of America (RIAA) (Billboard, Jan. 15). [illegible]

[illegible]

A Legal Primer On 'Works For Hire'

[illegible]

...works made for hire under the Copyright Act are contributions to a collective work, motion pictures or audiovisual work, translations, supplementary works, compilations, instructional texts, tests, answer material for tests, and atlases (see commentary, page [illegible]).

According to former copyright lawyer and president of AGF Management [illegible], "It has been the law that sound recordings were not works made for hire, and the determination of who the 'author' is of a sound recording should be made through contractual negotiation."

[illegible], former general counsel to the Copyright Office, disagrees, saying that in his view, sound recordings have always been considered works for hire despite the fact that they are not specifically listed in the Copyright Act as such. "In that sense, this is just a technical amendment, a clarification," he says.

RIAA president/CEO Hilary Rosen says, "Sound recordings already had the benefit of work-for-hire status under the existing law, because [illegible]

...before work for hire status can arise."

However, Peter Jaszi, professor of law at American University Law School, says that sound recordings do not fit the existing definition of a "compilation" or a "collective work," which is defined as a work comprising the contributions of several people using pre-existing material to form some other creation, such as an encyclopedia.

"I would say that the sound recording, as we are considering it—that is, a collection of songs related temporally or thematically—falls out of this definition," he says. "It isn't quite a collected work, and it isn't quite a compilation either."

Rosen says, "There is no denying that it is standard industry practice to claim work-for-hire status for sound recordings, as it is with motion pictures and other collaborative efforts."

She adds that even acts such as the Dave Matthews Band and R.E.M., among others, have filed sound recordings as works for hire, "because [illegible]

...to sound, and why such status helps artists and labels alike," Rosen says.

However, some copyright lawyers, such as AGF Entertainment's [illegible], disagree with her assumptions that all parties would be able to file as co-authors.

He says, "All [non-featured performers'] contributions to sound recordings are hired on the contractual understanding [through standard producer agreements and standard background musicians union agreements] that their contributions are made without claim of authorship—as works made for hire or as assignors of all rights. This has been the practice forever. To say that the recent change of the copyright law was necessary to address this issue is ridiculous."

The copyright law states that the transfer of copyrights by artists to record companies in contracts on or after Jan. 1, 1978, can be terminated and that artists have the option of recovering their copyrights 35 years after the date of the transfer—or, beginning in 2013, based on the copyright principle that rights of authors should revert after a certain period.

[illegible]

...The grant [illegible] appropriations bill, which contained the work-for-hire provision, was signed into law by President Clinton Nov. [illegible].

The RIAA says that the amendment was announced in a Nov. [illegible], 1999, press release when it was first passed in the House of Representatives as part of the Cyber-Piracy Protection Act (Billboard, Dec. 4, 1999). However, that announcement came too late for the provision to be debated or withdrawn.

"Near the end of last year's legislative session, a number of artists sought legislative protection from 'cyber-squatters,'" says Rosen.

"In the course of those discussions, a mechanism for enabling protection for artists' names without interfering with legitimate uses of those names was proposed—namely, an exception for names used in works made for hire," she says. "It was in the context of this compromise that congressional staff determined that the law should be clarified to confirm that sound recordings are works made for hire.

"Staff made this change only after seeking input from the Copyright Office that it was appropriate," Rosen continues. [illegible]

[illegible]

BEST AVAILABLE COPY

Artists, Representatives Speak Out On New Amendment

Some industry experts speculate that the work-for-hire amendment included as part of the Intellectual Property and Communications Omnibus Reform Act of 1999, will have far-reaching implications for recording artists.

Among the concerns is that the law will effectively prevent artists from having the option to reclaim their copyrights, which is an option laid out under the termination right provision of the 1976 Copyright Act.

> *'We're going to have to fight for our rights'*
>
> • JON BON JOVI •

(see story page 1)

Following is a sampling of the reaction to the law from recording artists and artists' representatives.

• Don Henley, Warner Bros. Records recording artist: "This law raises several questions about several things, one being the work-for-hire provision. It also raises critical questions about the reversion of copyrights to artists in the year 2013, and it raises critical questions about the balance between record companies and artists as it relates to ownership of copyrights.

"I was very involved in the cybersquatting bill, and I had several conversations with [Recording Industry Assn. of America (RIAA) president/CEO] Hilary Rosen. I like Hilary, but I'm not sure she's correct that work-for-hire had to be inserted to help pass that part. I don't think Hilary is deliberately misrepresenting the facts; I wonder if she's being given all the facts. This all happened at the very last minute, and everybody was caught off guard. I fail to see what the [cybersquatting bill] has to do with the termination right clause.

[illegible]

"I was warned about this very issue about the time the cybersquatting bill was about to go through, and I fired off several letters to several congressmen. I said that some of the language in the bill would undermine the Copyright Act. I got no reply. Even if it proves to be a non-issue, it still has the appearance of looking bad—that this was inserted with no comment from the artistic community or artists. Not even Congress was involved. It was done by a congressional staffer.

"I can certainly understand where a film company would consider a film to be a work-for-hire; a film is a huge collaborative effort involving a great many people. But in the case of a record company, it's often only dealing with one artist, such as myself, who writes, performs, and produces his own record. For a record company to claim, simply because it gives an artist an advance and puts up a little marketing money, that it then owns that artist's work or that copyright in perpetuity is preposterous and outrageous.

"The first thing artists should do is call their managers and lawyers and tell them to start researching this issue. Even if Hilary is correct and this is just a technical issue and it has nothing to do with the reversion of copyright, I guarantee this is going to resurface in the future because record companies are going to do everything they can to terminate the reversion of copyrights. Record companies already make about $9 on average for every $1 that the artist makes. For them to try to grab another piece of the pie is an example of the unmitigated greed that has come about as a result of the corporatization of the recording industry."

• Ron Fierstein, former copyright lawyer and president, AGF Management, New York (represents Shawn Colvin, Mary Chapin Carpenter, and Terri Clark): "The absence of sound recordings from the Copyright Act's list of works specially ordered or commissioned has not been accidental but purposeful, and the subject of great debate in the intellectual property law world.

"The issue has been whether 'sound recordings' fit together with the other categories of such works, like compilations or even motion pictures, which are an amalgam of the separate and distinct creative contributions of many 'authors' such as directors, screenwriters, and so on. Although musicians, engineers, arrangers, producers, and others contribute their talents to a sound recording, the ultimate product is [usually, much more clearly] the creative output and expression of a singular party, the recording artist [with the other contributor's specific roles clearly defined by contract]. It's the artist's name and face and performance on an album.

"Until this unexpected change, sound recordings were not [one of the categories formally defined by the Copyright Act as] works made for hire, and the determination of who the 'author' is of a sound recording should be made through contractual negotiation."

• Richey Irie, entertainment attorney with Los Angeles-based Irie, McNeill & Wyat: "This unquestionably has the potential to have an adverse impact on artists. Most of the time, record companies and producers have not really complied with the factors that constitute a work-for-hire relationship.

"The record companies bill the artists, any monies that the companies have expended as advances are really just loans to the artists. They aren't one-time payments. The prerequisite of a work-for-hire relationship is that the individual performing the work was paid a one-time fee—not a fee that's recoupable. The hallmark of all recording contracts is that all monies paid to the artists are recoupable. The artist is really being paid on the basis of royalties.

"Although sound recordings have been dubbed as work for hire, we know that if challenged it wouldn't stand, because it really wouldn't be a work for hire. At this point, I don't think most artist representatives and members of the bar have thought this through. We were caught with our pants down. I'm a big artist advocate, so I would without question support the formation of a group that looks after legislative issues concerning artists."

• Jon Bon Jovi, Island/Def Jam recording artist: "The law is a ste[alth]

[illegible]

But that's what lawyers are for, and we're going to have to fight for our rights. Anyone whose label has [already] agreed to the reversion of the masters, they have to stand by that. If you're a new kid, you sell your soul on right either playing fields, now they're asking for the virtual rights.

"This isn't the first time the artist has gotten raped. Hopefully we're getting smarter so we'll get representation with our own group. I won't mention the artists whose

> *'Artists should call their managers and lawyers and tell them to start researching this'*
>
> • DON HENLEY •

lawyers have always double-dipped and ripped the artist as well as the label, or how many managers have been on the take.

"Would I be the guy to stand up there and go down to Washington? I don't really have the [time], but would I be involved in something like that and stand behind something? I definitely would."

• Herb Trawick, president of the artist management company the Trawick Group (represents Brian McKnight): "Clearly, given recent events [AOL's purchase of Time Warner], content is king. Artists have very few tangible assets, and it's scary to have the few assets they do have trifled with. Artists are a fairly powerless lot—and they're most powerless legislatively. It's horrifying. I would support a body established to look after legislative matters concerning artists."

• James Taylor, Columbia Records recording artist: "This issue should have a public hearing. People who are authors of songs and people who make recordings should have a say and not just the people in the record industry. I don't think the record company should be considered the author of something if they aren't the author."

• Deborah Harry, Beyond Records recording artist: "For too long, most musical artists have not had a truly fair participation in the benefits of their work, or an appropriate say in how their works are treated and used. Anything like this new law, which potentially diminishes rather than enhances artists' rights, disturbs me greatly as an artist."

• Mary Chapin Carpenter, Sony Music recording artist: "One troublesome aspect of this development is the role of the RIAA. What is most disappointing to me is the process that was used to pass this amendment—[putting] it into a 1,700-plus-page piece of irrelevant legislation, with no member of Congress sponsoring it, and with no debate or discussion, particularly from the artistic community. The RIAA claims that the amendment is merely technical. That's plainly open to debate, and that debate has not been allowed to happen."

• Ron Stone, president, Gold Mountain Management (represents Bonnie Raitt, Tracy Chapman): "For a year or two, I've been trying to organize some sort of guild with the managers and the artists, who usually wouldn't join anything. But the measure is this: Between the consolidation of the record companies, radio, promoters in the marketplace, the artist is under siege here. This law erodes, even further, the artist's position in the industry.

"We are one of the last remaining groups in the entertainment industry [outside athletes, unlike movie actors or sports figures, has no free agency. [Most artists are] tied to a record company for their entire career, never having to negotiate a deal in the free market for their services."

• Coolio, recording artist in final negotiations to sign with a new label: "I can't believe a law like this was passed. This is going to force artists to start their own labels. Everything will go back to grass roots. At some point, artists have to speak up about this. I'd totally be a part of a group established to look after legislative issues regarding artists—in fact, I'd be the spokesperson. Artists have been cheated out of their works just about ever since the record business began. The only way it's going to change is for everybody to come together as one. We need to make a fast, rush bell."

• Jay Cooper, senior partner, Manatt, Phelps and Phillips (represents Sheryl Crow, Jean Williams): "It's nasty—a significant number of records today are produced in their entirety by the artist and their producer, having nothing to do with the record company at all. Many artists have also recouped advances from record companies and have, in essence, paid for those product. They've not only paid for it, but they've produced the product, so they've created the whole thing. At the very least there must be full hearings on the matter with everybody being heard on the subject."

• Dave Koz, Capitol Records recording artist: "This might be a nice wake-up call for artists to see if

> *'This is going to force artists to start their own labels'*
>
> • COOLIO •

an organization can be set up to protect our interests. With the media changing so dramatically, maybe this is the right time—and this law serves as the impetus—to protect our interests in the 21st century. Just because you make a record for a record company does that give them the right to collect on that for eternity? I'd hate to think that's not the case.

"The thing that's a little off putting about this law is that issues, Over time, I think this will impact a great many people's lives. At the very least, it would have been nice to have some discussion."

• Michael McDonald, Ramp Records recording artist: "It's always been my understanding that the labels did own the masters. I've never thought of it in any other way. But recently I've thought, 'Why shouldn't artists own their own masters?' It should have never been the situation where labels own the intellectual property. They did it because they could; they were the only game in town. It's really more

[illegible]

of a moral question. Should anyone other than the artist really own their works?

"I'd be more than happy if I could have access to my masters, if not own them, and then I'd have the ability to go out and package and market the music and make sure the stuff was available to the public, especially if the label has no intention of marketing the product any further."

This article was prepared by Bill Holland in Washington, D.C., and Melinda Newman and Gail Mitchell in Los Angeles.

Copyright Amendment Should Be Repealed

BY BARBARA A. CRAMER

In 1976 Congress passed the first major revision of the Copyright Act since 1909. The proposal for the revision was instituted by Congress in 1955 and the Copyright Office prepared 35 studies that were distributed for review and comment. This was followed by many years of extended and controversial hearings before congressional committees.

It was a long, 21-year process before the act was concluded, and it was said to become effective for nearly two years in order to give the Copyright Office and the law an opportunity to prepare for the changes. I was honored to have been a participant in this process.

Congress thus wrote a current and very important amendment that was passed last November and became effective immediately. There were no hearings, no studies, and no requests for comment from interested groups. Anyone interested in the legislative process should be outraged that important, substantive legislation was pushed through without adequate consideration.

What is the nature of this change?

Under the existing law, an "employer" is considered the "author" of the copyright created as a result of the employment relationship. Under the old 1909 Copyright Act, the "authors" of some of the great songs in films were not the individual composers and lyricists but the film companies. That is, when the Copyright Act gives certain rights to the "authors," it means employers. Unfortunately, the U.S. is virtually alone in refusing to recognize as the author the person who really wrote the work.

The 1976 Copyright Act, which took effect in 1978, defines a work for hire as:

- A work prepared by an employee within the scope of employment. The November amendment does not change this.
- A specially ordered or commis-

(Continued on page 1122)

COPYRIGHT AMENDMENT SHOULD BE REPEALED

(Continued from page 1)

sioned work if the following conditions hold: that the work is one of nine categories defined below, and if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

The nine categories of specially ordered or commissioned work are a contribution to a collective work, a part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer material for a test, or an atlas.

The November 1990 amendment adds a 10th category, a sound recording.

Let me give you just one important change as a result of the amendment. Authors are given the right under the Copyright Act to terminate grants 35 years after the date of the grant except for works made for hire. This new amendment may deprive many recording artists, especially those with limited bargaining power of their termination rights, a chance that was put in the law specifically to benefit those who may have made disadvantageous deals early on in their careers.

However, we have always the right of free speech in arguing the fact that, had the amendment been put through the traditional channel of review and comment, it would have prevented substantial opposition.

The amendment should be repealed immediately, which can be done, and it should be reintroduced and considered in the normal course with an opportunity for proponents and opponents to be heard.

Billboard

[illegible]

Hearings Sought On 'Work For Hire' Law

BY BILL HOLLAND

WASHINGTON, D.C.—U.S. Register of Copyrights Marybeth Peters characterizes U.S. recording artists as the "the most unprotected" group of creators in the U.S. copyright community.

Peters' view was stated as part of her call for congressional hearings on a controversial, new "work for hire" provision to the U.S. Copyright Act that many feel could keep recording artists from recovering rights to their sound recordings in the future (Billboard, Jan. 15).

In a related development, four House lawmakers on the Judiciary Committee have chastised the industry for having the provision inserted without congressional hearings to air the concerns of artists' groups and have called for a hearing this session.

Peters, the federal government's top copyright official, tells Billboard she believes that "U.S. recording artists are the most unprotected segment of the entire world of copyright." She says that "this [work for hire law] issue that's just arisen has caught them by surprise, and they feel they should be heard, and I support that."

The work for hire copyright provision, which adds sound recordings to a limited list of nine other types of works that can be considered works for hire, was inserted in an unrelated bill at the request of the Recording Industry Assn. of America (RIAA). The RIAA says it used the work for hire language to protect artists' names in an anti-cybersquatting measure also passed by Congress.

RIAA president/CEO Hilary Rosen says the copyright community has always viewed sound recordings as works for hire even before the insertion of the new category in the copyright law. She calls the move "a confirmation of the understanding that has always existed."

However, copyright experts, as well as many artists' representatives and lawyers, disagree. So does Bruce York, executive director of American Federation of Television and Radio Artists. He says, "Every copyright expert we've talked to says that sound recordings were not meant to be considered works for hire."

From the halls of Congress, John Conyers, D-Mich., the ranking Democratic member of the House Judiciary Committee, says, "It is utterly disappointing to me to have substantive copyright changes involving the work-for-hire doctrine made in the middle of the night without any opportunity for the committee to review this non-urgent matter in regular open session. This is the wrong way to do business, especially when it involves someone's property rights."

In 1998 Conyers, as then-ranking Democrat from Detroit, was also one of several lawmakers who criticized the RIAA about another provision inserted in legislation without a hearing or consultation with artists' groups. The provision was in a bankruptcy reform bill that singled out recording artists and would have prevented them from threatening bankruptcy in long-term contract negotiations. That provision was later modified by the RIAA after complaints, but, in that case, the bill stalled in conference.

> *'This issue has caught artists by surprise, and they feel they should be heard, and I support that'*
>
> — MARYBETH PETERS —

Judiciary Committee member William Delahunt, D-Mass., also wants a hearing this session. Says spokesman Mark D. Agrast, "Mr. Delahunt is quite concerned about this issue. He was not aware of the change in the law until after the fact, when the performer community told him about it.

"The question of whether sound recordings are works for hire, or under what circumstances, is one that has vexed generations of copyright attorneys," says Agrast. "Without prejudging the merits, he feels it is appropriate—and would have been appropriate—to consider this under regular order [of business]."

Delahunt also serves on the Judiciary Committee's Intellectual Property Subcommittee.

Rep. Mary Bono, R-Calif., also feels the matter needs to be aired. A spokesman in her office says, "Congresswoman Bono is quite concerned with the impact this provision may have on the rights of performers and supports the need for a hearing to examine this issue."

Rep. Barney Frank, D-Mass., who also sits on the Judiciary Committee, agrees. "It does seem to be sufficiently substantive, so I do not think it should have been done in that way procedurally and I am for reopening [the issue].

"I have in the past worried about the rights of performers," adds Frank, "and as I've always told the recording industry, the motion picture industry, the publishers, the people with whom I worked on copyright protection, that for me, [such protection is] really just a proxy for the creators."

The four lawmakers join two other Judiciary Committee members—Intellectual Property Subcommittee chairman Rep. Howard Coble, R-N.C., and Rep. Howard Berman, D-Calif.—in calling for a hearing on the issue (Billboard, Jan. 22).

Peters' strongly worded call for a hearing and her description of recording artists as unprotected is seen by observers as an informed opinion, given her previously stated goals to ensure that copyright law adequately protects all rights holders in the digital age, both domestically and internationally.

Peters says she believes "hearings in Congress would be the best way to correct this." She also says other possible remedies, such as individual challenges of prior copyright registrations, could plunge the Copyright Office—and the industry—into administrative chaos.

"The issue here is not currently," Peters says. "I think most performers would agree that by whatever means the ownership of the sounds, for purposes of exploiting them [for a period of time], belongs to the record company. But before the new law, artists absolutely had the right to reclaim them.

"What they would be challenging is the statement as regards the authorship," she says. "I assume that the record companies would not be agreeing that it was not a work made for hire."

Peters also brought to light another artists' rights component in the already complicated issue of reversion rights.

Under the provisions of the 1976 copyright law revisions, she says, featured artists who made records between Feb. 15, 1972—when an amendment to the old copyright law first recognized sound recordings—and Jan. 1, 1978—when the revised copyright law went into effect—would be able to reclaim their authorship rights after 56 years. Those artists could inform record companies as early as 2018 of their plans to reclaim their rights in 2028 (56 years after 1972).

These artists form a new category of possible claimants—in addition to those who made recordings from 1978 on and would be able to claim their rights at 35 years. Beginning as early as 2003, the latter artists could inform companies of their plans to reclaim their rights in 2013 (35 years after 1978).

Universal Eyes Total Buy Of London Records U.S.

BY DON JEFFREY

NEW YORK—Universal Music Group has decided not to sell its 50% stake in London Records U.K. and is considering buying the other half of the label, according to sources.

The other 50% is owned by Roger Ames, chairman/CEO of Warner Music Group. One source says that he had been in discussions with Universal to buy its stake but that the record company had "chosen not to sell."

A spokesman for Universal confirms that the company has decided not to divest its interest in London U.K. and adds that Universal has a "contractual right" to acquire Ames' share by the end of January.

Ames was unavailable for comment at press time. But a source at Warner points out that London U.K. does not own the full London catalog and roster; it has rights "to American-generated-only catalog and U.S. signings."

It was recently announced that Warner Music International had acquired London Records U.K. from a trust established by Ames. London's publishing firm, FFrr Music, was acquired by the Warner/Chappell Music publishing company. One report estimates the total value of the deal at $200 million (see International Newsline, page 60).

Releases from London U.K. have been distributed by Warner Music in the U.S. through a licensing deal with Sire Records. These acts include All Saints, Orbital, and Fine Young Cannibals.

Universal acquired its 50% stake in London U.K. when it bought PolyGram (where Ames had been president of the music company) in 1998. Universal distributes London's U.S. titles. These acts include Salt-N-Pepa, Meat Puppets, and Harvey Danger. It was unclear at press time whether Universal would retain rights to the London name in the U.S. if it acquired all of the label.

GUEST COMMENTARY

C'right Change Spells Trouble For Artists

BY ANN CHAITOVITZ

Congress recently passed the Satellite Home and Viewer Improvements Act, part of the omnibus spending bill, which was signed by the president on Nov. 29.

In a short provision unrelated to the subject matter of the legislation, the bill changed the definition of "work made for hire" in the Copyright Act by adding "sound recordings" to the list of works that may be considered "works made for hire." The language was added during a closed-door meeting among congressional staff members at the behest of the record companies, under the guise of a mere "technical" correction.

It was adopted without hearing or discussion. The American Federation of Television and Radio Artists fought to kill it but was unable to because appropriations bills cannot be amended. This so-called technical correction spells real trouble for recording artists.

As Register of Copyrights Marybeth Peters and other noted experts have stated, this change was not a simple technical correction. Rather, it was a substantive and significant change that hurts artists. It was also a pre-emptive strike by the record companies to deny artists the ability to regain control of their recordings in the future.

> 'It is very important that artists make their voices heard in opposition to this change'

This addition of sound recordings to the definition of "work made for hire" will permit record companies to obtain irreversible ownership and control of artists' recordings by eliminating the current legal protection enabling artists to terminate the transfer of rights and regain ownership of their contributions to sound recordings.

If sound recordings are works made for hire, artists will lose the right to obtain control of their recording and the future stream of income generated by the recording.

Most royalty artists' contracts provide both 1) that the copyright for a sound

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COPYRIGHT CHANGE SPELLS TROUBLE FOR ARTISTS

(Continued from page 101)

recording be transferred from the recording artist to the record company and 2) that the sound recording is a work made for hire.

However, just saying that something is a work made for hire does not make it one. Before this change, a sound recording could not be considered a work made for hire under the law, and thus the work-for-hire contract provision was essentially null.

The effect of these contracts was that the artist was simply transferring the copyright in the sound recording to the record label. And with a transfer of copyright, the artist retained the opportunity to terminate the transfer at the end of 35 years under the Copyright Act, thereby regaining control of the recordings.

The main purpose of the termination right was to permit artists who have signed unfavorable contracts to regain control of income from the now valuable copyright work. The clock is ticking as 2013, the first year that the copyright owners of sound recordings may exercise their termination rights under the Copyright Act, approaches.

The Artist Formerly Known As Prince offers a perfect example of the impact caused by the changes made by this new amendment. The Artist has stated that he is rerecording all of his old albums, so his fans will be able to buy either his new recording of the old album—and support him—or the old recording of the album—and support his former record label.

Assuming that The Artist's royalty contract contained the standard work for hire and transfer of copyright provisions, under the old law, The Artist would be able to terminate the transfer of copyright for his first album, "For You," in 2013 and regain ownership and control of this recording.

He could then decide to release only one of the recordings or, if he continued to sell both recordings, purchases of both would support him. As The Artist's other recordings reach a date 35 years after their copyright, he could simply terminate those copyrights and regain control over the records and the income stream that they produce.

However, under the new law, these recordings would be considered works made for hire, and he will lose his termination right and the opportunity to regain ownership of these recordings.

A substantive change of this nature should not be made without hearings to explore and debate fully the impact it will have.

At the very least, the change will alter the economic equation that underpins the artist's relationship with the record company and tilt the balance even more in favor of the record company.

At the worst, this change tosses out long-established principles of copyright law that were fully debated and considered.

The Judiciary Committee's Intellectual Property Subcommittee has promised to hold hearings on the issue, so that it can be properly debated by all those with interest in this issue, including recording artists.

It is very important that artists make their voices heard in opposition to this change.

Congress Faces Music Biz Issues

Hearings Planned On AOL Time Warner, Work-for-Hire Law

BY BILL HOLLAND

WASHINGTON, D.C.—U.S. music industry groups say they have no plans to have legislation introduced in the short second session of the 106th Congress but will be kept busy dealing with new issues that arise, as well as working to defeat still-pending bills that adversely affect their interests. Two hearings are already in the works.

The Senate Judiciary Committee has announced there will be a hearing to review the recent AOL/Time Warner deal (Billboard Bulletin, Jan. 21). Meanwhile, the House Intellectual Property Subcommittee has called for a hearing to examine the impact on recording artists of a change in the Copyright Act that makes sound recordings works made for hire.

Other issues that may affect the record industry include a vote on the trade status of China, a "cultural amendment" to the still-pending juvenile justice bill, and lingering issues concerning Internet radio [illegible].

In a joint statement released Jan. 12, Senate Judiciary Committee chairman Orrin G. Hatch, R-Utah, and ranking minority member Patrick Leahy, D-Vt., said the hearing on the AOL/Time Warner merger will focus on examination of Internet music delivery services, possible "content roll-downs" that might limit consumer choices, broadband delivery access, and possible concentration and competition con-

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CONGRESS FACES MUSIC BUSINESS ISSUES

(Continued from page 1)

cerns.

"We will have to look closely whether it makes public policy sense to consolidate control of content, cable, and Internet distribution channels," says Leahy (see story this page).

The work-for-hire provision was inserted in an omnibus budget bill without hearings at the end of the first session at the request of the Recording Industry Assn. of America (RIAA). The RIAA maintains the language was inserted simply to make sure an unrelated anti-cybersquatting bill gave the names of recording artists protection from squatters who snatch up domain names for profit (Billboard, Jan. 15).

However, artists' representatives and many copyright lawyers believe that as a result of this new category in the copyright law, artists may no longer have the right to terminate their assignment agreements with record companies in the future and reclaim their authorship rights to recordings (Billboard, Jan. 22).

On Feb. 1, RIAA president/CEO Hilary Rosen, responding to opposition from some copyright experts and representatives of the artist community, sent a letter to the chairman and members of the House Intellectual Property Subcommittee urging hearings on the issue.

In the letter, Rosen restates her view that the change in the law is merely a clarifying amendment and writes that it is "appropriate and sensible to confirm that partners involved in the production of sound recordings can by agreement deem those sound recordings 'works made for hire' under the Copyright Act."

No date for either the AOL/Time Warner or work-for-hire hearings has been scheduled yet.

OTHER ISSUES

Still-pending business that affects the music industry includes a politically sensitive vote—pushed back until June—on permanent, most-favored-nation trade status for China. The major U.S. record companies are poised to open new markets there through planned joint ventures. However, following rallies in Seattle last year over the policies of the World Trade Organization (WTO), there is opposition to a change in trade status for China, which is about to join the WTO (Billboard, Jan. 15).

It is unclear what other industry-related issues and legislation lawmakers can attend to in this election year. The Republican leadership, faced with a short session and threatened by minority Democrats who will run campaigns against members of an alleged "do-nothing" Congress, will seek to use their time to accomplish as much as they can on major issues.

All House members and one-third of senators are up for re-election.

Adjournment is tentatively scheduled for Oct. 6, a month before elections, leaving both chambers empty for the remaining [illegible] days of the year.

Also pending in this session of Congress is a possible vote on a so-called "cultural amendment" in the unresolved juvenile justice bill. The amendment includes the creation of a commission with subpoena power to investigate and report on the effects of violence in the media on the nation's youth. Within that context, there might be new calls for uniform product labeling for violent product, say insiders (Billboard, Jan. 15).

Conservative lawmakers may also continue to push for support on a new joint Congressional Violence Task Force. Opponents worry it could turn into a bully pulpit for those seeking to blame the entertainment industry for violence.

Several other issues—probably on the back burner this session—include a possible legislative remedy to several Supreme Court decisions from 1999 that give state government agencies and universities immunity from federal lawsuits (Billboard, July 10, 1999).

The cases involved patent suits, but legal experts say the issue could grow to include state immunity from copyright infringement lawsuits against download-happy state university music sites.

As-yet-unlicensed Webcasters using music also pose a threat to the industry as some that might eventually tumble from arbitration at the Copyright Office into the courts or the halls of Congress.

A Jan. 1 1999, deadline passed, with many unlicensed Webcasters ignoring a provision mandated by the Digital Millennium Copyright Act that requires music-user Webcasters to file with the Copyright Office an intent to participate in rate arbitration hearings (Billboard, Jan. 8, 1999).

Earlier that year, the Digital Media Assn., which represents the owners of many Web sites, had suggested that lawmakers propose a bill offering the same kind of legal exemptions—allowing in-store play of background music—that are now given to brick-and-mortar record stores and certain restaurants and bars. Copyright owners on the Hill rejected the proposals.

Music industry observers say any such proposed expansion has no application to the performance of music in cyberspace.

On a related front, traditional radio broadcasters, represented by the National Assn. of Broadcasters (NAB), may oppose music and sound recording fees as reductions for their members who "stream" music as simply a simulcast of their AM and FM signals. But for now the group is proceeding cautiously.

The NAB met an alert to its members Oct. 8 recommending that stations that simulcast online their over-the-air broadcast signals or "engage in other Internet activities involving the digital transmissions of sound recordings," meet the Jan. 1 filing deadline to register with the Copyright Office for arbitration or possibly risk liability.

The NAB, according to the advisory, told members that there is a "serious dispute" on whether those broadcasters that only simulcast their AM or FM signals and so are "subject to this new right ... but the issue has not been resolved."

Dennis Wharton, an NAB spokesman, says that broadcasters will oppose any efforts by record companies to collect fees, but there are any chances are slim that Congress will review the matter this session.

February 12, 2000

Billboard

Broadcasters Sue RIAA Over Royalties

BY CHUCK TAYLOR

Don Henley's 'Inside Job' Ponders Love, Work, Copyrights & Wrongs

BY TIMOTHY WHITE

Wall St. Cools Toward Web Cos.

BY EILEEN FITZPATRICK and BRIAN GARRITY

Jive's 'N Sync Sales Roar On

BY ED CHRISTMAN and DON JEFFREY

House Measure Cuts Back On LPFM

BY BILL HOLLAND and FRANK SAXE

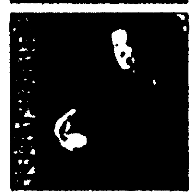
THE WHITE PAPER: DON HENLEY'S "INSIDE JOB"

(Continued from page 1)

[illegible]

Clockwise from top center

I Can't Stand Still
Asylum, 1982
Building The Perfect Beast
Geffen, 1984
The End Of The Innocence
Geffen, 1989
Actual Miles: Henley's Greatest Hits
Geffen, 1995
Inside Job
Warner Bros., 2000



[illegible]

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THE WHITE PAPER: DON HENLEY'S "INSIDE JOB"

(Continued from preceding page)

increase wealth and promote innovation . . . Dissenting voices have been drowned out by a stream of circular arguments and complex mathematical models that ignore real-world conditions and disregard values and pursuits that can't be easily turned into commodities."

Human dignity is also for sale. Any racial or social denunciation or self-degradation is deemed OK if there's going to be a cash return on it. And that's supposed to be smart. It seems that there is nothing so virulently racist, self-hating, or bigoted toward black and poor people that can't be excused as long as the scenario ends with the artist shown being paid cash for doing it.

See, that's also an attempt to get under the [illegible] radar too, by thinking being that "If I'm so ready than they can't knock me," in the '80s and '90s people tried very hard to be a rock star but also be like the common man. You try to climb your and to a blue collar and you go, "I'm one of you." Springsteen has been successful to some degree at maintaining that even after he's become humongous, but I think it's another version of that: I'm a working man, I'm one of the people.

Being one of the people is having the courage to take an isolated position. Mark Twain said, "Courage is resistance to fear, mastery of fear—not absence of it." You don't make believe you're not afraid of things.

Believe me, when I sit around writing these lyrics, I have fear. [Laughs.]

On "Workin' It" you're speaking the truth to power: "We've got a whole new class of opiates To blunt the stench of discontent In these corporation nation-states Where the loudest live to trample on the least." There are corporate nation-states now, and in the 21st century, social observers have said people may have to go to war against corporations rather than countries, and for good reasons.

I fucking hope so because I'm sick of it, and that includes record companies and film studios, and the oil companies and chemical companies. Across the board, the song ostensibly seems to be about the entertainment business, but it's about all of them, as far as I'm concerned. Because I've spent half the money I've made in the past 25 years fighting these bastards, mostly on the environmental front.

On the song "Goodbye To A River" I say "They're killing everything divine," and they are. And they're killing, as you said, human dignity. You can turn on daytime TV and see the most disgusting, squalid display of the lack—or disappearance—of human dignity I've ever seen in my life. The networks are exploiting people's flaws, exploiting human weakness. Like Jenny Jones, who ought to be in prison in my estimation.

The question asked every day in our culture, in capital letters 10 feet high, is, "WHAT WILL YOU GIVE UP FOR MONEY?"

Or for 15 minutes of fame—it's one or the other. These people, they must want to be on television really badly. I guess Andy Warhol was right—everyone will be famous for 15 minutes.

But I think they also want to be paid for it. The time and money that went into that weird "wedding with a millionaire" stunt on network TV must have been considerable. What viewers are watching isn't a real human high point but rather a cynical public attempt at diving for the bottom.

As Russ Lynch said recently, "The barrel has no bottom." Some people just laugh about it, they go, "Uh, well, you should ignore that stuff," but it's affecting our culture. I don't want to sound like William Bennett, but once I agree with him about some things.

The problem with William Bennett is that he didn't walk it like he talked it. He waited until he could make money in the private sector as a moralist. Because when he was Reagan's secretary of education from 1985-1988, he attacked rising college costs and lowered academic standards—but then he defended every budget cutback on higher education spending! And when he was the "drug czar"—head of the Office of National Drug Control Policy under President Bush—Bennett advocated zero tolerance for recreational drug users and Pentagon involvement in drug interdiction, yet he was silent on Jan. 18, 1983, when Bush pardoned Aslam P. Adam, one of the biggest Pakistani drug dealers in modern history. Adam was a real drug czar, a known crook, and they let him go!

I'm really tired of people passing the buck, and you cannot find one person who's responsible for anything anymore. I was in a health food store in my neighborhood the other day and heard a guy say to a teenage man who asked where some product was, "It's not my job," and walk away. I've heard that line in clichés but I never actually saw it happen.

My parents used to say, "We'll always love you, but the point in life is that you're supposed to find lonesome most of the time, because you have to be willing to be the last good person if that's what it takes to behave honorably." How did "Workin' It" come to be written? What got your goat that day?

[Laughs] That day—and every day! Well, we were over in a studio in North Hollywood called Royaltone a year and a half ago, and we wanted to do something echoing [Jimi] Hendrix. I kept saying to Stan, "I wanna do something like Hendrix on this record. I want to bring back that sound and feeling." So we got a couple of drummers in there, and we got my guitar player from my band, Frank Simes, and I said, "Frank, go out there and play some Hendrix riffs!"

So he started playing amorphous stuff like that, but with no shape or structure, and Stan just recorded it all. Later on he got on the computer and Pro Tool-ed it into a sequence and made a song out of it and gave me the track. So I went into a '60s mentality, when people were protesting.

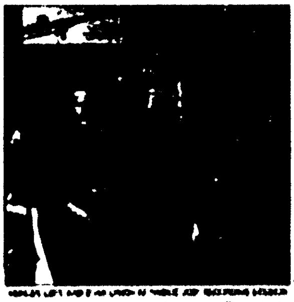
But oddly enough, the song in the beginning had a different title. The editor of Harper's magazine, Lewis Lapham, wrote a book several years ago about Ross Perot and why people wanted him; the book was called "The Wish For Kings." Lapham is a pissed-off angry guy and it's a brilliant little book. So my song was originally called "The Wish For Kings," and it had the same spirit about it, and the chorus was "The wish for kings!," and we were shouting it. The song was about how we want a king, want to be led, but when we get a leader we end up hating him or her and burning them at the stake.

But I decided to take out that that wasn't going to fly and was too obtuse, and I wanted something more accessible, and somehow it just morphed into "Workin' It." I wanted a hook that was universal, and that phrase is in the lexicon now. It has a little bit of a "Chain Gang" thing about it, subtly, to me, and part of it was influenced, I'm sure, by my utter dismay and loathing for what's happening in the record business for all the giant octopuses that keep rising out of the sea and gobbling all the little creatures around them. Corporations were originally formed for expeditions, for explorers in ships.

They were meant to share risk and benefits for a specific expeditionary aim.

Yes, they would form a corporation, and the monarchy would bless it. But now they've turned into something they were never meant to be. And this echoes the same thing I was trying to get across in "Sunset Grill"—the demise of the little man and the mom-and-pop business. The theme is not new to me, but I guess I'm getting more blunt or blatant about it. The most telling moment for me is in the song "Inside Job" where I'm literally screaming, "Wake up!"

For instance, our entire culture is awash in guns, whose popular use is shoved down little kids' throats in every cartoon and video game. When the Constitution was being written, the right to keep and bear arms had a symbolic and an actual validity. Now it's a better defense of individual freedom to be able to keep and bear established property rights. A gun isn't gonna protect you.



[illegible]

[Laughter] Exactly. But this culture has raised to the highest level in history the art of making the other way.

This raises a good point. With all your themes on this new record, like talking about the responsibilities of marriage on "Taking You Home" or effecting public ideals and not having a sense of entitlement on "My Thanksgiving" or quasi-religious expectations on "They're Not Here, They're Not Coming," I assume you mean for this stuff to have an effect on people, right?

Right. I repeat, the word is "hope."

But there are lobbyists in this business who have actually written in Billboard commentaries that "music cannot cause action." That means music cannot make people dance! So do you, Don Henley, think your music can have an impact on people, change their minds, more than to make a mid-course adjustment?

Yes, I think so. And not in great numbers, you know! I think I long ago gave up any illusions that music was going to revolutionize the world in big broad strokes. But I know that it can change the lives of individuals, because I've got letters right here on my coffee table from fans of mine that I just received.

One here has written me about how the Walden Woods Project and my involvement with that brought him back from a wasted life and how he's turned his entire life around, and he's married and has children and reads [Henry David] Thoreau now. It's an incredibly touching note.

And I feel music and art and literature can have the power to change other people's lives, too. I don't think it's going to change entire societies or cultures or the general direction in which this world is going, but I think it can have a life-changing effect on certain individuals, and they in turn can change other individuals. I suppose it's the ripple effect I'm hoping for.

I just don't want people to forget what music is about and what it was capable of doing at one time. I want them to try to remember how they were moved by it—in their youth, especially.

If music can do no wrong, then it can do no right. And if we can say a song like "We Shall Overcome" had no validating effect on the civil rights movement, then we're saying it and other such activist hymns had no effect on anything, didn't inspire anybody, didn't make anyone step off a sidewalk and join a march anywhere.

Yeah! So what's the point? To say music is meaningless? Are we just doing music to make a living now? Just for the money? That's not the reason I do it.

So when did music change your life? What particular thing would make you say that?

Oh, I think when my mother brought home "Hound Dog" in 1956. When I was 10 or 11 years old my father made periodic trips to a larger town like Marshall or Texarkana [Texas] to the record stores to get me Looney Tunes records, cartoon-type records. One day she said, "I'm going to Marshall," which was 60 miles away. "Do you want me to get you anything from a record store?"

I said, "Yeah! I heard a record on the radio from Elvis Presley called 'Hound Dog,' and I'd like you to get that for me." She brought that home, and that was the beginning—it made me feel excited.

But the more profound change was when the Beatles came along in '64. I liked rock'n'roll, and I was interested in it, but hearing the Beatles was what solidified the direction of my life. That's when I decided I wanted to somehow live my life in connection with music and making records.

I used to listen to the Beatles every morning before I went to school. They used to give me the strength to get through a day in high school and all the cruelty that that entailed. And the music spoke to me of faraway places and other kinds of lives.

So I just hope because everything has been and continues to be brought down to the lowest common denominator now and I just refuse to go there.

On "Inside Job" you sing your interpretation of Larry John McNally's "For My Wedding" and make the song your own. Meanwhile, there are people these days who are willing to give up that spiritual and personally committed side of themselves, with full presence of mind, for mere money and fame on TV. That's their life and career; this is yours. Which are we supposed to attach gravity to?

Good point. Is no moment sacred anymore? Does everybody have to do everything on television? Does everybody have to have an audience for their private, most spiritual moments? And I guess the answer is yes. Normally, we get married in front of our friends, people who mean something to you. We don't

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(Continued from preceding page)

usually do it in front of the entire [illegible] nation.

And we're not supposed to be [illegible]! Those things are supposed to have lasting value and responsibilities attached to them.

I will say that given my track record with women, some could say these things I sing may have a ring of disingenuousness to them.

But knowing many women you've dated for a long time, I'm aware that you're very loyal to them and that they speak well of you.

I know what you mean. I am good friends with most of my exes. And sometimes it took several years to get back to that point with those people, but if you love somebody they become part of your life. Especially so [actress] Maren's [Jensen] case. We went through a lot together and we're still very close friends, and she's about to have a baby any day now, and my wife and I are gonna have one any day now, too. [*Editor's note: Henley and the former Sharon Summerall's third child was born ten days after the interview.*] She and her husband are doing very well, and I helped her get her business off the ground, and now they're just sold it to Estée Lauder and she's fixed for the rest of her life.

But my life has changed, too. I finally woke up one day and took a look around and said to myself, "I don't want to be the last guy at the party. I'm too old." The guy who's the last one left after the party is over—me. And I snapped out of it. And the universe responded in kind and sent me Sharon. [*The couple was married in 1995.*] And then the kids came [including a son, Will, born in 1997], and that really changed everything.

So these songs are heartfelt, although some may scoff. But that's OK.

Tell me about the decision to write or record "Taking You Home," "For My Wedding," and "Everything Is Different Now."

Right, and it's a trilogy [laughs]. OK. They provide the balance to things like "Workin' It."

While I didn't write "For My Wedding," I wish I had, and when I heard it, I knew I had to do it. And "Everything Is Different Now" is of course about my wife and my marriage, and there are chords on that song that sound sort of [illegible]—you can almost see guys in hoods walking through a dark corridor. But it is about walking through a dark corridor and coming out into the light. The atmosphere is chilling, in a way, until it breaks into the gospel thing, with a little nod to Al Green on the bridge. I put on my best Al Green voice there.

"Taking You Home" ironically enough was written for a movie, but the movie had a theme in it that dovetailed into my life. I don't know if you saw "Double Jeopardy"—it was an OK movie that starred Ashley Judd, a very competent actress, and Tommy Lee Jones—but the gist of the movie is that she marries somebody and has a kid, but her husband is not what he appeared to be.

At the end of the movie she's reunited with her kid, and they walk across an open field together and my song was supposed to play into that, and I saw the song as being about unconditional love and the strength of a parent's love for a child. And the Ashley Judd character did superhuman feats to get her kid back. As a parent, I related to that, and as a parent I know you always have fear for your children to be protected. So I used the image of taking Annabelle, my first daughter, home from the hospital and the emotional impact of that.

I've written songs for movies before, but this was the first time I was able to write a song for a movie that I was emotionally invested in. And the director loved it, the head of the music department loved it, the independent music supervisor they hired loved it, the producer, who was Leonard Goldberg, loved it. And then the all-powerful marketing department heard it and shot it down. They said, "We can't market the movie, we can't make the right video with this song, because this is an action adventure picture, and this is a love song."

Which was the most absurd thing I ever heard, because that movie "Armageddon" had that huge love song by Aerosmith, and then Whitney Houston, for "The Bodyguard," had "I Will Always Love You." There are numerous examples of pictures that could be called action adventures that were marketed with love songs.

It was a pretty big picture anyway and did over $100 million worth of business, but [the song] would have helped the picture, and it certainly would have given me promotional value as I need them. We're still battling that out, depositions are being taken. We're coming close to a settlement, but I don't know if we're gonna get there.

The point is I did the work and they accepted the song, they accepted delivery of the master. They jilted me at the altar. You can't do that to people. And I can't tell you how many phone calls [manager] Irving [Azoff] got at his office from other musicians, saying, "Good for you! They fucking did that to me, too."

I just decided once again to stand my ground. But Bob Dylan put it best, and the older I get, the more I understand it when he said, "You have to serve somebody."

But service to somebody, to the community, to your family, to your friends—if you don't have that element in your life, you're a miserable fuck, and you should be.

But you're also saying there are responsibilities on both sides that come along with service. Those on one side have to understand the power they hold, and those on the other have to understand they're not just there to be a mouthpiece. One has to show a little isolated courage at times. That brings us to the song "Inside Job."

Which goes back to "Damn Grill" again. The germ of that idea was that this guy owns his own business, and though it's just making hamburgers, it's honest work, and he owns it.

The "Inside Job" song came at the last minute, and it came in part due to this intellectual property battle we're in right now. It was fueled by that whole RIAA thing [with the "work for hire" clause inserted without debate in Section 1011(d) of Title I of the Satellite Home Viewer Improvement Act, which was part of the appropriations bill H.R. 3194, Public Law No. 106-113 to Section 101 of Title 17, United States Code, paragraph two]. That, and all the articles I've read that the Internet is going to completely destroy privacy and that they know everything about you already. So it's kind of a convergence.

What's going to happen from your standpoint in terms of countermanding these things, whether it's issues regarding the Internet or with the RIAA?

I'm going to keep writing songs about it! And I'm refining a letter I'm going to send to all the artists alerting them to the need for congressional hearings to overturn the "work for hire" amendment. Other artists like Sheryl Crow are signing on with me and have given me lots of connections with other managers and artists, and I'm building this coalition.

I'm doing it slowly and cautiously, and hearings are going to be held, from the way I understand it, in the middle of May, and I'm gonna be there. People like Billy Joel and Sheryl Crow say they're ready and willing to come, and we're gonna make a big stink about this.

I'm more determined than ever to try to walk the talk. Otherwise, these songs ring hollow. If I don't fight back at the corporate structure even though I'm a part of it, even though I'm signed to Warner Bros. Records, if I don't give them shit, then these songs don't mean a thing. I have to live this.

On hearings in Congress for the controversial 'work for hire' law: 'People like Billy Joel and Sheryl Crow say they're ready to come, and we're gonna make a big stink about this'

Meanwhile, the revised copyright laws as enacted in 1976 were still weighted so heavily against the artists and creators of intellectual property that Congress put a clause in there that artists could make a written request and get their intellectual property—such as master recordings—reverted to them in 2013, even if a Joni Mitchell or an Eagles had never owned those master recordings before. Creative people have a right to own those things—particularly after they've had a long run of making money for somebody else.

You bet your ass. In the '70s, maybe there was a lot of guilt there or maybe everybody was high, but then they woke up 20 years later and went, "Whoops!" Here is the age of incredible corporate greed. I think they're waking up and saying, "Well, maybe we were a little too hasty."

We gave away the store back then. I don't think we should have done that. And even Congress isn't a good bargaining structure anymore. They're beholden to both sides on these things and turn around and narrow to the status. So you've got to keep an eye on them every minute. I mean, I'm also disappointed in network news and how they've [illegible] it. Just to be fair, I'm on the [illegible]. That's not they justify it.

Meanwhile, you also had your own fight over "cyber squatting" and somebody trying to take your name and possibly trying to sell it back to you.

There's going to be one Web name, donhenley.com, and then Warner Bros. will have their own [illegible] [illegible] too. I had to get lawyers and fight to get these domain names back because somebody had bought them. In some instances, people did the right thing and gave them back to me free of charge—I mean I paid them a small fee, which was what they had paid to register the name. In other cases, people tried to hold me up and tried to extort large sums of money out of me.

And that's going to be a whole issue, too. This whole cyber squatting thing. Congress has passed some legislation, but I'm not sure it has enough teeth in it. And there're going to be issues not easily resolved even by legislation. For example, there's a guy in San Antonio whose name is Don Henley, and he's registered the name, and he's a Vietnam vet who's a fundamentalist Christian, and he's registered his Web site, and it's all about that.

So people went there expecting it to be me. And he decided, "as a favor to them," to list a discography of mine and some information about me, thereby muddying the waters even more over whether it was me or not. And some people came away totally confused. He finally put up a very small disclaimer way that you had to hunt for to find. But he refuses to give up that name, and there's nothing I can do. It's not so easily remedied.

And I'm confused about my own site. I've put my own gate on the records, and I don't want to feel there's nothing left that's my own. I'll put tour information on it and digital downloads of all the road updates and Enrique-[illegible] camera work. But it's all new to me. I don't go online much or use E-mail, and I'll let the record company promote my catalog on these sites.

Speaking of catalog, how do you feel about your other four solo records, starting in 1982 with "I Can't Stand Still," which you made with Danny Kortchmar and Greg Ladanyi?

You know, I feel really good about that song I wrote with Kootch, "Dirty Laundry." I got to work with the Cardinals on that, and they hadn't yet become a really well-known entity in the pop music world at that point, because we actually recorded the song in '81. I'm proud of that song.

And I still stand by "Dirty Laundry," of course. Even though I'm a little weary of it now, it has relevance and truth to it, I think.

And I stand by "Johnny Can't Read" as well. I'm so frustrated these days with [George W.] Bush taking credit for reforming the education system in Texas. First of all, it hasn't been reformed, they just lowered the test criteria. Secondly, to the extent that it has been reformed, it was done by two of the members of the state legislature—Paul Sadler, who is a Democrat, and Bill Ratliff, who is a Republican. They're the guys who greatly improved—I wouldn't say "fixed"—the Texas education system. Bush let them have pretty much of a free hand, and now he's taking credit for it. But Johnny still can't read.

And "The Unclouded Day"—my grandmother, Dela M. Whorter, used to sing that song, my mother's name. It's a Protestant spiritual written [by J.K. Alwood and J.F. Kinsey] in the late 1800s.

How about "Building The Perfect Beast" in 1984?

Let's see. I still like "The Boys Of Summer". I don't get tired of that song, and we've rearranged it for the upcoming tour. And "You Can't Make Love" is an interesting song about trust and romance.

There's a song that was on the cassette and CD but not on the original vinyl record because there wasn't room—"A Month Of Sundays." I think it's one of my best songs, and it was written back during the time when the American farmers were speaking out about their plight. And small farmers were losing their farms, and they had all these terrible, sad land auctions, and everything was going on the block—farms

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that had been in families for generations were being sold.

And that's when Farm Aid began, around that time. I went to Washington and marched with the farmers. It was a rainy day, and we all gathered at the Lincoln Memorial.

As an environmentalist, I have to say I have some conflicts with farming practices. I have a deep love and empathy for that lifestyle, because my father grew up on a farm, and he taught me how to grow things in the soil. On the other hand, farming pollutes the shit out of the planet with fertilizers, pesticides, and chemicals of all sorts. And certain modern methods of farming cause erosion so that we're losing an enormous amount of topsoil. Organic farming is my method of choice, and that's a growing movement in this country.

"A Month Of Sundays" is also about the passing of the torch and the changes in the American landscape—and the making of America.

And there were two orphan and [illegible] songs of mine that got overlooked, both were on "Building The Perfect Beast." One is "Land Of The Living" [by Henley and Kortchmar], and the other is "Not Enough Love In The World" [by Henley, Kortchmar, and Ben Tench], which I thought and even David Geffen thought would be a big hit, but it wasn't. I thought that we could have done better on the promotion of that song, but it was a tip of the hat to Motown and we lost our Motown. [illegible], thought it was a great song, but people don't accept that part of my work.

Too much diversity, I've found, confuses record companies and radio; they're used to monochromatic records and monolithic artists.

What do you think of "The End Of The Innocence" from 1989?

I still love the song "New York Minute," and "The Last Worthless Evening" is just straight-ahead pop, but it's good. And of course, "The End Of The Innocence," that song is very fixed in time. I think it has enough universality that it could still apply to today, but it was about the whole Reagan era.

I've heard people say "The Heart Of The Matter" was their favorite song—period.

I have a collection of the most amazing letters about that song from all over the world that I treasure. I've got to keep them forever.

Again, such things show popular music does have an impact and creates a dialogue.

True—not a revolution, maybe, but a damned good dialogue.

Any thoughts on the "Actual Miles: Henley's Greatest Hits" collection?

It was a bridge from one period of my musical life and career to another. I think it's a good record with good additional songs on it. I still stand by "The Garden Of Allah," but radio didn't want it, like it, play it. And "You Don't Know Me At All" was a good pop song, but I just wanted to get that stage of my life over and get on with the next stage—so the cover of the album depicted.

The used-car salesman image was a jab at corporate culture, but one critic put down my appearance as if I had always dressed that way. He didn't even get the joke on that. Some people don't understand the used-car lot experience.

As with "Inside Job," there's food for thought in all your solo records.

Well, that's the best thing anybody could ever say about those records. The highest compliment anybody could pay me. I appreciate that.

And I thought about it now, and thought, "Well, I've been away 11 years, I really need some hit singles." But there's none of an album, this one's got 11 fucking songs on it. And just because something's a single doesn't mean it has to be pablum, it can still be heartfelt emotion.

My beliefs and the things I stand for are becoming stronger. If I tried to make a nice, light, fluffy, lovely little record, I don't think I'm capable of doing it, because there's part of me that always wins out. [*Laughs*]

It's like a hand on a Ouija board—it just goes where it's gonna go. And it's something I'm grateful for. But Stan Lynch also did an amazing job on the new record; he's become a great producer. A lot of the musical textures and the playing on the album were done by him, everything from drums and a lot of guitar to percussion and everything. I've got a great team in him and Rob Jacobs, my engineer, and the assistant engineer and keyboard player, Stuart Brawley. We've got some guests, too: Randy Newman, Jimmie Vaughan, Stevie Wonder, and also Benmont Tench from the Heartbreakers, who plays on stuff like "They're Not Here, They're Not Coming."

I think "They're Not Here, They're Not Coming" is a potential single that's not pablum and could be a huge hit. The music is thrilling, and the lyric needs to be heard, because it says we're not entitled to a big crowd from the skies—whether it be flying saucers or supermoms—to entertain or redeem us. We don't deserve it.

You've just articulated that song better than I could, and I've been trying for weeks. We're always expecting to be saved from above. Something or somebody is going to come down from the heavens and make everything all right. When, in fact, we have to make everything all right.

And Mike Campbell was brilliant musically on that track; he realized the song was about spirituality, and he gave me an Indian raga guitar solo—and that sets the spiritual side of it. It's like an updated sitar thing.

And I did research on that song: the incident at Roswell [N.M.] happened in 1947, which is the year that I was born, and there's a survey that about 80% of the American people believe that aliens have visited us and walk among us. That's frightening! There's cults that go out to Sedona, Ariz., and all these waiting. I subscribe to this magazine called Skeptical Inquirer, which does investigative reporting in every area on paranormal phenomena.

Is there any place in any of your houses to sit down, or are they all covered with books?

[*Giggles*] There are no clear horizontal surfaces at all. There's no place to eat. It's true.

But I love Carl Sagan, those last ground-breaking books, who said it's virtually impossible in books like "Contact" and "The Demon-Haunted

'I feel music, art, and literature can have the power to change people's lives. It's the ripple effect I'm hoping for'

World" for other races to able to make it to this planet unless they have figured out a way to transcend time and space. You just can't live long enough to do it.

So again, "They're Not Here" is a song about taking responsibility for your life—and the life of your country and the life of your family and the life of your culture. And it's about doing it yourself.

There are other songs on the new album that could create commentary. One is "Damn It, Rose," which bubbled up from my subconscious, but it's about suicide, and specifically a suicide of someone I knew, and I almost took it off the album when I realized what I'd done. Yet it's important to point out that suicide is an incredibly hostile, selfish act.

But I decided the song has more universal meaning than that. It's about empty rebellion and the authenticity of our rebellion. That's another theme that runs through this album, trying to find an authentic experience. They won't play George [Jones] and Merle [Haggard] on the radio anymore, because most of these other artists on country radio are not authentic country people—they're posing as country people.

There's also the issue of revenge in the song and how revenge doesn't really change anything. There are always consequences for it, but innocent children, when it comes to revenge—it's the Law of Unintended Consequences. In a moment of high emotion when you think you're going to get back at someone, you invariably end up hurting other people.

People have no concept anymore of ordinary heroism. Take some kid who had a father who beat him every day with an ax handle, and his mother was worse. If that kid grows up and gets himself a TV show where he does the same thing to others—live, for money—then he's treated like a hero, instead of the pandering coward he really is.

Meanwhile, we need to celebrate a true hero like Frederick Douglass, a former slave who never had a nice day, yet grew up to be a far better person than anyone who ever wronged him.

See, we live in unplugged times these days and being on to our past and attach there to it and make that the reason for why we are the way we are in the present.

A real hero understands that there may be reasons, but there are never any excuses.

Right! But rather than drawing a line in the sand and saying, "I'm going to change my life," we'd rather wallow in all the dysfunction! We have the opportunity to start anew every day when we get up. That's what the Eagles song "Get Over It" was about.

We've all had sorrow in our lives, and we've all had hardship, but compared to our ancestors, we've never had a bad day! While we were writing this album at his house, Stan came home with tears in his eyes one night after he ran into this old man who had been in a concentration camp during World War II.

Stan said, "You know what? After talking with that guy, I just realized that, even though my parents divorced when I was 14 or I've had my own ups and downs, and I experienced the career pain of leaving Tom Petty's Heartbreakers, and so on, compared to that old man, I've never had a bad day."

Another night I was grumbling about something. Stan went quietly into another room and came back with an urn that held the ashes of his Uncle Bernie from Cleveland, who had recently died. Stan plopped it in my lap and said, "Here! This is what it all comes down to!" And I said, "Uh, I see." And my mood brightened considerably. [*Laughs*]

We're so spoiled in our culture, and some of my songs are aimed at my generation and how we all dropped the ball.

Our parents and grandparents cut us so much slack. They had been through the aftermath of slavery, wars, and holocausts; there's nothing they wouldn't do for us. We got too entitled about it. But it's not too late to knock it off and show more leadership.

You're right. I've lost friends over this kind of stuff! One friend was an environmental lawyer who represented one side, and yet was representing those developers selling the wetlands. After hearing her give all kinds of excuses about her party positions for it, I finally just stopped talking to her.

I still do a lot of conservation work in Texas, California, some in Colorado and in Massachusetts for the Walden Woods Project, which people can now check out anytime at walden.org.

I still need to raise $17 million of $18 million for Walden Woods to endow the Thoreau Institute, so we're kind of scrambling to help us raise foundation money. I'll have to work on that for the next 10 or 20 years, but that's OK.

These themes of science arguing facts, and offering solutions of public responsibility and of public gratitude, are also in the new song "My Thanksgiving."

Which would also make a great single.

I think so too. To release it later in the year when Thanksgiving is actually coming would be a good thing, but it's about how spoiled we are in comparison to other cultures and countries. We're definitely headed for a fall of some type at this rate.

Meanwhile, our tour starts at the end of May in Houston, and hopefully I'll have the whole year off from it for it with my new band. We'll [illegible] on keyboards, Mike Thompson on piano, accordion, and trombone, Lenny Marrano on bass, Scott Ladd on drums, Peter Merode and Frank Farina on guitars, and Danny Rojas on percussion. They're fresh. There's new energy.

I want to give consumers good value, and my ticket prices will reflect that. And I debated putting 11 songs on the record, even my contract states that the record company only has to pay me for 12, but what the hell. We used up all the space on the record.

I have a 14th song, "Mamma Canción," left over that has an R&B overtone and heavy worldly lyrics that I'll use somewhere, sometime, in some way. But we started "Inside Job" in the fall of '97 and now it's done!

Meanwhile, my new daughter is going to be named Julia Sophia after my other grandmother, my father's mother, and we'll call her Sophie. And I've just discovered that I have some North Italian or Swiss Italian blood somewhere in my Irish-English-Texas family tree! Can you imagine? Things just get more interesting all of the time. ■

Billboard

Atlantic, AOL Team For Album Campaign

[illegible]

New Work-For-Hire Law To Be Examined

The Arguments From Both Sides

BY BILL HOLLAND

WASHINGTON, D.C.—In an effort to inform readers of the different views concerning loss-of-artists'-rights issues growing out of the new law (Public Law 106-18) that amends the Copyright Act to make sound recordings a category of works made for hire, Billboard offers a point-by-point presentation of the views of the Recording Industry Assn. of America (RIAA), which put forward the measure in Congress, and of those artists, artists' representatives, and copyright law experts who disagree with that position and believe it should be repealed or modified.

The Copyright Act, expressing the will of Congress, states that when a creative work is "put into tangible form," the copyright, which grants the benefits of authorship or ownership, immediately becomes the property of the author who created it. The author or creator can rightfully claim copyright.

However, the Copyright Act states a limited exception to this rule: a work made for hire. As the phrase sug-

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THE ARGUMENTS FROM BOTH SIDES

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[illegible] grants, if a work is "made for hire," the employer, and not the employee, is considered the author and therefore owns it and can claim copyright.

The Copyright Act defines two basic types of works made for hire: works prepared under an employer-employee relationship and works "specifically ordered or commissioned for use as a contribution to a collective work."

Until late last year, there were nine specific categories under this second definition, including collective works and compilations. Record companies and copyright law experts have long argued about whether a sound recording fits the definition of collective works or compilations. The Copyright Act also says that a signed contract that states a creation is a work for hire is only one part of a test to decide whether it is indeed.

The Nov. 29, 1999, change in the law, which makes sound recordings a new 10th category of such works

[illegible]

for hire, allows U.S. record companies to legally claim authorship and copyright ownership of the work of recording artists in perpetuity.

TECHNICAL CORRECTION?

RIAA president/CEO Hilary Rosen maintains that the change in the law was a "technical correction" to the revised 1976 Copyright Act because it simply codified a long-held industry assumption that sound recordings were already considered works for hire as part of the "compilations" section of collective works, were registered as such at the Copyright Office, and were often identified as such in record company contracts.

Artists, artist groups, and many copyright law experts, including U.S. Register of Copyrights Marybeth Peters, strongly disagree that the change is a technical correction and say it is in fact a substantive change in the law.

Many not only point to the '76 act, which conspicuously does not list sound recordings as one of the nine categories of works made for hire, but say that it is arguable whether or not sound recordings fit the definition of the pre-existing categories of commissioned collective works.

"If the Congress had wanted sound recordings to be considered a 10th category of work made for hire, they would have done so" at the time of the revised '76 Copyright Act, says Andrew Leff, who works as chief of staff for Tribune Music Group, which manages the band Hanson. Before his music management career, Leff worked on Capitol Hill for several senators and the Democratic National Committee.

How To Contact Committee Members

[illegible]

THE REPUBLICAN MAJORITY

• Rep. Howard Coble, chairman, 6th District, North Carolina, including district office in Greensboro. D.C. office: 2468 RHOB. Phone: 202-225-3065. E-mail: howard.coble@mail.house.gov

[illegible]

THE DEMOCRATIC MINORITY

• Rep. John Conyers Jr.*, ranking minority member, 14th District, Michigan, including district office in Detroit. D.C. office: 2426 RHOB. Phone: 202-225-5126. E-mail: john.conyers@mail.house.gov

• Rep. Howard L. Berman*, 26th District, California, including Van Nuys and North Hollywood, with district office in Mission Hills. D.C. office: 2330 RHOB. Phone: 202-225-4695. E-mail: howard.berman@mail.house.gov

• Rep. Rick Boucher*, 9th District, Virginia, with district office in [illegible]

[illegible]

If the subcommittee, after listening to testimony, decides to change or repeal the law, its recommendation will then go to the full House Judiciary Committee for discussion, debate, and consideration. The committee's office is in 2138 RHOB, 202-225-3951. All members of the subcommittee are also members of the full committee.

The chairman of the House Judiciary Committee is retiring Republican Rep. Henry J. Hyde, who represents the 6th District in Illinois, with home office in Addison. His D.C. office: 2110 RHOB, 202-225-4561. E-mail: [illegible]

The ranking minority member is Rep. John Conyers Jr. His particulars are listed above.

If changes to the work for hire provision go to committee level, Billboard will publish the addresses, phone numbers, and E-mail particulars of all Judiciary Committee members.

—BILL HOLLAND

Some copyright experts disagree and suggest that sound recordings could be considered works made for hire because, as parts of an album, the individual tracks may fit the already existing category of commissioned works as "collective works" or "compilations," but as the industry in the digital age moves away from albums to downloads of individual tracks, that opinion may have even less import and may not hold.

They also point to the legislative history of the Copyright Act. These copyright law experts worked on the Copyright Act's provisions for a decade, to carefully balance the rights of creators and users and to protect the intellectual property of artists. They say the Copyright Act clearly shows that it was the intent of Congress to offer artists a chance to recapture the ownership of their work—if they were not considered works made for hire.

As to the point that record companies routinely register sound recordings as works for hire, a source in the Copyright Office has said that, in court, a recording artist could claim otherwise and that courts have ruled that the determination of whether or not a creation is a work made for hire requires more than one factor such as a registration at the Copyright Office.

"It's dangerous to say the overall rate of registration creates a presumption that [the sound recording] is a work made for hire," says the source. "Because it's a presumption you could knock over by blowing on it."

CYBER-SQUAT PROTECTION?

The RIAA says that the main reason the group asked that the provision be inserted was to make sure that the names of recording artists were protected under a Senate version of an anti-cyber-squatting measure introduced late in the session and later passed into law.

It says that without the insertion, the wording of the bill would have protected other works, such as those from the motion picture industry, from cyber-squatters, but not those by recording artists.

The artists groups say the insertion was uncalled for because the wording of the anti-cyber-squatting measure already had phrasing that would protect the name of any artist "used in, affiliated with, or related to a work of authorship protected under title 17, the Copyright Act."

They also discount the RIAA's claims that the measure protects artists. They argue that it was employed to offer protection to record companies, which have increasingly sought to gain ownership of artists' domain names for Web sites in contract negotiations.

'CHAOS' ON TAP?

The RIAA says it inserted the provision because without a change in the law, in 2013, the year that featured artists could come forward to exercise their termination rights and reclaim their copyright work, any collaborators on a sound recording, including producers, sidemen, and even engineers, could also come forward claiming authorship rights, with the "chaos" of lawsuits as a result.

The RIAA's Rosen also believes such claims would render the exploitation of recordings impossible. As she wrote in a letter to the subcommittee, "If every creative participant on an album could claim to be a 'co-author' under the copyright law with an equal right to license its use, it would be virtually impossible to make commercial use of the recording." She writes that that is why work made for hire status "is beneficial to both artists and record labels alike."

Artists and artists' groups call much of this reasoning unfounded and believe few such minor contributors would claim authorship. They say the "chaos" comment in itself only underscores the primary reason why the RIAA wanted the revision to the law—to head off future litigation.

Opponents contend that the RIAA has no right, in any case, to assert any creative party's lawful claims.

They add that in some instances, but not all, certain record producers might come forward to claim authorship in those cases in which they completely supervised or "mastermind" the creation and narrative scope of the recordings, such as some recordings in the "youth vocal groups" or R&B area.

However, they do not believe that, in most cases, a musician's sideman, orchestra members, or background vocalists, most of whom are already subscribing to standard session contracts, would claim authorship as collaborators.

HOW IT WAS INSERTED

Dismissing as mischaracterizations that the provision was quietly and secretly slipped in, the RIAA says that the measure was first shown to and approved by lawmakers and that the Copyright Office was consulted before it was attached to a Senate bill.

But the RIAA has not commented on the fact that there was not a hearing to elicit views on the issue, other than to suggest that none was needed because the change in the law was simply a technical correction.

Register Peters, however, has expressed concern that "the provision was suggested in the middle of the night," echoing comments by other Hill staffers and advocates who were dismayed by the 11th-hour action. "Obviously," Peters has said, "this was done without the input of performers" (Billboard, Jan. 15).

Opponents point out that no lawmaker suggested the insertion of the provision. It was requested by the RIAA and drafted by Mitch Glazier, then the subcommittee's majority chief counsel and now hired by the RIAA as its lobbyist.

Glazier told Billboard that he brought it to the attention of several subcommittee members and other staff members and advised them it was both needed—and noncontroversial.

In this case, despite Glazier's opinion and judging from the reaction of music industry lawyers, the legal question of whether a sound recording was or was not a work made for hire was, before the change in the law, at the very least a highly arguable point, according to more than 10 nationally respected copyright law experts contacted by Billboard.

A dozen national newspapers, magazines, and legal journals have reported or written stories on the controversial amendment since the

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THE ARGUMENTS FROM BOTH SIDES

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fleet of the years. All have noted that the provision was inserted without the benefit of public hearings or consultation with affected parties or allied groups such as the American Federation of Television and Radio Artists.

Copyright Office insiders and veterans of the copyright law community likewise agree consultation and input was minimal. Indeed, the RIAA's Gholar has even said that no one at the RIAA made inquiries about the repercussions of such a new law on reversion rights.

One Copyright Office source admits that the manner in which the provision was inserted is "a touchy issue" with the relevant entities and that a comment might jeopardize relations with Congress but adds, "There is no question that we had reasons to about the process, and we expressed those concerns."

For example, Copyright Office officials were asked if any artist had come forward to assert that their work should not be considered a work made for hire. The officials said no.

Moreover, sources at the Copyright Office and artist managers all say that no recording artist would probably ever be aware nor have had any knowledge of the sound recording registration form handed in by a record company and therefore would have no reason to contest the Copyright Office in effect.

PREVIOUSLY FILED?

The RIAA denies a report that one of its top officials had circulated draft language on Capitol Hill to a previous session of Congress stating that sound recordings be made eligible for work-made-for-hire status.

But Billboard's source for this report is a former senior staffer on the Senate Judiciary Committee, now a federal judge, who says the measure was in fact "floated" to the committee by an RIAA official in a previous Congress. The RIAA official was advised such a measure would not pass committee muster if formally introduced, according to the source.

Subcommittee To Hear Witnesses

BY BILL HOLLAND

WASHINGTON, D.C.—In response to requests from members of the recording-artist and copyright-law communities who wish to testify at the May 25 House hearing on the controversial new "work made for hire" law—which they say removes artists' future ownership of sound recordings—the chairman of the House Courts and Intellectual Property Subcommittee plans to enlarge the panel of those invited to testify.

The Hearing:
May 25 at 10 a.m.
Room 2237
The Rayburn House Office Building
Independence & S. Capitol Streets, S.W.
Washington, D.C.
For Possible Changes Call 202 225-5741

Recording artists, managers, and legal professionals who oppose the new law, which was put forward last November by the Recording Industry Assn. of America (RIAA) and signed into law by President Clinton on Nov. 29, contend that artists will no longer be able to reclaim the ownership of their recordings in the future in once-guaranteed rights reversion proceedings (Billboard, Jan. 15 and Jan. 22). They want the amendment repealed or its consequences modified.

Sources close to the issue say that the chairman of the subcommittee,

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SUBCOMMITTEE TO WEAR WITNESSES

(Continued from page 1)

Rep. Howard Coble, R-N.C., had initially decided to invite as few as four witnesses, including representatives from the RIAA, to explore the issues, but when he became aware recently of the calls from managers and other groups and individuals throughout the country expressing their wish to either sit on a panel or offer written testimony or send acts for the record, he decided to expand the panel.

On May 11 the hearing location was changed from a small basement room in the Rayburn House Office Building to a larger room on the second floor of that building.

A spokesman for Coble says, "The chairman wouldn't have called for the hearing if he wasn't interested. He's not out to shut out people. That's not his intent."

Coble is viewed by Washington insiders as an even-handed chairman who is not afraid throughout the copyright community and who supports a fair balance between the rights of creators and users.

Coble agreed in January to review the issue following a flurry of opposition to the new law by artists and artist representatives and copyright officials in Britain, Jan. 31).

"I'm very pleased with the way chairman Coble has handled this issue," says Margaret Cone, who represents several recording artists in the work-for-hire controversy and has spearheaded efforts to bring the issue to light. "Right off the bat, as soon as he knew that artists were upset about this new law, he called for a hearing. He is to be commended."

The Coble spokesman declines the actually small list of possible witnesses on the large work-for-hire of the subcommittee, noted, Rep. Coble says a total the few available dates for hearings this spring.

So far, the list of probable witnesses includes Hilary Rosen, president/CEO of the RIAA; a copyright law professor, as yet unnamed, who is expected to side with the RIAA on views; Marybeth Peters, the U.S. register of copyrights, who has criticized the process in which the item became law; Mike Greene, president of the National Assn. of Recording Arts and Sciences; and a recording artist still to be named.

Other possible witnesses being considered are Barry Bergman, president of the Music Managers Forum, an unnamed copyright law professor who would represent the artist community's views on work for hire, and a coalition of veteran and new recording artists' groups, such as the American Federation of Television and Radio Artists.

"The chairman wants full exposure with as many opinions on this as possible," says the spokesman. "But it's still in flux."

"We're busy with preparing testimony for several hearings this month," says Marybeth Peters. "But we're ready—we've been looking very deeply into the legislative history of the work-made-for-hire section of the Copyright Act."

Manager Allen Kovac, CEO of the Left Bank Organization, believes that it will be up to recording artists—and not representatives and managers—to organize a full-time group to represent their interests, much as the players' organizations have in football and baseball.

"The artists are the guys, the talent are just engines—that's what the owners of sports teams found out with players," Kovac says. "It's time for every artist who owns copyrights to get a seat at the table."

Kovac says he will be coming to Washington to bring his concerns about the work-for-hire law to the attention of lawmakers, along with Capitol Records artist Diana Carter and A&R chief who records for Left Bank's label, Backyard Music. He also plans to attend the hearing.

Among the other acts watching the proceedings closely is Mint Island group Hanson. "We're really happy Congress is holding hearings—this is a really important issue," says Isaac Hanson.

Taylor Hanson adds, "While they're at it, Congress should shorten the 56 year period after artists to recapture their ownership rights under the Copyright Act's termination-right clause. It's just too long. We will be in our fifties before our rights revert to us—and we're at the young end of the spectrum."

THE BACKGROUND

In the fall of last year, the RIAA, whose most important members are the five major recording companies, was successful in having legislation passed that makes a sound recording for the first time a new category of a "work made for hire" under the Copyright Act (Billboard, Jan. 15).

(Continued on next page)

Subcommittee Hearing Is Next Step

The hearing puts the issue back into the normal pattern of policy-making checks and balances

SUBCOMMITTEE TO HEAR WITNESSES

(Continued from preceding page)

Recording artists, artists' managers, and many copyright law experts say the new law takes away the right of featured recording artists from the 1978-1999 era and their heirs to reclaim their "authorship" rights in rights reversion proceedings that had been guaranteed in the Copyright Act. Under those proceedings, artists could gain ownership of their recordings in 35 or 55 years (depending on when the recordings were made), beginning, at the earliest, in 2013.

Under the work-for-hire law, they lose the ability to renegotiate the exploitation of their master recordings.

Such expressly given rights, allowing creators and their heirs to benefit from their creations, were ensured by the manner in which the drafters of the revised Copyright Act of 1976 worded two of the act's provisions. Section 101 delineates nine categories of works that should be considered a work made for hire. Sound recordings were not counted among the categories until the change in the law. Section 203 offers artists the right to recapture their "authorship" of their recordings.

In the digital era, where "content" such as music feeds in a fundamental necessary way the new E-commerce economy, the ownership of intellectual property becomes an increasingly important and financially significant element. As creators of the content, say the artists and their reps, recording artists believe they should have a fair share in any bounty.

Register Peters has said that despite the rosy future of the intellectual-property based economy, she considers recording artists "the most unprotected" segment of the copyright community.

Artists' groups say that the record industry sought to put the provision in the law to ensure that the threat of possible litigation over these rights would be avoided and made moot.

The change in the law, they maintain, gives record companies not only complete ownership and control of artists' work but also ownership and control of such new-technology outlets as music Web sites, including the names of individual artists or their group and album title names.

The recording industry denies the charges, initially saying its action was predicated on ensuring that recording artists were protected in an unrelated anti-cybersquatting measure.

"The reversion right never came up in discussions," says Mitch Glazier, currently the RIAA's lobbyist but last fall the chief majority counsel on the subcommittee who spearheaded and drafted the work-for-hire proposal at the request of the RIAA.

Glazier and the RIAA maintain that the law now protects artists from other recording-session participants, such as producers, sidemen, and background vocalists, who might come forward to claim authorship rights in reversion proceedings.

The artist-community opponents also say that the insertion of the amendment without hearings or consultation sidestepped the process by which a bill makes its way through Congress to ensure it is not harmful and benefits the public good (see story, previous page).

The recording industry maintains that no such public airing was needed because the provision was just a technical change in the law.

HOW THE LAW WAS CHANGED

The Copyright Act, at Congress' request, was extensively and carefully revised over more than a 10-year period throughout the 1960s and '70s. Legal scholars say that before the recent change in the law, there was no language in the revised Copyright Act, or in its accompanying legislative history, that specifically said that sound recordings should be considered works made for hire.

In large measure, the drafters achieved a balance between the rights of creators and users in most of the Copyright Act. However, there are some gaps, and the precise definition—or any definition—of the status of sound recordings is one of them.

The 1976 Copyright Act defines a "work made for hire" in Section 101 as:

"(1) a work prepared by an employee within the scope of his or her employment, or (2) a work specially ordered or commissioned for use as a contribution to a collective work as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

Legal discussion on whether sound recordings "fit" or "don't fit" into the existing categories have been going on ever since the revision of the Copyright Act, and the issue is, at best, ambiguous.

Most discussion has fallen into an analysis of the above subdivision (2), specifically, whether sound recordings can be considered either as a specially ordered or commissioned contribution to a collective work or as a compilation.

The RIAA argues that sound recordings have traditionally been treated as works made for hire because of several factors. Before the change in the law, they already "fit" an existing category above, because of the industry practice to register a sound recording contract as a work for hire; and because sound recordings are often defined as such in most recording-contract language.

The RIAA concludes that its request for the change in the law was warranted because the new category is simply a "technical correction" to the existing language and interpretation of the Copyright Act.

Says the RIAA's Glazier, "Sound recordings are considered works made for hire under contracts and [the Copyright Act's category of] 'commissioned works.'"

The RIAA also maintains that it put forward the provision only to include recording artists in an anti-cybersquatting bill (now also a law) that offers protection of individual and band Web site domain names.

Opponents of the new law argue that the framers of the revised Copyright Act would have specifically listed sound recordings if they had felt the need to do so. Some also turn to some subsequent court decisions in work-for-hire cases that cite the unequal bargaining power of creators such as recording artists.

Artists, they say, are obligated to sign such a work-made-for-hire provision in any and all recording contracts—or face being turned away by the label. They maintain that the court decisions based on lack of bargaining power underscore the last phrase (in Section 101 above), which states that for a work to be considered a work made for hire, it must fit an existing category and be agreed to in a contract signed by both parties.

Opponents also say that creation of recordings, and the manner in which they are offered to record companies in recent decades, differs in reality from the traditional view of a "specially ordered" or "commissioned" work and therefore does not fit the pre-existing language, as Glazier maintains.

While label A&R staff and in-house producers still oversee and control the recording of some albums, most are the creations of the "featured artist," with A&R staff having much less say on them in decades past.

Opponents also say that recording artists were already protected in the new anti-cyber-squatting law by language that included "any protected [by copyright] work," making a new work-for-hire status for sound recordings moot and superfluous.

Some copyright law experts also say that far from creating a work made for hire, the "author" or recording artist who creates a sound recording may be an independent contractor. In some instances, the recording may be the work of several independent contractors, including an "outside" producer or other significant contributor.

[illegible] some copyright law experts who aren't sure if a sound recording (before the change in the law) could be considered a work made for hire agree on two points: the issue is and has been a legally ambiguous, murky, and undefined area, and until there is a further definition by the Congress, the authorship-reversion rights of the recording artist to regain control of recordings after 35 or 55 years, guaranteed under the law before it was changed, should not be taken away.

Artists See Law As Disturbing, Call For Debate

Following is a sampling of the reaction to the work-for-hire law, gathered from recording artists by Billboard reporters.


HENLEY


TAYLOR

• Don Henley, Warner Bros. Records recording artist: "For a record company to claim, simply because it gives an artist an advance and puts up a little marketing money, that it then owns that artist's work or that copyright in perpetuity is preposterous and outrageous."

• James Taylor, Columbia Records recording artist: "This issue should have a public hearing. I don't think the record company should be considered the author of something if they aren't the author."


HARRY


CARPENTER

• Deborah Harry, Beyond Records recording artist: "Anything like this new law, which potentially diminishes rather than enhances artists' rights, disturbs me greatly as an artist."

• Mary Chapin Carpenter, Sony Music recording artist: "The [Recording Industry Assn. of America] claims that the amendment is merely technical. That's plainly open to debate, and that debate has not been allowed to happen."

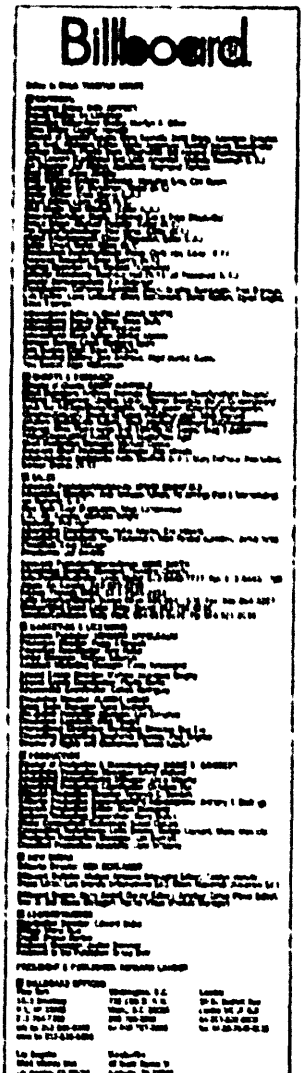

COOLIO


KOZ

• Coolio, recording artist in final negotiations to sign with a new label: "I can't believe a law like this was passed. Artists have to speak up about this. The only way it's going to change is for everybody to come together as one. We need to make a fuss, raise hell."

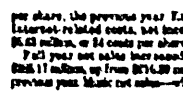
• Dave Koz, Capitol Records recording artist: "This might be a nice wake-up call for artists to see if an organization can be set up to protect our interests. Just because you make a record for a record company does that give them the right to collect on that for eternity?"

• Michael McDonald, Ramp Records recording artist: "Recently I've thought, 'Why shouldn't artists own their own content?' It should have never been the situation where labels own the intellectual property."


Billboard

Will Artists Fight For Rights As Webster Did?

Strong Sales, Reduced Losses For Navarre



Mr. COBLE. We will return in just a few minutes.

[Recess.]

Mr. COBLE. The subcommittee will come to order.

The Chair recognizes the gentleman from Florida, Mr. Wexler.

Mr. WEXLER. Thank you, Mr. Chairman.

I would like to first ask a question of Mr. Greene. I am trying to figure out who the winners and the losers are from what happened and who would be the winners and the losers—if there are any—if changes are made. You and some others have made a very compelling argument on behalf of the unknown artists, the people that Mr. Berman apparently is assisting someone in building nursing homes and so forth. [Laughter.]

What I am failing to understand is how those unnamed, unknown artists would benefit by any change. If I understand this correctly—and tell me if I have this wrong—all of this just relates to what happens 35 years after you sign a contract. And for all those unnamed people that we don't know now because they didn't sell hundreds of thousands or millions of records or so forth—nobody is buying their records 35 years hence. So we could change the law 180 degrees, we could do everything but make it a lottery. How would it help them?

Mr. GREENE. You instincts are good in terms of the fact that there is just not a way to create a demand for an artist that there is no demand for.

Mr. WEXLER. Right.

Mr. GREENE. But at the risk of sounding somewhat renaissance here, I think it is important for people to know that art many times stands a test of time that confounds what is happening at the moment in time. So something may be worth a lot more money to an artist if they have the opportunity to exploit it later.

Mr. WEXLER. That's fair.

Mr. Cooper, I was truly stuck by your conversation with Mr. Goodlatte in terms of your portrayal of the negotiation with respect to Ms. Crow.

It seemed to me, in the context of that negotiation, because of Ms. Crow's extraordinary ability, her ability to sell, and do what she does so well, you were able—rightfully so—to negotiate from a point of view where she received greater remuneration as a result of her success. And those things were calculated back and forth in a marketplace negotiation. And then a deal was struck.

And then you profoundly said that one thing that was essentially off the table was the work for hire provision because they wouldn't ever change that. But these other things they did change, apparently, and they paid more money, I assume. So I guess there was in fact a struggle in terms of how much they have to pay in order to keep the work for hire provision.

Is that a fair way of understanding it? Obviously, there are more issues than just that, but they paid, didn't they?

Mr. COOPER. No, that is not exactly quite correct. First of all, the vast majority of the renegotiations that we have done for Ms. Crow and others are done not in a free marketplace. Most of them are done when there is some recording agreement still in effect—an artist originally signs a contract that calls for five, six, seven, or eight albums. Somewhere during the time, if the artist has suc-

cess—they have suddenly sold 1 million or 2 million albums of album number one, or 3 million of album number two—and then the artist, rightly so, says, "Gee, I am not now being compensated as a 3-million album selling artist. I would like to go back and renegotiate my contract."

So the vast majority of the time, the companies will come to the table and they will renegotiate the contract. Why do they renegotiate the contract? They want to keep the artist happy because a happy artist produces good records.

Mr. WEXLER. The same way a baseball team renegotiates the contract for the rookie shortstop that had no future 6 months ago and is now the World Series MVP.

Mr. COOPER. Exactly.

Mr. WEXLER. If I could just follow with one other question—and it struck me because Ms. Crow indicated which extraordinary artists apparently share her frustration in this process, and one of them was Bruce Springsteen. And it just occurred to me while you were reading what you perceived to be the law—I am worried about Clarence, the saxophone player, because I love Bruce Springsteen. When I buy Bruce Springsteen's albums, I buy them just as much for Clarence the saxophone player as I do for Bruce Springsteen.

Where does he come out in this deal? If we adopted your point of view and at the end of the game—if I understand it, then, at that point, Bruce Springsteen then says, "I am the artist, I negotiate, I make my deal." Where does Clarence come out in this? Does he have to follow Bruce? Where does he come out in this?

Mr. COOPER. I was a saxophone player, so I know this from experience. Clarence is a hired hand, a hired gun. He gets paid a salary, he gets paid fees. Bruce may decide to reward him with a royalty. But he is generally employed by Bruce Springsteen. He is not employed by the record company. He doesn't sign with the record company unless Clarence Clemens goes out and makes his own deal somewhere.

But he is one of Bruce's side men, just like the piano player, the bass player, the drummer, and everyone else like that.

Mr. WEXLER. He is not a work for hire in any respect?

Mr. COOPER. He may be in the context, but he may be under work for hire for the artist.

Mr. WEXLER. Okay. That is my point.

If he is in fact a work for hire for the artist, and we then change the rules as you suggest we do as between the artist and the recording company, are we then obliged to change the rule between the artist and the "Clarences" of the world?

Mr. COOPER. Well, I didn't quite finish what I was going to say. It may be a work for hire.

Mr. WEXLER. What if it is? Let's assume he is.

Mr. COOPER. There is one other intervening factor, which is that he is a member of the Musician's Union. When you contract with musicians, you contract with a certain employment form. The union sanctifies this relationship and he is paid as an employee just like any other hired hand on that particular record date.

So it is not clear——

Mr. WEXLER. So you are not advocating that we do for Clarence necessarily what you would advocate we do for the primary artist?

Mr. COOPER. No, not whatsoever.

Mr. WEXLER. Thanks.

Mr. COBLE. I thank the gentleman.

Mr. Sherman, I believe we give the lawyers equal time. Did you want to respond to that question as well?

Ms. ROSEN. I would like to respond to that.

Just a marketplace point about the scenario that Mr. Cooper talked about in terms of renegotiation—I think there were two key points that he made that are important for the committee. One, the record company does have to renegotiate because a happy artist is a productive artist. They want to do that. They want to maintain that relationship and they want to share in the rewards.

The second is that his scenario doesn't acknowledge the fact that there are artists in those renegotiations who do make it a priority not to take the advance and to take back the master recordings. The most well-known examples over the last few years have been Metallica, which said to Electra Records to keep their advance and give them the masters. REM was the same thing. They waited for their contract to expire, they had a renegotiation, and that is what they wanted.

So this is a negotiation in the marketplace.

Mr. COBLE. We are about to run out of time.

A representative from RIAA has asked permission to insert a letter into the record in response to the Billboard articles which were previously introduced and made a part of the record. And without objection, that response will appear in the record.

[The referenced response follows:]

RECORDING INDUSTRY
ASSOCIATION OF AMERICA,
Washington, DC, January 12, 2000.

SUSAN NUNZIATA, *Managing Editor,*
Billboard,
New York, NY.

DEAR SUSAN: Last week's Billboard article is flat out wrong in its characterization of recent Congressional action on the "work for hire" provision of copyright law. The article is inaccurate in its description of both the process and the substance.

For starters, not only did the RIAA not "sneak" this proposal into an unrelated measure, we issued a press release announcing it on November 19, prior to final passage of the legislation. And while Billboard claims the change is a clear case of labels versus artists, many artists themselves rely on the work for hire doctrine to guarantee the rights they need to control a work to which many have made contributions.

First, the process. Near the end of last year's legislative session, a number of artists sought legislative protection from "cybersquatters." The RIAA actively *supported* the artists' effort to gain protection for their domain names (even though the matter had not been the subject of hearings). In the course of these discussions, a mechanism for enabling protection for artists' names without interfering with legitimate uses of those names was proposed—namely, an exception for names used in works made for hire. It was in the context of this compromise that Congressional staff determined that the law should be clarified to confirm that sound recordings are works made for hire. Staff made this change only after seeking input from the Copyright Office that it was appropriate. None of these changes were subject to hearings, it is true; but neither was the entire cybersquatting artist proposal and that is the nature of the process at the end of a legislative session, whether we like it or not. And contrary to the Billboard report, the RIAA has never before sought this change.

Substantively, this is *not* an issue which favors labels over artists. *Everyone* has a common interest in allowing sound recordings to be *eligible* for work for hire sta-

tus lest the ability to exercise commercial rights in the sound recordings be seriously impaired. Whether or not the issue has been the subject of debate, there is no denying that it is standard industry practice to claim work for hire status for sound recordings, as it is with motion pictures and other collaborative efforts. Just a cursory look at the Copyright Office public database reveals that artists including The Artist, REM, Dave Matthews, Luther Campbell and Trent Reznor, as examples, have claimed work for hire. Why? Because *if it isn't a work for hire, then every creative participant on the album (like the producer, the arranger, the mix engineers, and each and every background musician and vocalist) would be a "co-author" under the copyright law with an equal right to authorize the commercial use of that recording.* That result would make it virtually impossible to make commercial use of the recording, a result no more acceptable to the artist than to the record label. This is exactly what work for hire status is meant to avoid, and why such status helps artists and labels alike.

As a practical matter, sound recordings have already had the benefit of work for hire status under the existing law—because they almost always qualify as either a "contribution to a collective work" or a "compilation." That sound recordings weren't specifically named in the statute originally is merely an anomaly of copyright law—sound recordings weren't granted copyright status until after the work for hire provision in current law had already been put to bed. Making clear, in the words of the statute, what has already been clearly understood benefits everyone. And remember—including sound recordings on the list merely makes them *eligible* for work for hire status. It is still necessary to have a written agreement between the parties before work for hire status can arise. Or would Billboard prefer that artists be denied the right to do so?

Sincerely,

HILARY B. ROSEN.

Mr. COBLE. It is 1:30, but I think Mr. Berman has another question he would like to put to you.

Mr. Berman, the gentleman from California?

Mr. BERMAN. Thank you, Mr. Chairman.

Mike, I am confused because you said two different things on this issue. It seems to me there is a certain contradiction.

One, you likened the record company to a bank. You pay off your mortgage but the bank takes title to the house. If they are a bank, then the artist who doesn't like the terms of the loan can go to another bank.

For all their evils, the record companies are more than a bank, aren't they?

Mr. GREENE. Sure.

Mr. BERMAN. Your second comment in response to a question was that they were out there promoting the label and doing a bunch of things that add value.

Mr. GREENE. I was just referencing in terms of the advance principle that it was similar to that of a mortgage. Certainly, in promotion, going out and being a talent scout, the traditional distribution that has existed—the record companies are far more than just a bank.

Mr. BERMAN. Their expenditures go well beyond the advance. They independently will do separate advertising and promotion beyond what the recording artist has to do with the money that they get, right?

Mr. GREENE. Sure.

Mr. BERMAN. I want to go back to Professor Hamilton and this collective work issue.

A collection of D.H. Lawrence's short stories—same author—is that not a collective work?

Ms. HAMILTON. This is a very fact-based, intensive inquiry to figure out whether you have a collective work, but my answer would

be that if D.H. Lawrence put that collection of short stories together as a unit, that that is the literary work, and it is not the kind of collective work that anybody had in mind at the time they framed this particular provision.

If it is a collection that is put together post hoc—let's say a literary professor puts together all of Lawrence's stories that have trees in them—in that circumstance, that is a collective work. That is someone other than the artist who is engaging in selection and arrangement to create the work. The publisher becomes the author of the compilation where his selections, arrangement, and assembly are original

The best way to understand the collective works provision is to look at the examples we are given. We have the plain language of the act. The best one to try to understand this is periodicals, magazines that have multiple contributors from graphics to photographers to writers, et cetera. So that makes sense to have a work made for hire. That is a very different thing from saying that work made for hire is appropriate where you have an artist who has done a collection of short stories or an album.

Mr. GOLDSTEIN. Mr. Berman, I have been sitting here listening to this and number one, the statement is made that there is nothing in the legislative history to suggest that the example you give would qualify as a collective work. If one looks at the House Report on the 1976 act—page 122—there is a statement that examples of collective works would ordinarily include periodical issues, as Professor Hamilton suggested, anthologies, symposia, and collections of the discreet writings of the same authors. That is at page 122.

I think if John Updike were asked by his publisher to collect, to anthologize stories of his that reflect on a particular theme, John Updike would be entitled to protection for that, not only for his stories but as a collective work.

Mr. BERMAN. Well, I guess all this just reinforces in my mind, getting back to where we were before November 1999 might not be the same thing as resolving the long-term conflict.

Mr. COBLE. I thank the gentleman.

The train is about to leave the station and we don't dare leave Mr. Delahunt in its wake.

The gentleman from Massachusetts?

Mr. DELAHUNT. Mr. Chairman, I don't mind being on the caboose.

To pick up on the final comment by Mr. Berman in terms of these conflicts—it is interesting to watch because when Ms. Hamilton speaks, Professor Goldstein is shaking his head in the negative, and vice versa. So clearly there is disagreement as to interpretations here.

Have there been any discussions between the artists and the recording industry regarding these unresolved issues, this gray area?

Ms. Rosen?

Ms. ROSEN. Well, I have had some productive discussions with featured artists.

Mr. DELAHUNT. Are there ongoing discussions?

Ms. ROSEN. I would characterize them as open-minded on both sides and continuing.

Mr. DELAHUNT. Mr. Greene?

Mr. GREENE. All I know is that the Grammy process lasts for 8 months. In October, November, December—all the way through February—I was talking to every record company president almost on an every-other-day basis them wanting to get their artists on the show. Nobody ever mentioned one word about this to anybody in our organization and we read about it in the paper. That is one of the things that I think was the most disconcerting to us.

Mr. DELAHUNT. Again, there seems to be minimal agreement here, but I think what the—counsel?

Mr. COOPER. If I may, there have been discussions—no agreements—there have been discussions as to whether it is possible to come up with language to solve the problem. I think everybody is interested in it, but there hasn't been any agreement because we are substantially at odds as to how to resolve the issue.

Mr. DELAHUNT. Okay. But there have been discussions.

Ms. CROW. Speaking to the artists I have spoken to, people want this resolved in a way that we are protected as artists, that we regain our work and the sweat of our labor, and that we are able to leave something behind. I think we get bogged down on how much money they made.

But the bottom line is that the record labels don't want to be short-changed and the artists don't want to be short-changed. If there is a way to compromise and to make everyone feel protected in this, that we come away with the rights that other authors have, other poets, songwriters who are able to at least enjoy being able to have their copyrights back, no matter at what level the artist is, then that is what we feel should be done.

If there is a way to come together and find wording that makes the record industry as well as whoever is supporting all these record labels feel comfortable—for us, the aim is to get the wording back to the way it was. If that can't happen, then a compromise that protects our ability to regain our masters.

Mr. DELAHUNT. I would presume that that would be the preference of the subcommittee, that there be negotiations and bona fide discussions with an effort to resolve the issue.

Mr. Chairman, in the past, it has been the practice of yourself along with the ranking member to request that individual members on both sides assist and facilitate to determine first whether there can be a non-legislative resolution of these issues. I would strongly recommend that you and Mr. Berman consider that approach on this particular occasion.

My sense is that it is in the best interest of everyone—the recording industry as well as the artists—to have some certainty—whether it is 35 years later or whenever it is—so that we can have some harmony—no pun intended.

Ms. LOFGREN. Would the gentleman yield?

Mr. DELAHUNT. I yield for just a minute to my friend.

Ms. LOFGREN. I don't need a minute.

Reflecting on the last time a collaborative process was used where the chairman asked the interested parties to sort through the issues before us, it created a negative, adverse, and I thought unwarranted criticism of the chairman. I do believe, however, that these talks would be very productive. I suggest, therefore, that we avoid the kind of criticism that was unfairly levelled against the

committee in that other case by making sure that these discussions are transparent and available to all interested parties. That will avoid the problem.

I thank the gentleman for yielding.

Mr. DELAHUNT. And Ms. Rosen, I think you testified that from your perspective—and I presume Professor Goldstein would concur—the amendment really was unnecessary, that really what occurred was a codification of current case law.

Ms. ROSEN. Mr. Delahunt puts words in my mouth eloquently, as usual.

I would just say, though, that there has been a great deal of frustration and consternation at what has come to light about what were obviously plans that had not come to light for people——

Mr. DELAHUNT. I am not talking——

Ms. ROSEN [continuing]. Contracts and things like that. So all of a sudden language that seemed so unnecessary to some people seems more necessary than ever.

Mr. DELAHUNT. I guess what I am saying——

Ms. ROSEN. I have a right flank, too.

Mr. DELAHUNT. I understand that.

But I guess I am saying that if it is unnecessary, then can we presume that the position of the industry would be that a repeal would be acceptable and wouldn't make any difference?

Ms. ROSEN. I think at this point a flat repeal would be extremely prejudicial and that I have committed with Sheryl and other featured artists for a coalition to try and work through non-prejudicial——

Mr. DELAHUNT. I am not going to explore what prejudice and prejudicial means, but I think the kind of discussions you alluded to are a preferable course, given what has occurred.

My sense is—and I would be interested to hear from my colleagues—what we are talking about here—I think it was Ms. Hamilton who talked about the shift of the balance of power—it is really about putting the parties in a position where the negotiations are truly free negotiations. So that there isn't such disproportionate power on either side so that and the negotiations are bona fide and free.

I guess I am looking to the artists on this. I think it was you, Ms. Crow, who indicated—or maybe it was you, Mr. Greene—who talked about the coalition of artists. We keep coming back to this. And Ms. Lofgren is absolutely right. I would like to take a look at the standard contract myself.

Has there ever been given any consideration of negotiations between the coalition and the recording industry so that those artists that Ms. Crow represents who haven't achieved her commercial success and don't have her notoriety can be protected? I use the sports analogy. There is an agreement between the National Football League and the Players Association, a guild, if you will. I think what you are suggesting is that the individual performer does not have that leverage, even—as I understand as a result of the questioning by Mr. Goodlatte—in the negotiations that were conducted on behalf of Ms. Crow. Even then, the industry would not relent on the work for hire issue.

Ms. CROW. Let me just say——

Mr. COBLE. Ms. Crow, if you would suspend 1 minute—folks, I gave my word that this room would be vacated at 1:30.

Bill, I don't want to interrupt you, but can you wrap up?

And Ms. Crow, if you could answer very quickly?

Ms. CROW. Let me just say that first I represent artists who are much larger than myself, too, including Bruce Springsteen.

The issue that is in our contract states that if it is deemed not a work for hire, it is an agreement between the record label and us. When this was put into motion in November 1999, it changed the scope of what our contracts read. It adds meaning to what it is that our contracts mean.

Mr. COBLE. Ms. Crow, could you respond in writing to that? Mr. Berman wants to be recognized very quickly before we wrap this up.

Mr. BERMAN. I want to take off on something Bill said.

If the goal here is not simply to go back to where we were before November 1999 but to resolve this conflict, the law will stay the same for quite a long time as it is right now. If the goal is first and discreetly to go back to where we were in 1999 with no prejudice to either side in their existing dispute with careful, careful discussions, it seems to me that is attainable.

Then I think the greatest thing is that there is now going to be a coalition—hopefully with representation in Washington—so that there is a more direct kind of sense of what is going on and these kinds of things. I think that will be better for both sides if that happens.

If we want to then try to resolve the larger issue, believe me, that will be a bitter and bloody fight because in some ways it is about power. It is also how you run your business and all that stuff.

My guess is that Hilary and the recording industry would be quite happy if recording artists wanted to be employees of record companies. My guess is that recording artists might think twice about wanting to be employees.

So it gets real complicated. I think we should separate the two issues—back before 1999 without prejudice to either side—and then take a look at what we might do on the larger conflict.

Mr. COBLE. Folks, when the Crimes Committee comes in here and throws me in the U.S. Penitentiary, I want you all to bail me out. [Laughter.]

In closing, I want to thank the Register of Copyrights, the panelists, and the two lawyers that weren't on the panel. Folks, in this town, oftentimes you here people say, "I have no dog in that fight," when they don't want to be involved. We have nothing but dogs in this fight because we like the artists and the performers on the one hand and we like RIAA on the other. I think this is solvable, but don't be lulled into a sense of false security and think it is going to be solved before midnight.

I want to thank you all for being here. This concludes the oversight hearing. The record will remain open for 1 week.

Thank you for your cooperation.

We stand adjourned.

[Whereupon, at 1:46 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

RECORDING INDUSTRY
ASSOCIATION OF AMERICA,
Washington, DC, June 1, 2000.

Hon. HOWARD COBLE, *Chairman,*
Hon. HOWARD BERMAN, *Ranking Democratic Member,*
Hon. ZOE LOFGREN,
Subcommittee on Courts and Intellectual Property,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN COBLE, RANKING MEMBER BERMAN, AND REPRESENTATIVE LOFGREN: On May 25, 2000, at the hearing in open session of the Subcommittee on Courts and Intellectual Property which addressed the issue of sound recordings as works made for hire, Representative Lofgren submitted into the record recent court cases which have been cited with respect to the eligibility of sound recordings for work made for hire treatment. Chairman Coble asked me at the hearing to comment on those cases. This written statement is a supplement to my oral response given at the hearing.

Some have argued that these cases establish that sound recordings cannot qualify as specially commissioned works made for hire, and therefore the amendment last November made a substantive change in copyright law. This is a gross mischaracterization of these decisions.

There are three decisions that are sometimes cited. The most recent and relevant are from district courts. *See Staggers* v. *Real Authentic Sound*, 77 F.Supp.2d 57, 64 (D.D.C. 1999); *Ballas* v. *Tedesco*, 41 F.Supp.2d 531, 541 (D.N.J. 1999). The most important fact about both of these cases is often overlooked: in neither case had the parties agreed in writing to designate the sound recordings at issue as works made for hire. This is a threshold requirement for work made for hire status, and in the absence of work made for hire agreements, the courts in these cases did not need to opine on whether sound recordings otherwise can qualify as works made for hire. Indeed, apparently because there were no written agreements, neither party claiming work made for hire status seems to have argued how sound recordings might fall under one of the enumerated categories, such as "a contribution to a collective work." It is little wonder, then, that these artists would have summarily disposed of the work made for hire issue with little discussion and little analysis.

The third case is from a court of appeals. In *Lulirama* v. *Axcess Broadcast Services*, 128 F.3d 872 (5th Cir. 1997), the Fifth Circuit analyzed a very narrow question to hold that jingles produced for radio advertisements are not sound recordings that can be works made for hire. The court considered only whether these jingles could be considered part of an "audiovisual work," one of the other categories in the definition. Of course, sound recordings and radio broadcasts are not audiovisual works, so this category did not apply. Importantly, however, the Fifth Circuit did not consider whether the sound recordings qualified under any other category, such as "contributions to a collective work" or "compilations." It is likely that this was because the radio advertisements involved were not to be used as part of an album, or other collection, so the hiring party did not argue that this category applied to these works.

In other words, none of these cases involved the circumstances of a typical recording contract, where an artist is commissioned to create recordings for use in an

album. This situation plainly involves the commissioning of contributions to a collective work, which is one of the categories of works made for hire.

Sincerely,

CARY SHERMAN.

Last November, the house subcommittee on intellectual property cast a new law, which affected myself and every other recording artist. It was an amendment to the copyright act of 1976, and it was secretly buried in an omnibus budget bill that was over 1700 pages long.

There was no hearing or discussion. No opportunity was given to any recording artist or their representative to put, forward a single witness to express their views and open this issue up for discussion. There was not one hearing within Congress that examined the implications of the amendment prior to its enactment.

This new amendment denies recording artists the right to recapture the ownership of their copyrights when their original copyright term expires. Now the works of any recording artist, which until very recently were guaranteed by law to revert back to them or their heirs, forever remain the property of the record company.

This, in essence,, defeats the mandate of our founding fathers, as embodied in the constitution, to promote the progress of the arts by developing incentives for creators to create.

Artists are not insured of an income just because their picture appears on a C.D. cover. To paraphrase Donna Summer, "we work hard for the money", and sometimes that money only comes from our copyrights, especially after the salad days of any success are over.

We are not an easy bunch to organize, except when it comes to helping others—i.e.—Farm Aid, Live Aid,, and the countless local charity events occurring everyday somewhere in this country. We pretty much do what we do because we love it, and not for the financial rewards. That puts us in a position of weakness in the powerful world of politics. But just because you can take away our rights, doesn't mean you should, and I urge you to follow your conscience in doing the just thing here today.

Respectfully,

EMMYLOU HARRIS.

BILLBOARD,
Washington, DC,
May 25, 2000.

Hon. HOWARD COBLE,
Subcommittee on Courts and Intellectual Property,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN COBLE: Billboard notes in the written testimony submitted by Recording Industry Association of America President/CEO Hilary Rosen at the May 25 hearings on the 'Work For Hire' Copyright Amendment controversy that she makes veiled reference to Billboard, asserting "It is a sad commentary that I could not even get one of our most prominent industry trade weeklies to accept for publication a one-page letter to the editor I wrote rebutting the allegations."

In this passage of her testimony 'Rosen continues to distort (as she did in a May 2000 phone call to Billboard's publisher) a January 2000 incident in which Rosen, while on the phone with a Billboard staff editor, attempted to submit—via the very editor then editing the unpublished article in question—an unsigned note commenting on that as-yet unpublished story.

Moreover, Rosen was herself already quoted at length in this very story, which was ultimately headlined "WORK FOR HIRE PROVISION SPARKS ARTIST FUROR, DEMAND FOR CHANGE" and published one day later in Billboard's issue dated January 22. (For the record, Rosen was also quoted at length in a prior article on the subject in the Billboard issue dated January 15.)

Rosen was informed at the time Billboard was preparing to go to press on its January 22 article that it was contrary to Billboard policy to allow someone to comment, prior to publication, on an article—particularly after the person sending the note (in this case Rosen) had already been interviewed for that selfsame article and was quoted at length in its very text.

Moreover, Billboard does not accept for publication letters not formally submitted to the Letters Editor; indeed, this unsigned note appeared to have been dictated on the spot and didn't even carry an RIAA letterhead.

Nonetheless, Bill Holland, author of the January 15 and January 22 articles and Billboard's Washington Bureau Chief, conferred with me on this matter and I allowed him to enter into his final draft of the January 22 text any comments from Rosen's unsigned note that were not already covered in her statements in the as-yet-unpublished story.

I explain all this to show the lengths to which Billboard has gone to accommodate Rosen's perspective in our ongoing coverage of the 'Work For Hire' Copyright Amendment controversy, as well as the extent to which Rosen appears willing to distort the facts to serve her own purposes. Given the extraordinary degree to which Rosen is regularly quoted in Billboard—which even just recently has published both critical letters and commentaries from Rosen on a range of issues—Billboard regards this as bad form.

Billboard respectfully requests this letter be formally entered into the permanent record of these proceedings.

Sincerely,

TIMOTHY WHITE.

June 1, 2000

Hon. HOWARD COBLE, *Chairman*
Subcommittee on Courts and Intellectual Property,
Committee on the Judiciary,
House of Representatives, Washington, DC.

"Sound Recordings as Works Made for Hire" Hearings May 25, 2000

DEAR MR. CHAIRMAN: As the President and Chairman of the Board of The American Society of Composers, Authors, and Publishers, I join with the many performing artists' groups who have united to protest the decision to add sound recordings to the list of commissioned works that may be considered "works made for hire" as the definition of that term was expanded by the Satellite Home Viewer Improvement Act of 1999.

At the outset, I commend you for your decision to hold this hearing, and also express the appreciation of ASCAP's members for your consistent record of fairness in your approach to issues that affect songwriters and music publishers. This admirable history extends to all of the complex and contentious questions which are an integral part of every legislative proposal that affects creative property owners. We are, therefore, confident that this "works made for hire" issue will also be resolved fairly, in a manner that preserves the legitimate interests of the performing artists.

Although the *performing right* of ASCAP members is not directly affected by the issue of sound recordings as works made for hire, so many of those whom we represent are adversely affected by this issue that I felt that it was imperative for us to go on record opposing the change. The members of this subcommittee and other members of Congress will once again be asked to determine how to balance competing rights among performing artists, record companies and others involved in the creation of recorded musical performances. I am offering the songwriters' perspective on some of the equitable considerations that we feel should be included in your deliberations.

Performing Artists and Record Companies

The tension between performing artists and record companies over who should have the primary right in a recording has probably gone on since the advent of sound recordings. In the 1909 Copyright Act, sound recordings were not protected as copyrightable works under the federal copyright law. By the late 1960's, several efforts to provide copyright protection for sound recordings had failed, but it is interesting to note that two very different approaches were proposed in defining who was to be considered the "author" of a sound recording and of a new performance right that was proposed to be attached to sound recordings. One focused on granting the copyright in sound recordings to the record companies; another emphasized the performing artist as the proper beneficiary.

I have been told of a famous hearing that was held by one of the Congressional Judiciary Committees in the late 1960's. It was one of the early uses of a celebrity as an expert witness. The hearing featured Julie London who was then famous for several hits including "Cry Me A River," written by ASCAP songwriter and now an ASCAP Board member, Arthur Hamilton. Julie London provided audio evidence to the Committee of how much the singer brings to the creative interpretation of the song. Her examples included her reinterpretation of the "Mickey Mouse Club" theme song as a ballad, and Barbara Streisand's hit record, "Happy Days Are Here Again," also done as a soft, sad ballad. As moving and memorable as her performance was

to her congressional audience, she did not convince Congress to pass the bill she supported. Congress finally passed a bill that extended limited protection to sound recordings on October 15, 1971, but it deliberately left the "authorship" question to the employment and contractual relationships of the parties.

I should note that, for ASCAP, history often repeats itself in these legislative struggles involving performing artists. When the royalty for digital audio recordings of music was originally proposed in the bill that eventually became the Audio Home Recording Act of 1992, I believe that the initial proposal would have given the royalty to the recording companies and not to the performing artists. ASCAP, among others, insisted that the performing artists be named in the legislation, and that position prevailed. Again, when the Performance Rights in Sound Recordings Act of 1995 was being considered, ASCAP urged that performing artists benefit from the new right being extended. We did so again in the recent battle over a new compulsory license for sound recordings played over the internet. Thus, we are true to our consistent position over many years when we join in support of the performing artists in this instance.

Disparity of Bargaining Power and Termination Rights

Mr. Chairman, one of the equities to consider in crafting copyright law that addresses the work made for hire issue is the disparity that exists between the bargaining power of the performing artist and that of the record companies. The 1976 Copyright Act recognized this disparity and the fact that the value of a work could not be meaningfully estimated until after it had been exploited by providing for a termination right. Termination rights did not extend to works for hire. And so, as the Register of Copyrights has testified on this same issue: "Although sound recordings were being contemplated as copyrightable subject matter contemporaneously with the mid-1960's debate over works made for hire, they were never proffered as a category to be added to the list of commissioned works."

There is no reason to revise the determination made in the 1976 Copyright Act that performing artists deserve the same protection through termination rights as other authors.

Conclusion

The recent change in the law contained in the amendment to the Satellite Home Viewer Improvement Act of 1999 appears to many performing artists to be an unfair legislative effort to advance the record companies' legal position and to further enhance their real world economic advantages. This subcommittee should not allow that perception to persist. Action should be taken to restore the legal balance of this creative property right.

Mr. Chairman, our board, officers, employees and members would be pleased to assist your subcommittee in achieving an expeditious resolution of this issue. We believe that we share a mutual objective—protecting performing artists' historic right to their creative works.

PREPARED STATEMENT OF BROADCAST MUSIC, INC.

Mr. Chairman, thank you for this opportunity to submit a written statement on a very important copyright matter pending before the Subcommittee on Courts and Intellectual Property ("Subcommittee"). On May 25, 2000, the Subcommittee held an oversight hearing on the "Issue of Sound Recordings as Works Made-for-Hire." This written statement, submitted on behalf of Broadcast Music, Inc. ("BMI"), is intended to be made part of the hearing record.

Late last year, an amendment was inserted in the Satellite Home Viewer Improvement Act of 1999, and enacted as part of a very large Omnibus Budget bill, Pub. L. No. 106–113, 113 Stat. 1501 (1999). The four-word amendment added sound recordings to the list of commissioned works that may be considered as "works made for hire." The amendment will have a detrimental effect on many of BMI's 250,000 songwriter, composer and publisher affiliates who write songs, compose music, or serve as recording artists.

I. DESCRIPTION OF BMI.

As you know, BMI licenses the public performing right in approximately four and one-half million musical works on behalf of its affiliates, as well as the works of thousands of foreign songwriters, composers and publishers through BMI's affiliation agreements with over sixty foreign performing rights organizations. BMI's repertoire is licensed for use in connection with performances by broadcast and cable television, radio, concerts, restaurants, stores, Internet sites, background music

services, passenger vessels, trade shows, corporations, colleges and universities, and a large variety of other venues.

BMI has played an important role in the development of the U.S. copyright law, in particular the 1976 Copyright Act as well as the 1998 Digital Millennium Copyright Act ("DMCA"), both of which were, in large part, the handiwork of this Subcommittee. BMI's President, Frances W. Preston, testified before the Subcommittee during the 105th Congress on the DMCA legislation. BMI representatives also participated in the numerous legislative activities that led to enactment not only of online service provider ("OSP") liability reform (Title II of the DMCA) but also of other provisions in the DMCA. For example, Marvin L. Berenson, BMI's General Counsel, participated in the OSP negotiations coordinated by Representative Bob Goodlatte, a member of this Subcommittee.

II. BMI APPLAUDS THE HOLDING OF THIS HEARING.

At the outset, BMI would like to thank Chairman Coble for holding this oversight hearing. Oversight hearings serve the salutary purpose of stimulating debate and promoting understanding, by both elected officials and the public, of important policy issues.

Mr. Chairman, we also commend you for your fair-minded and even-handed leadership of the Subcommittee during a time of great tension in copyright law as policymakers are forced to navigate the intersection of law and technological change. We would also commend the ranking minority member of the Subcommittee, Mr. Berman, as well as the leadership of the full Committee on the Judiciary, Chairman Hyde and Ranking Member Conyers.

During the past three decades, the modern era of U.S. copyright law, the Subcommittee has earned a well-deserved reputation for fairness and openness. The Subcommittee has contributed to a body of law widely hailed as a huge success, and authors and copyright owners are the beneficiaries of the Subcommittee's workproduct.

This is not to say that mistakes in process and substances are not sometimes made. Routinely, after the enactment of major legislation, Congress must pass "clean-up" or "housekeeping" legislation, and amend its own amendments. This is an integral part of the legislative process.

In this regard, this oversight hearing is an important first step. BMI stands ready to participate constructively in the Subcommittee's future steps.

III. THE WORK FOR HIRE AMENDMENT SHOULD BE REPEALED.

BMI would like to make four points about the work made for hire amendment.

First, the amendment became a part of a "must pass" piece of legislation (the Satellite Home Viewer Improvement Act) late in the legislative process and was not subjected to public debate and discussion. We do not question the motives of those who drafted the amendment or ensured its enactment. We only note that many interested parties, including BMI, were not offered an opportunity to discuss the amendment's merits or to publicize its potential passage.

Second, the amendment—by expanding the commissioned work for hire categories to include "sound recordings"—amounts to a substantive change in American copyright law. If the change is not a substantive one, there would have been no reasons for the amendment in the first place and it can safely be repealed.

Third, the amendment should be repealed for another reason: the amendment will have a deleterious effect on authors in their capacity as recording artists. BMI believes strongly in the rights of composers, songwriters and publishers to own the copyright in their works. BMI also believes that performers who create sound recordings are, in many instances, the authors of those recordings. The work made for hire doctrine serves as a limitation on the rights of authors generally. By eliminating the termination right, the amendment clearly takes power away from the performer(s) in relationship to the recording company. This power shift could have serious financial repercussions for performing artists who in many cases transfer the rights to their copyrighted works early in their careers when the value of the recordings may not be fully realized. The amendment may also have unintended consequences. For example, the new digital economy is creating new means of distribution of albums, and individual tracks that may not be part of a collective work.

In any event, from a substantive perspective, the amendment modifies a key element in the 1976 Copyright Act: the performing artist's termination rights. As this Committee noted in its Report for the 1976 Act, "a provision of this sort is needed because of an unequal bargaining position of authors, resulting in part from the impossibiiity of determining a work's value until it has been exploited." H.R. Rep. No. 94–1476 at 124 (1976).

Fourth, and finally, the most effective way for the Congress to proceed would be for the amendment to be repealed immediately "without prejudice." The copyright law should be returned to what it was one day before enactment. Thereafter, the Subcommittee could then continue its hearing process, and if the proponents of change satisfy their burden of persuasion, the Subcommittee would be authorized to determine what further amendatory course to take.

CONCLUSION

BMI appreciates the opportunity to submit these written comments and looks forward to working with the Subcommittee to resolve the serious issues raised by the work made for hire amendment.

COLUMBIA UNIVERSITY IN THE CITY
OF NEW YORK, SCHOOL OF LAW,
New York, NY, May 30, 2000.

Hon. HOWARD COBLE,
Hon. HOWARD BERMAN,
Subcommittee on Courts and Intellectual Property,
Committee on the Judiciary,
House of Representatives, Washington, DC.

Re: Sound Recordings Work for Hire amendment to "Intellectual Property and Communications Omnibus Reform Act of 1999"

DEAR CHAIRMAN COBLE AND REPRESENTATIVE BERMAN: I write in connection with the Hearing held May 25, 2000 concerning the addition last year of the category "sound recordings" to the list of commissioned works capable of becoming "works made for hire" by contract pursuant to 17 U.S.C. § 101. You have already received a letter signed by several teachers of intellectual property law urging the removal of the sound recordings category. I agree with and endorse the analysis and arguments made in that letter, but prefer to write individually, and to emphasize some further considerations.

Addition of sound recordings to the commissioned works for hire categories was not a "technical correction." The consequence of making a commissioned work one "for hire" is to remove the author from all future determination of the economic and artistic fate of her work. Under the Copyright Act, the creator of a "work for hire" is not even considered a statutory "author." Unlike other creators, she has no right under § 203 to terminate grants of rights under copyright thirty-five years following their execution. Yet Congress has long recognized that authors often fail to share in their works' success, and has accordingly provided for a "new estate," a second-chance for authors to reap the rewards to which their creativity entitles them, and which the Constitution anticipates, by empowering Congress "to promote the progress of science and useful arts by securing . . . to *authors* . . . exclusive right[s]," (emphasis supplied).

Stripping performing artists of their statutory authorship status carries other deleterious consequences as well. Some courts have held that an employee for hire, as a non-author for copyright purposes, is also a non-author for purposes of claiming a night to prevent misattributions of authorship credit under the Lanham federal trademarks act. See, e.g., *Cleary* v. *News Corp.*, 30 F.3d 1255 (9th Cir. 1994); cf. 17 U.S.C. § 106A (employees for hire not entitled to assert fights, including right of attribution, under Visual Artists' Rights Act). Thus, converting performing artists into employees for hire not only excludes them from the future control or the copyright in their works, it can also operate to deny them the ability to ensure that others not falsely take credit for creating the recorded performance.

It has been suggested that the addition of the "sound recordings" category is nonetheless in fact a "technical correction": (1) because record producers systematically have provided in their contracts with performing artists that their work is "for hire"; and (2) because sound recordings that include several "cuts" or selections, may be considered "compilations" or "collective works," which already are included in the list of § 101 categories. As to the first contention, saying a commissioned work is "for hire" does not make it so. That is the point of a limitative statutory list. If the category is not included, neither repetition nor analogy will shove in what Congress left out.

As to the second, if the sound recordings assemble preexisting recorded selections, particularly from different performers, the compilation or collective work characterizations may be appropriate, and the work may be "'for hire" if it meets the other

requirements of § 101(2). It is important to emphasize, however, that the preexisting recorded material is *not* transformed into a work for hire by virtue of its later inclusion into a compilation or collective work. See 17 U.S.C. §§ 101,103.

More significantly, even were the "collective work" label accurately applied to some sound recordings of the past, the designation will cease to describe the sound recordings created and distributed in the future, and, for that matter, even today. Current and potential modes of exploitation decouple the song from the album: with on-demand digital delivery of individual recorded performances, consumers can sever the tie that bound them to the whole album. Songs are and will be produced and exploited for individual streaming and/or downloading. If the songs first appeared on a collective work for hire, the performing artists may not terminate the producer's fights in the individual songs. But if the songs are created and marketed separately, as I believe they will be to an ever-increasing extent, then no collective works characterization can remove the performing artist from her work. By contrast, the new addition of sound recordings does accomplish that end, for the label "sound recording" applies to any original fixation of sounds, and hence governs 4csingles" as well as "albums."

Seen in this light, the deleterious consequences for artists become painfully apparent. Just when the Internet begins to afford artists more autonomy, the new addition of sound recordings to the list of contract-generated works for hire means that any recourse to a record producer can contractually denude the performer of his copyright, not only by means of a long-term assignment, but forever, because once the work is deemed "for hire," the rights granted cannot be recaptured.

Sincerely,

JANE C. GINSBURG.

MARITIME MUSIC, INC.,
Southampton, NY, June 7, 2000.

Hon. HOWARD COBLE, *Chairman,*
Subcommittee on Courts and Intellectual Property,
Committee on the Judiciary,
House of Representatives, Washington, DC.

Re: Expansion of Work-For-Hire Doctrine

DEAR CHAIRMAN COBLE: I am writing to you as an individual performer and as a member of AmSong, Inc. to express my deep concern regarding the recent amendment of Section 101 of the United States Copyright Act to include sound recordings in the definition of "works made for hire". Although I was unable to attend the May 25, 2000 House Subcommittee on Courts and Intellectual Property hearings on the work for hire legislation, I feel very strongly that the amendment should be repealed, and am grateful for the opportunity to submit this statement for the record.

The amendment, which was introduced as 1011 (d) of the Intellectual Property and Communications Omnibus Reform Act, was dubbed a "technical amendment." However, the amendment is fair from technical. It has made a significant change in the law which will be devastating to recording artists if the language remains. The new law—which was implemented at the behest of the corporate interests represented by the Record Industry Association of America—constitutes an erosion of our right as creators to retain ownership and control of our works which is contradictory to the very purpose of our copyright laws. The RIAA does not represent me nor does it represent any other recording artists I know and although the RIAA does take stands on issues that are beneficial to recording artists, it is apparent that we have divergent interests with respect to the practical application and ramifications of "work for hire" legislation.

The new law now deprives performers of the right to terminate grants of our performances and master recordings since no termination right is available for works created by an artist as a "work made for hire." This termination right, which has been available to each of us as authors since sound recordings became subject to federal copyright protection, afforded performers a chance to reclaim our work after the passage of the statutorily prescribed number of years (56 years for pre-1978 recordings and 35 years for recordings made on or after January 1, 1978). It was expressly designed by Congress to allow authors and creators to regain control of our own original creations. Under the new law, performers will now be locked into agreements with record labels for the life of copyright in the performance. In effect, it puts performers in a worse position than songwriters, poets, novelists, graphic artists and other authors and creators, all of who continue to enjoy the Congressionally guaranteed "Second bite at the apple."

I have been performing on sound recordings since the 1960s. It has taken years of my life and countless dollars to rectify the problems created by my early recording and production agreements which were very heavily weighted in favor of my record label and which for many years included the heretofore unenforceable "work for hire" provisions. This was the case despite the fact that I wrote and performed the compositions on each Album, engaged and paid the producer, musicians, background vocalists, and technical staff, and ultimately approved the final product before delivering each album to the record label. Moreover, I have always been responsible for and paid the entire cost of recording my albums. Accordingly, I am sure you can understand how it is inconceivable to me that the record company or any one other than myself be deemed the "'author" of my work. The notion that my albums are part of some sort of collaborative collective work is simply not accurate. This could not have been the intent of the framers of our Constitution when they provided for copyright protection for authors, nor could this have been the intent of Congress in passing this recent legislation.

On behalf of myself and my fellow performing artists, I ask you to restore our rights as members of the creative community by supporting legislation to remove sound recordings from the category of works made for hire.

Sincerely,

BILLY JOEL.

BENJAMIN N. CARDOZO SCHOOL OF LAW,
YESHIVA UNIVERSITY,
New York, NY, June 16, 2000.

Hon. HOWARD COBLE, *Chairman,*
Subcommittee on Courts and Intellectual Property,
Committee on the Judiciary,
House of Representatives, Washington, DC.

RE: *Sound Recordings as Works Made for Hire*

DEAR MR. CHAIRMAN: Thank you again for inviting me to testify before the Subcommittee on Courts and Intellectual Property on the unfortunate addition of "sound recordings" to the works made for hire provisions of the 1976 Copyright Act, 17 U.S.C. § 101 (2000). The hearing, held on May 25, 2000, was an important and illuminating discussion of the usually little-noticed work-made- for-hire provisions.

I am writing this letter to clarify some of the points that were made at the hearing and request that you make it part of the public record.

The history of the work-made-for-hire provisions needs to be understood in order for the Committee and the Congress to make the right decision regarding repeal of the inclusion of "sound recordings." Immediate repeal is the right decision.

In the Copyright Clause, Art. I, Sec. 8, cl. 8, the Framers explicitly chose to place "exclusive rights" in creative works into the hands of "authors," and simultaneously rejected publishers, disseminators, guilds, or industry as primary rights holders. To be frank, the work made for hire doctrine, which permits an employer or commissioner to be the "author" for copyright purposes is at odds with the plain language of the Clause. It is, in reality, an end-run around the Framers' decision to place the power over creative works into the hands of those who created them.

Nevertheless, the courts over the years developed the work-made-for-hire doctrine, reasoning that it was appropriate to make an employer the author of the works of his employees, because he had provided the "instant and expense" of the creation. In other words, where the employer was the primary cause for the creation of the work, the employer should be considered the author.

This reasoning naturally applies to employers of full-time employees and was extended to those who commission works when Congress amended the Copyright Act in 1976.

In 1986, Senator Thad Cochran nicely explained the justifications for work-made-for-hire status as follows:

> The theory of the work-for-hire doctrine is that the employer or commissioning party is entitled to authorship of the work because he conceives, directs, and controls the production of the work and bears the financial risks of development. While this argument is a strong one for works prepared by an employee in the course of his employment, it is not always applicable to freelancers who often conceive and develop a work in their own studios.

132 CONG. REC. 99th Cong., 2nd Sess. (Apr. 17, 1986) (introducing S. 2330 A bill to amend the copyright law regarding work made for hire).

As I stated in my testimony, the legislative history of the 1976 Copyright Act indicates that originally there were to be no categories of commissioned works made for hire. Work made for hire was to be limited to employer/employee relationships. Pressure from the industries, though, soon opened the door to commissioners, and the drafters eventually chose nine categories of works that could be included under the commissioned works made for hire provisions. *Oversight Hearing on the United States Copyright Office and Sound Recordings as Work for Hire: Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong., 2d Sess. (2000)(statement of Professor Marci A. Hamilton, Thomas H. Lee Chair in Public Law, Benjamin N. Cardozo School of Law). The reasoning was that the commissioned works included were on similar footing with employers, viz., they provided the instant and expense of the creation. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 121., *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5736. In other words, they were responsible for its creation.

The 1999 amendment of the commissioned works provisions to include "sound recordings" flies in the face of accepted work-made-for-hire theory by permitting the recording companies to insist on work-made-for-hire agreements in circumstances where the artists have supplied the instant and expense of the creation.

There was some discussion at the May 25, 2000 oversight hearing on the question of whether an album was a work-made-for-hire before the work made for hire provisions were amended to include "sound recordings." Under existing industry practice, such a claim is dubious.[1] While works not explicitly named in the commissioned list may fall under other categories, they only properly do so where the commissioner causes the work to be made. Thus, a collection of short stories written by and at the expense of a single author should never fall under these provisions, but where a publisher brings together a collection of short stories through its own initiative and expense, the work may be a collective work. 17 U.S.C. §101(2). The same is true for albums. When the album is put together on the initiative and expense of a single author, no industry should have the right to impose a work-made-for-hire agreement on that author and thereby steal the author's rightful legal status. If the album, however, was created at the expense of a record label, the album could be considered a collective work as that term was intended under the 1976 Copyright Act.

The legislative history makes clear, therefore, that Congress would not have intended to include albums or short stories that were put together at the instant and expense of the author or artist. Moreover, the Copyright Clause brings such an extension of work made for hire into constitutional question. In those scenarios where the artist is causing the work to be made and paying for its creation, a so-called commissioner does not deserve the windfall work made for hire status bestows and should be limited to negotiating for rights. By extending the reach of the commissioned works made for hire category to all albums as the "sound recordings" amendment does, Congress made a mistake. Repeal is the only appropriate answer.

Sincerely,

MARCI A. HAMILTON,
Thomas H. Lee Chair in Public Law.

PREPARED STATEMENT OF ANN E. CHAITOVITZ, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

I. BACKGROUND

On November 29, 1999, Congress passed the Consolidated Appropriations Act 2000[2], an appropriations bill, containing over 1,000 pages. Tucked away in one of its titles, the Satellite Home Viewer Improvement Act[3], an amendment labeled "Technical Amendments," changed the Copyright Law to the detriment of recording artists. Without consultation with performers or their representatives, without prior notice, without legislative committee hearings, and without debate in either the House of Representatives or the Senate, the amendment added "sound recordings" to the list of works which could be a "work made for hire" under that definition in the Copyright Act (17 U.S.C. §101). Significant rights of thousands of performing

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[1] The fact that music industry contracts routinely include a "work-made-for-hire" clause is irrelevant. Copyright industry contracts typically far exceed statutory boundaries. The measure of the author's rights must come from the statute and the Constitution, not industry attempts to overreach.

[2] Pub. L. No. 106–113, 113 Stat. 1501 (1909).

[3] S. 1948, Tit. 1. (1999) incorporated in and passed as Consolidated Appropriations Act 2000, Pub. L. No. 106–113, 113 Stat. 1501 (1909)

artists were wiped out by the inclusion of those two words, "sound recordings," under the label of a "clarifying change."[4]

The addition of "sound recordings" to the definition of works made for hire cannot be called a "clarifying change" or a "technical amendment." MaryBeth Peters, the Register of Copyrights, stated that this amendment made a substantive change in the law: "I have also been asked if this is a technical amendment. And the answer is no. It is a substantive amendment." *Billboard*, January 15, 2000. Legal scholars and practitioners agree that the addition of sound recordings limited the rights of performers. William Krasilovsky, co-author of the industry text "This Business of Music" and a leading music business attorney—who was actively involved in the discussion leading to the enactment of the 1978 Copyright Act—put it succinctly: "This wasn't a 'clarification.' That's fraudulent. . . . This is a substantive change.[5]" No one can seriously argue that it is not.

II. LEGAL CONTEXT

The framers of the Constitution recognized the importance of providing incentives to authors and inventors which, by stimulating creativity, would result in benefits to society as a whole. Article 1, Section 8, Clause 8 of the Constitution gives Congress the power "to promote 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." As the Supreme Court has said, the purpose of copyright is "to encourage people to devote themselves to intellectual and artistic creation"[6] and the "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors."[7] The first Copyright Act passed in 1790 and all subsequent copyright laws enacted since then have had this Constitutional purpose as their underpinning. From Article 1, Section 8, Clause 8 through the 1976 Copyright Act, the *author* is paramount. The author is the person with the creative talent and that talent inures to the common good. When authorship is not recognized or the rights of the author are significantly limited, not only the author, but also society as a whole will suffer. Stripping performers of their status as "authors" and thereby depriving them of significant rights under the copyright laws does not meet the Constitutional goal. It does not secure to them "the exclusive rights" contemplated by the Constitution but rather grants those exclusive rights in the first instance to the record company, notwithstanding the fact that the creative genius in the performance rests with the performer.

Under the Copyright Act, the author in the first instance is the copyright owner of a work. 17 U.S.C. §201(a). Where a work is "made for hire," the employer, not the creator, is considered the author *ab initio*. 17 U.S.C. §201(b). In enacting the 1978 Copyright Act, Congress defined a "work made for hire" as follows:

> A "work made for hire" is "
> (1) a work prepared by an employee within the scope of his or her employment; or
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other works, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities.

Category (1) of the above definition applies to regular employees—those who have taxes withheld, health benefits, working places in the employers' offices, etc.[8] In en-

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[4] H. R. Conf. Rep. No. 106–464, at 105 (1999).

[5] M. William Krasilovsky, *"Work for Hire Law" Rattles Proponents of Artists' Rights*, Billboard, January 15, 2000.

[6] *Goldstein* v. *California*, 412 U.S. 546 (1973)

[7] *Mazer* v. *Stein*, 347 U.S. 201 (1954)

[8] *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989). Reid listed thirteen factors to be considered in determining whether a hired party is an employee: (1) the hiring party's right to control the manner and means of production; (2) the skill required of the hired party;

acting the 1978 Act, Congress specifically limited the category (2) types of works made for hire above—those specially ordered or commissioned—to nine specific and distinct categories.

Unlike the recent addition of "sound recordings" to the list of commissioned works, when Congress initially considered what works should be included in that list, it debated the issues and consulted with the various interested parties until it achieved a "carefully balanced compromise."[9]

> The status of works prepared on special order or commission was a major issue in the development of the definition of "works made for hire" in section 101, which has undergone extensive revision during the legislative process. The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as "works made for hire," and those that should not. The definition now provided by the bill represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered "works made for hire" under certain circumstances.[10]

In contrast to the consideration that went into the original drafting of the definition of "work made for hire," the amendment adding sound recordings was done without any prior consultation with performers or their representatives. This amendment clearly does not "further the objectives of the copyright owner" and does not recognize the "legitimate needs of all interests involved."

The amendment to include sound recordings as a specially ordered or commissioned work that can be a "work made for hire" has a direct and profound effect on recording artists. It strips artists of the significant right of termination. In the 1978 Act, Congress provided that authors and certain of their heirs have the right to terminate transfers of copyright 35 years after the date of the transfer and, thereby, recover ownership of the copyright.

After thorough debate, Congress made a policy decision to provide termination rights to authors to "safeguard[ ] authors against unremunerative transfers. A provision of this sort [was created] 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."[11] The authors of all copyrighted works enjoy termination rights, *except for creators of works made for hire.*[12] Thus, this recent amendment to the Copyright Act adding sound recordings to the list of commissioned works which can be considered works for hire eliminates the ability of performing artists to terminate their transfers and regain ownership of their recordings. Register of Copyrights MaryBeth Peters has stated, ". . . before the new law, artists absolutely had the right to reclaim [their sound recordings]."[13] Congress surely did not intend to strip artists of this right.

Under the earlier Copyright Act, there were two terms of copyright protection. The initial term was 28 years with a renewal term of first 28, later 47, and now 67 years. The Congressional purpose in having two distinct terms was to allow the author to enjoy the fruits of his or her creation by recapturing the copyright after the initial 28 year term. The rationale behind the two terms was stated in the Committee Report accompanying the 1909 Copyright Act:

> It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of 28 years, your Committee felt that it should

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(3) the source of the hired party's instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional work; (7) the extent of the hired party's discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) whether the hiring party provides employee benefits; and (13) the tax treatment of the hired party.

[9] H. R. Rep. No 94–1476, 94th Cong., 2d Session (1976).

[10] H. R. Rep. No 94–1476, 94th Cong., 2d Session (1976).

[11] H. R. Rep. No 94–1476, 94th Cong., 2d Session (1976).

[12] The concept of termination rights is not unique to the area of sound recordings. Authors of pre-1978 musical compositions, books, poems and other original works of authorship have been asserting termination rights for the past 22 years. In the music industry, the termination right has enabled songwriters to renegotiate—or end—inequitable contractual relationships with the original grantees of their music publishing rights. This is common practice in the music industry and has become part of, and not disturbed, the business practice. There is no reason for affording performing artists a narrower scope of rights than those afforded to other authors.

[13] Bill Holland, *Hearings Sought on 'Work For Hire' Law*, Billboard, January 29, 2000, at 9.

be the exclusive right of the author to take the renewal term and *the law should be framed . . . so that he could not be deprived of that right.* (Emphasis Added.)

In enacting the 1978 Copyright Act, Congress eliminated, with the exception of subsisting copyrights, the dual term of protection for a single period of years. Congress continued to believe, however, that the author should be allowed, at some point, to recapture the copyright. Therefore, they provided termination rights to permit authors to terminate transfers of copyright 35 years after the date of transfer.

III. SOUND RECORDINGS DID NOT CONSTITUTE WORKS MADE FOR HIRE

It has been argued that sound recordings have always been works for hire under the copyright law and that this amendment makes no changes in existing law.[14] This argument fails under both the language of the statute as it existed prior to November 26, 1999 and existing case law interpreting the statute.

> Recording artists' works [were] not works-for-hire because the typical artist is not a record company employee [footnote omitted] and sound recordings [were] not one of the types of commissioned works eligible for work-for-hire status.[15]

As we show in Part A below, the courts that addressed the question under the pre-amendment law held that sound recordings were *not* works made for hire. And, although the record industry claims that sound recordings are compilations or collective works, and thus were always works made for hire under the pre-amendment law, sound recordings plainly are neither. Finally, the record companies' self serving claim that their actions in registering sound recordings as works made for hire makes them so is without any merit.

Moreover, as we show in Part B, sound recordings are of such a different nature from the nine categories of specially commissioned works that Congress decided were appropriate for work made for hire status when it enacted the 1978 Copyright Act that, as a matter of policy, they should not have been added as a separate, new category.

A. Under Pre-amendment Law, Sound Recordings Were Not A Type of Specially Commissioned Work That Could Constitute A "Work Made for Hire" under that Prong of the Definition

1. Prior to the Amendment, Sound Recordings Could Not Be Considered as Works Made For Hire Because They Were Not Included in the Definition

Congress was quite explicit in listing *nine* categories of commissioned works which could be considered "works made for hire." "The course of negotiations indicates that the scope of the work-for-hire definition, especially the scope of the commissioned works category, is limited so as not to include sound recordings." Ryan A. Rafoth, *supra* n.14, at 1048.

The Supreme Court has held that "only enumerated categories of commissioned works may be accorded work for hire status." *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 748 (1989). The three courts that have considered whether sound recordings can constitute "works made for hire" under the specially commissioned work prong of the definition have all concluded they cannot. *Lulirama Ltd.* v. *Axcess Broadcast Services, Inc.*, 128 F3d 872 (5th Cir. 1997); *Ballas* v. *Gennara Tedesco*, 41 F. Supp. 2d 531 (D.N.J. 1999); *Staggers* v. *Real Authentic Sound*, 77 F. Supp. 2d 57 (D.D.C. 1999).[16] As the United States District Court for the District of Columbia ruled a mere month before the RIAA sought to amend the Copyright Act, "[b]ecause a sound recording does not fit within any of the nine categories of 'specially ordered or commissioned' works, whether it was made for hire depends on whether [the author] was [an] employee and prepared the sound recording within the scope of that employment [prong one of the definition]." *Staggers*, 77 F. Supp. 2d at 64. Accord, *Ballas*, 41 F. Supp. 2d at 541 (" The definition does not provide

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[14] *Billboard*, January 29, 2000, p. 9 reporting on an interview with Hilary Rosen, President and CEO of the Recording Industry Association of American in which she claims that the amendment is "a confirmation of the understanding that has always existed."

[15] Ryan A. Rafoth, Note, *Limitations of the 1999 Work-For-Hire Amendment: Courts Should Not Consider Sound Recordings To Be Works-For-Hire When Artists' Termination Rights Begin Vesting in Year 2013*, 53 Vand. L. Rev. 1021, 1029 n.3 (2000).

[16] The exclusivity of the enumerated categories had earlier been affirmed in a non-sound recording context by the Fifth Circuit Court of Appeals:

> [T]he legislative history underscores the clear import of the statutory language: only enumerated categories of commissioned works may be accorded work for hire status.

Easter Seal Soc'y for Crippled Children and Adults v. *Playboy Enters.*, 815 F.2d 323, 328 n.8 (5th Cir. 1987). Accord, *Lulirama, Ltd.* v. *Acxess Broad. Services, Inc.*, 128 F.3d 872, 877 (5th Cir. 1997).

that a sound recording standing alone qualifies as work for hire under Section 101 (2).")[17]

Knowing that most recording artists will not fall within the definition of employee set forth by the Supreme Court in *Community for Creative Non-Violence* v. *Reid*, the record companies amended the specially commissioned work prong of the definition in response to the past, and to change the outcome of future, court decisions.

2. Sound Recordings Are Not Compilations or Contributions to Collective Works

Sound recordings simply do not fit within the previously existing nine categories of commissioned works that could become works for hire, although the record companies have asserted that they could be considered "compilations" or "contributions to a collective work." This is rarely the case.

In order to be a compilation, the album must consist of separately preexisting materials.[18] A sound recording of a particular musical composition cannot be considered a "compilation" because it is a fully integrated work. A record album consists of recordings of several musical compositions unified by a common concept and has generally been brought together by the featured recording artist who, as required by his/her contract, delivers recorded albums as a set of master tapes "completed, fully edited, mixed, leadered and equalized. . . ."[19]

As "The Time Bomb in the Record Company Vaults"[20] explains, "[i]t is unlikely that a set of new sound recordings by a single author would be considered a collective work or compilation." Examples of collective works and compilations listed in the Copyright Act are works that are typically created by multiple authors. And, as copyright experts Melville and David Nimmer explain, Congress did not classify three one-act plays as a collective work because the originality involved in the selection and arrangement was minimal and did not warrant a collective work copyright. In the recording process, because of the cost involved, artists tend to record and deliver the approximate number of songs that they are contractually obligated to deliver so the record company does not even exercise selectivity in choosing the songs for the album. Also, since record companies release single recordings as well as albums, they cannot seriously argue that the recordings were commissioned for use as a contribution to a collective work or compilation because the record companies also plan to distribute the recordings as singles.

Under certain circumstances, such as "The Best Hits Of" type records, certain sound recordings might be considered compilations, but the vast majority of recorded albums would not qualify as compilations or collective works. Indeed, with the advent of electronic delivery systems, the recorded album as we know it might disappear, and artists' performances will be captured on individual sound recordings and transmitted one by one.

3. Copyright Registration Does Not Make Sound Recordings Works Made for Hire

No conclusion can be drawn from the fact that sound recordings have been registered in the Copyright Office as "works made for hire." While the record companies have always filed these copyright registrations as works made for hire, simple registration, especially one that is contrary to law, is not determinative. Just registering something as a work made for hire does not make it one. None of these copyright registrations has been challenged because the issue will not become ripe until 2013, the first year that the copyright owners of sound recordings may exercise their termination rights under the Copyright Act. It is the record companies that prepare and file applications to register claims to copyright in sound recordings. The performing artist rarely, if ever, sees the application before it is filed. Absent some apparent reason made obvious to them from the deposited copy, the Copyright Office would not ordinarily question the assertions of authorship made on the application. Therefore, under the law and under Copyright Office practices, no conclusion can be drawn concerning authorship.

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[17] H. R. Rep. No. 94–1476, 94th Cong., 2D Session (1976)

[18] A compilation is "a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes work of authorship." 17 U.S.C. § 101.

[19] *Counseling Clients In The Entertainment Industry* (1994) at 188 par. 24(g) (recording agreement).

[20] Randy S. Frisch and Matthew J. Fortnow, *The Time Bomb in the Record Company Vaults, in Entertainment Publishing and the Arts Handbook* (1994).

4. The Artist Is the Author

Hilary Rosen, President of the Recording Industry Association of America, has argued that sound recordings should be works made for hire because otherwise "every creative participant on the album would be a co-author under the copyright law."[21] That simply is not the practice in the industry and is not accurate under the copyright law. Side musicians and background singers, the non-featured performers, traditionally have been considered employees when performing on sound recordings and fall within the first prong of the work made for hire definition under the criteria set forth by the Supreme Court in *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730.

Neither producers nor record companies generally make sufficient creative contributions to be authors. In order to be considered an author, they must contribute authorship to the sound recording. "Originality itself must exhibit a modicum of intellectual labor in order to constitute an author."[22] "[The Supreme Court] defines author as the person to whom the work owes its origin and who superintended the whole work, the 'master mind.'[footnote and citation omitted]" *Aalmuhammed* v. *Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000). Clearly, this is the featured artist—the record companies accept completed albums from the featured performers. They cannot be considered joint authors of the sound recording since they do not contribute authorship. *Aalmuhammed* v. *Lee*, 202 F.3d 1277; *Lakedreams* v. *Taylor*, 932 F.2d 1103 (5th Cir. 1991).

B. Sound Recordings Are Fundamentally Different From the Other Categories in the Specially Commissioned Work Prong of the Definition

Sound recordings are substantially different from the other categories enumerated in the definition—motion pictures or other audio visual works, translations, supplementary works, compilations, instructional texts, tests, answering materials to a test and atlas. Unlike the other categories, the artist here pays for the finished product. The record company acts like a mortgage bank and provides a loan to the performer to finance the recording in the form of an "advance." That advance is "recouped" by a record label when it deducts the advance from royalty payments owed to an artist for sales of that recording. However, unlike a mortgage bank, the record company maintains ownership of the work even after the artist has "paid back" the advance. Imagine the absurdity of the bank still owning your house after you have paid off the mortgage! Although not every recording recoups (i.e., pays the loan back), virtually every recording that still has value after 35 years has fully recouped its advance payments. Acknowledging the inequity and unfairness of this situation, Congress provided authors with a second bite at the apple (see termination rights legislative history, p. 4). None of the works in the other categories are financed by the authors.

Moreover, records are much less collaborative than the other items listed, and the record company makes negligible creative contributions. A record album consisting of featured recordings of several musical compositions has generally been brought together by the featured recording artist who, as required by his/her contract, delivers recorded albums as a set of master tapes "completed, fully edited, mixed, leadered and equalized. . . ."[23] In addition, as a recent law review article concluded,

> The relationship between artists and record companies does not elicit the concerns that motivated Congress to establish the commissioned work categories. Unlike record companies, encyclopedia and textbook publishers contribute significant creative effort by compiling the works of many authors. [footnote omitted] The level of effort required to compile sound recordings pales in comparison to that required for textbooks and encyclopedias, which are compiled by coordinating thousands of scientists, authors and artists. [footnote omitted] Unfairness would result to textbook publishers if all the contributing authors had termination rights because reuse of their contributions in subsequent editions would require renegotiation on an infeasible scale. [footnote omitted] On the other hand, termination is not unfair to a record company because a single album usually contains one or a few artists with whom the company would have to renegotiate. [footnote omitted] Because Congress intended the commissioned works prong to accommodate works that require laborious compilation processes, which add substantial economic value to the compiled works [footnote

[21] Billboard, January 22, 2000, p. 122.
[22] Nimmer on Copyright, Section 1.02.
[23] *Counseling Clients In The Entertainment industry* (1994) at 188 par. 24(g) (recording agreement).

omitted], sound recordings should not be included within the scope of commissioned works.[24]

Proponents of this amendment argue that a record is like a motion picture, and since motion pictures are listed as a possible work made for hire, then sound recordings should be listed as well. This is a false analogy. The real analogy is between recording artists and book authors. Like a recording artist, the author of a book creates the idea for the book (sometimes over a lifetime), and starts the creative process well before walking into the publisher's office. A publisher might offer the writer a large advance, an editor to work with, cover artwork, manufacturing and marketing services. The publisher's contributions are analogous to the record company furnishing the recording artist with advances, A&R input, artwork, marketing and other similar services.

Of the nine categories of works made for hire, five are directly related to book publishing. Specifically, a translation, an instructional text, a test, answer material for a test, and an atlas. Congress did not go overboard and include all textual material. Congress recognized that novelists, featured writers of nonfiction, poets, etc., all should maintain their status as original creators and owners of their works. But with this amendment, there is no distinction between different types of sound recording performances. An album made up of tracks by numerous different artists for a theme created and directed by the record company is treated exactly like a featured artist album. There is no deliberate carving out of the exceptions. Effectively, with this broad language, Congress has thrown the baby out with the bath water.

Although the specially commissioned work prong of the definition requires that the artist expressly agree that the sound recording will be a work made for hire, this will not provide adequate protection to artists. In fact, most royalty artists' contracts provide both 1) the transfer of the copyright in the sound recording from the recording artist to the record company and 2) that the recording is a work made for hire. Of course, under the old law, the second provision was null because it was contrary to law.[25] Because of this amendment, the previously unenforceable language now presents a grievous threat.

A very few artists are powerful enough to negotiate that ownership of their sound recordings shall revert to them at some time sooner than 35 years in the future, and they have done so. Those negotiations, however, began with the legal premise that the artist would regain ownership of the sound recordings after 35 years under the termination rights provision of the Copyright Act. With this provision now eliminated, it will be more difficult for even successful artists to negotiate to regain ownership of their sound recordings and, even if they can, the term of the transfer will be longer as a result of this amendment.

New artists, who do not yet know the value of their recordings, the very people this provision was intended to protect, do not have the clout to negotiate such a provision and, thus, will lose control and ownership of their sound recordings for eternity. Many new artists enter disadvantageous deals with record companies "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."[26] The typical new artist record contract permits a one-sided renewal by the record companies for seven additional albums. As a result of this change in the law, new artists will permanently lose ownership of their first seven to ten years' work counter to the very interest that Congress hoped to protect by providing termination rights.

IV. THE ADDITION OF SOUND RECORDINGS TO THE DEFINITION OF WORKS MADE FOR HIRE CONTRAVENES THE WIPO PERFORMANCES AND PHONOGRAMS TREATY

On September 14, 1999, the United States adhered to the WIPO Performances and Phonograms Treaty ("WPPT"), a treaty granting certain exclusive rights to performers.

Article 6—Economic Rights of Performers in their unfixed Performances

Performers shall enjoy the exclusive right of authorizing, as regards their performances:

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[24] Ryan A. Rafoth, *supra* n.14, at 1050.

[25] ". . . record contracts frequently include clauses stating that the artist is a record company employee and/or that all the artist's work is commissioned as work for hire. [footnote omitted]. The law clearly indicated that these work-for-hire clauses have no effect regarding whether the objective work-for-hire requirements are met' courts instead look to the actual relationship between the parties. [footnote omitted]" Ryan A. Rafoth, *supra* n.14 at 1029.

[26] H. R. Rep. No 94–1476, 94th Cong., 2d Session (1976).

(i) the broadcasting and communication to the public of their unfixed performances except where the performances is already a broadcast performance; and
(ii) the fixation of their unfixed performances

Article 7—Right of Reproduction

Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.

Article 8—Right of Distribution

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.
(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.

Article 9—Right of Rental

(1) Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.
(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers.

Article 10—Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

As stated earlier, the employer of a work made for hire is the author *ab initio* of the work. The employee-creator never had rights, and therefore, the United States is not in compliance with the WPPT.

The record companies have taken the position that sound recordings have always been works made for hire. If sound recordings were works made for hire, rights *never* existed in the performer. That is unlike the situation where the performer is the author in the first instance and then assigns rights. Therefore, if the record company's position is correct, the U.S. ratification of the WPPT would have been disingenuous since U.S. performers, having no juridical standing, could never enjoy the exclusive rights which the treaty provides. On the other hand, if sound recordings have not been works made for hire before this change, the amendment adding sound recordings to the list of commissioned works less than three months after ratification of the WPPT make that treaty ineffective as it relates to U.S. performers. Curiously, a foreign performer recording on a foreign label would have greater rights in the United States than a U.S. performer since the foreign performer's contribution to a sound recording would not be a work for hire under the law of most foreign countries.

Until recently, no performance right existed in sound recordings in the U.S. Because of this gap in the law, most foreign countries, which do recognize a performing right in sound recordings, have refused to pay royalties to United States performers when their records are performed. These countries have argued that the United States does not provide reciprocal rights to the performers in their countries; therefore they are under no obligation, even though they collect the royalties, to pay them to U.S. performers. In 1995 Congress passed the Digital Performance Right in Sound Recordings Act which provides royalties for the performance of certain digitally transmitted performances. Performers were relying on that Act as a basis for collecting foreign royalties for digital performances outside of the United States. Foreign countries, which now collect performance royalties, have sought any excuse to deny U.S. performers the right to collect performance royalties when sound recordings embodying their performances are broadcast or otherwise transmitted. The recent amendment denying performers juridical status will simply provide those

countries with ammunition to continue to deprive U.S. performers of their performance royalties.

May 22, 2000.

Hon. HOWARD COBLE,
Hon. HOWARD BERMAN,
Subcommittee on Courts and Intellectual Property,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN COBLE AND REPRESENTATIVE BERMAN: The undersigned teachers of intellectual property law write to commend you and your subcommittee on your decision to reexamine a significant modification to 17 U.S.C. Sec. 101, made last November in Title I of S. 1948, the "Intellectual Property and Communications Omnibus Reform Act of 1999." This change in the Copyright Act, which added "sound recordings" to the list of commissioned works which are to be treated as "works made for hire" when they are created subject to a qualifying writing, was no mere "technical correction" designed to clarify an otherwise settled point of statutory construction. Nor was it trivial in terms of its practical consequences: If left in place, the new language will deprive many musical artists of the right they otherwise would have enjoyed to benefit from a "second chance" in exploiting their recorded performances. This is because "works made for hire" are, by the express terms of the statute, exempt from the operation of its "termination of transfer" provisions. Indeed, there appears to be a fundamental tension between the effect of the amendment, on the one hand, and the policies underlying "termination of transfer," on the other. Thus, a review of the kind you now are undertaking is very much in order.

Apparently, many recording industry contracts state that the contributions of recording artists shall be considered "works made for hire." Under pre-November 1999 law, however, such provisions generally were not effective. The 1976 Copyright Act favors the attribution of authorship to the individual or individuals actually responsible for the creation of works. "Work made for hire" status is thus the exception rather than the rule, and can exist only in certain circumstances defined by statute. When a contract designates an artist's contribution in this way, but the statute does not recognize the designation, the agreement may operate as an ordinary assignment transferring the artist's share of the sound recording copyright. But it will not prevent the artist (or his or her successors) from electing to recapture the rights thus assigned under the Act's "termination of transfer" provisions: in the case of Sec. 203, this opportunity arises 35 years after the date of the assignment, beginning in 2013, while in that of Sec. 304, which applies to extended terms of copyright, terminations could begin as early as 2028.

Under the 1976 Copyright Act, certain sound recordings may indeed qualify for treatment as "works made for hire." In situations where a record company exercises a high degree of control over an artist's activities in making a particular recording, application of the multi-factor test derived from the common law of agency by the U.S. Supreme Court in *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989), might yield the conclusion that the artist was an "employee" working within the scope of his or her employment. There is little direct authority on how the *CCNV* test should or would be applied to recording artists. But the general case law suggests that courts will be grudging in applying it to deprive artists of authorship rights. Certainly, we would not expect them to do so as a uniform matter. Thus, at least a significant number of recording artists are likely to be considered as "independent contractors" in their relations with recording companies.

Material contributed by an independent contractor may be considered a "work made for hire" under—and only under—the very specific circumstances defined in the second paragraph of the Sec. 101 definition of a "work made for hire." As that provision stood prior to the 1999 amendments, it referred to nine categories of works, some of which could include particular sound recordings: A given educational recording ordered specifically for use "as a test," for example, or one commissioned exclusively or primarily for incorporation into a movie or TV soundtrack, i.e., as a "a part of [an] audiovisual work." In these isolated situations, if a proper form of agreement has been executed, the "work made for hire" doctrine could apply.

Likewise, there may be particular situations in which a musical artist would be considered as having contracted to provide a "contribution to a collective work" (a particular kind of copyrightable "compilation" made up by combining a variety of preexisting works). This might be so when, for example, a recording company contracts with various artists for selections making up an "anthology" album. However, it would strain ordinary principles of statutory construction (to say nothing of com-

mon sense) to extend this rubric to the individual musical selections making up a an album of songs created as an artistic unit by a single recording artist.

Several courts applying pre-November 1999 law appear to have ruled out treating typical recording artists' contributions to typical sound recordings as "works made for hire" on the basis of the second paragraph of the Sec. 101 definition, noting that a "sound recording does not fit into any of the nine categories of 'specially ordered or commissioned' works. . . ." *Staggers* v. *Real Authentic Sound*, 77 F.Supp. 2d 57, 64 (D.D.C. 1999); *see also, Ballas* v. *Tedesco*, 41 F.Supp 2d 531, 541 (D.N.J. 1999). Likewise, nothing in the legislative history of the 1976 Copyright Act supports a suggestion that the nine categories were somehow intended to embrace sound recordings in general. To the contrary, that history indicates that the categories represented targeted congressional responses to concerns expressed by particular copyright industries. Despite the fact that sound recordings had been a part of the American copyright landscape since 1972, the sound recording industry apparently did not seek or receive any such legislative concessions.

It is far from clear that recording companies would have received such concessions, had they sought them prior to 1976—or that they should have been granted them, belatedly, by way of the 1999 amendment to Sec. 101. Solicitude for individual creative artists should be one of the hallmarks of the American copyright system, and the legislative history of the 1976 Copyright Act makes it clear that the Congress recognized musical performers as creators whose "original authorship" helps to justify the protection of sound recordings under copyright. Likewise, it is clear that the "termination of transfer" provisions of the Act were designed to safeguard the interests of individual creators. Termination provides a means by which artists (or their successors) can reclaim previously alienated rights; in the unusual cases where the value of those rights has increased with time, it allows the renegotiation of the terms on which they will be commercially exploited in the future. These are opportunities that should not been stripped away from any class of artists, including musical performers, unless a high burden of justification has been met.

Ultimately, our copyright system exists to benefit the public by providing incentives for the creation of new works. It accomplishes this by guaranteeing an economic return to creators whose efforts achieve popular success. In the process that your hearings will initiate, the recording industry should be required to justify the 1999 amendment by demonstrating what harm to consumers of recorded music would flow from permitting recording artists (and their successors) to exercise their termination rights as other "authors" of copyrighted works may choose to do. Among the questions that we hope you will be able to answer are these:

- Wouldn't the decades during which assignments of musical artists' rights would be in full effect, before any statutory opportunity to terminate those grants arose, provide recording companies with an adequate opportunity in which to recoup investments and realize profits on successful sound recordings?
- Would the industry's ability to reinvest in developing new artists be adversely affected if it is required to reconsider financial arrangements with those who entered into disadvantageous contracts early in their careers, before their work achieved popular recognition?

To conclude, the recent change in the Sec. 101 definition of a "work made for hire" represented a significant change in the law of copyright ownership. Moreover, it was a change that derogated substantially from basic policies underlying our copyright law. Such changes should be justified not only in terms of the economic interest of those seeking them, but by reference the public interest that our copyright system exists to serve. Thus, we welcome your committee's forthcoming inquiry into this

particular change. If no compelling justification for it is shown, we respectfully urge you to restore the pre-November 1999 definition.

Sincerely,

KEITH AOKI (Oregon),
ANN BARTOW (Dayton),
JULIE E. COHEN (Georgetown),
ROCHELLE DREYFUSS (NYU),
ERIC EASTON (Baltimore),
CHRISTINE FARLEY (American),
TOM FIELD (Franklin Pierce),
WILLIAM W. FISHER (Harvard),
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(institutional affiliations are indicated for identification only)

PREPARED STATEMENT OF BARRY BERGMAN, PRESIDENT, MUSIC MANAGERS FORUM

Mr. Chairman and members of the Committee, my name is Barry Bergman and I am President of the Music Managers Forum, as well as a personal manager. The Music Managers Forum is an association representing the interests of personal managers and recording artists, with affiliates in 10 countries and branches in many US cities including New York, Los Angeles, Nashville, Seattle, San Francisco, Boston and Washington DC. Our membership consists of individual business people who find, develop, nurture and guide the careers of recording artists, as well as some artists who are self-managed.

We believe these hearings are a major step forward for artists and managers due to the fact that until the formation of the MMF, there was no organization representing the interests of featured artists and managers. Furthermore, we are an organization comprised entirely of volunteers, so we do not have the money to hire high priced attorneys and lobbyists to look after the interests of featured artists and managers.

Therefore, we are grateful to have this opportunity to submit testimony on behalf of featured recording artists and our membership, who fully support the repeal of the recent Copyright Amendment granting work for hire status to sound recordings.

Managers of recording artists have a unique perspective on this issue, as we understand the nature of the recording artist/record company relationship better than most. We effectively balance the interests of art and commerce every day.

It has been noted that this controversial amendment was presented as a "technical correction" to existing copyright law. Our membership feels very strongly that this amendment represents a substantial change to existing copyright law, and that Congress has not been provided with enough information to make an informed decision. Essentially, you have heard only one side of the story. I hope that by presenting the featured artist viewpoint, you will conclude that repeal of the amendment is warranted, and further study and discussion is absolutely essential to fairly protect the interests of performers, while also addressing the concerns of the recording industry.

Other distinguished panelists will provide detailed and varied explanations for why the amendment should be repealed or let stand, while others may address the dubious method by which the amendment was passed. I am going to focus solely

on the point that the creations of featured recording artists are not "specially ordered or commissioned works" and that the recent amendment to the copyright law contravenes the intent of Congress when it amended the copyright law in 1976.

Copyright Law is based on the concept that original authorship and ownership results when an artist creates a work. The Copyright Office logo is a circle with a pen stretching through it, touching the other side of the circle, which signifies that copyright protection of the author starts the second the pen touches the page. In the instance of sound recordings, a recording artist is the original author and owner of their performance when it is fixed for reproduction, whether on tape, a compact disc, or as Thomas Edison originally invented, on a metal cylinder.

When the Copyright Act was amended in 1976, Congress recognized that, in certain limited cases, authors might be hired to create certain works, and in that event, the employer would be the author and owner. This is what was intended in the work made for hire provisions of the 1976 Copyright Act.

Congress and the copyright community worked diligently for years trying to define what would be and would not be a work made for hire. The interests of the creators of the works were carefully weighed against the interests of the users of copyrights. Eventually, a course of action was chosen which carved out very defined exceptions to the rule that all works are originally owned by their creator.

Before the recent amendment was passed, there were two alternatives that could designate sound recordings as works made for hire. The first was the traditional employer/employee relationship. The recording industry does not contend this situation exists with featured artists. In fact, virtually all modern recording contracts state explicitly that the artist is not an employee of the record company.

Since this alternative does not apply to featured recording artists, record companies now maintain that sound recordings are "specially ordered or commissioned works," which is the second statutory alternative.

There is simply nothing in law or practice to support the record company contention that a featured artist album qualifies as a work made for hire. A work can only be "specially ordered or commissioned" if it falls into one of nine very specific categories. For example, a work made for hire can be created when a book publisher hires a translator, or a movie producer hires an actor. The key point is that the employer has a choice of who to hire to create the work, and the employer controls most of the creative aspects. By limiting the categories in this way, Congress clearly showed its intent to recognize only very narrowly defined situations where an employer could hire any one of many people to finish a creative process started by the employer. Courts have uniformly upheld this narrow application of the work made for hire principle.

Proponents of this amendment argue that a record is like a motion picture, and since motion pictures are listed as a possible work made for hire, then a sound recording should as well. This is not a proper analogy. The real analogy is between recording artists and book authors. Like a recording artist, the author of a book creates the idea for the book, and starts the creative process well before walking into a publisher's office. A publisher might offer the writer an advance, an editor to work with, cover artwork, manufacturing, distribution and marketing services. These are analogous to the services record companies offer artists. However, a publishing company is not deemed the author of a book, except in very limited circumstances, such as the creation of an encyclopedia.

By declaring that all sound recordings are eligible for work made for hire status, the intent of the 1976 Copyright Law Amendment has been subverted by not carving out these limited exceptions. The vast majority of artists work for years creating their music before a record company ever comes into their lives. Furthermore, record companies do not generally tell artists, especially featured artists, what and how to record, although they may provide guidance regarding marketability. Given these circumstances, we believe classifying sound recordings of featured artists as "specially ordered or commissioned works" is both legally and morally wrong.

We believe that managers and artists everywhere are willing to work with Congress and the Recording Industry to carve out limited exceptions that better fit into the work made for hire situation, taking into consideration the spirit of the original law and the economic concerns of the recording industry. We ask that you repeal this amendment, and let us have a negotiation where all interested parties are present and accounted for. Then, and only then, will Congress have the opportunity to consider legislation which is fairly negotiated and reflects the concerns of everyone affected by the change.

Thank you very much for your consideration.

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ERRATA SHEET
UNITED STATES COPYRIGHT OFFICE AND SOUND RECORDINGS AS WORK MADE FOR HIRE

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

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This errata sheet is being prepared because the incorrect prepared statement of the Honorable John Conyers, Jr., was printed on page 11 of the original printing of this hearing.

The correct statement of Mr. Conyers follows:

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

We come here to deal with a subject about one group of creators that gets ripped off more than anybody else in any industry: recording artists. It is about time we separate the people in the recording industry from the recording artists. I keep hearing from the recording industry telling me what the recording artists want. I know a few recording artists, and we will be checking on this. This is appropriately a sensitive subject.

Some people think this was an unintended consequence. People have been trying to make this change for years, and there is nobody who is a veteran in this industry that doesn't know that.

The problem that we have is not just about the process, but the actual results surrounding the extension of the "work made for hire" doctrine into sound recordings. There may be different views on how substantive the change in fact is, but there can be no disagreement that it is controversial and that it was made in a totally-unrelated conference agreement dealing with satellite transmissions under section 119 of the Copyright Act. There were no hearings, no markups, no consideration of any kind by the members.

I guess it was put in during daylight hours because that is when the Congress brought the measure up. But I contend Mr. Chairman, that is not how this Committee and this Congress should be writing our intellectual property laws. The normal process is too important.

We should repeal this provision and start off by doing it right. That would be the fair thing to do because there have been no hearings or discussion about it. Let's agree to remove it and begin the process all over.

I believe that this change is a highly substantive one, and one that I strongly disagree with. It has been said by many that the entire concept of work for hire is inconsistent with the purpose of the constitutional framework on intellectual property. It is the creative spirit, not big money, that creates original expression.

Substantively, this amendment terminates the copyright interests of recording artists and turns them over *permanently* to the record companies. This means that the artists, *who actually record the songs*, will never have the exclusive right to distribute, perform, or reproduce their own recordings. While the record companies and recording artists disagree about whether the amendment really has any substantive effect or just clarifies past practices, it should be noted that the Register of Copyrights, who is appearing before us today, has stated publicly that this change is far from technical. I believe there is scant case authority to suggest this change is merely technical.