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IT'S MY [RECAPTURE RIGHT], AND IT'S NOW OR NEVER…

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I. INTRODUCTION

Author(s) of a sound recording[1] are typically required to grant an assignment of their copyright in and to such work when entering into a recording agreement to exploit such work.[2] However, such author(s) have the right to terminate the foregoing grant (and recapture the copyright in the work), effective on the date that is thirty-five years after the grant, pursuant to 17 U.S.C. § 203[3] ("Section 203").[4] This right was enacted largely "because of the unequal bargaining position" of recording artists when they are initially signing with record companies, which "has result[ed] in part, from the impossibility of determining a work's value until it has been exploited."[5]

Although the purpose of permitting this termination of grant and recapture of copyright is to "further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved,"[6] recording artists seeking to enforce their rights under Section 203 have been confronted with protracted litigation, simply because their loan-out company[7] executed the

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[1] See 17 U.S.C. §§ 102(a)(7), 201(a).

[2] See Bob Donnelly, Everything You Need to Know About Copyright Reversions, 1 ST. JOHN'S ENT. ARTS AND SPORTS L. J. 1, 7, 2012, available at http://www.lommen.com/wp-content/uploads/2016/03/Everything-You-Need-to-Know-About-Copyright-Reversions-5-12-version.pdf (discussing the standard Grant of Rights provision in Recording Agreements).

[3] Governing grants executed on, or after January 1, 1978. However, the author is required to adhere to certain conditions, including complying with specific notice requirements, pursuant to 17 U.S.C. §§ 203(a)(3)-(4) and 27 C.F.R. § 201.10. This includes properly noticing the grantee within a five-year period, before the effective date of termination, and recording the notice with the Copyright Office. 27 C.F.R. § 201.10(f)(ii)(A).

[4] 17 U.S.C. § 304 governs grants executed before January 1, 1978. Although this paper primarily focuses on Section 203, the issues implicated in Section 203 are also relevant to those within Section 304.

[5] H.R. REP. 94-1476, 124 (1976) (discussing the Copyright Act of 1976); see also Donald S. Passman, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS, 75 (10th ed. 2019) ("Historically, record companies held the keys to the kingdom.").

[6] H.R. REP. 94-1476, at 124.

[7] For these purposes, a "loan-out company" is an entity formed and owned by a recording artist, and which provides that person's services (e.g., recording, production, live performance) to a third-party (e.g., a record company, a music publishing company, a performance venue or a sponsoring

grant of copyright assignment in connection with entering into the agreement for the exploitation of the work.[8]

This paper proposes a solution through three approaches for recording artists, whose use of a loan-out company to grant an assignment of copyright is hindering them from exercising the rights of authors under Section 203. Part II discusses the latest litigation surrounding this issue, coupled with the legislative intent of the statute. Part III explores the potential preclusions of loan-out companies. Part IV proffers three "corporate" proposals for recording artists seeking guidance in preserving and exercising their recapture rights consistent with Section 203, while using their loan-out company to enter into an agreement(s) with their recording company.

II. THE PROBLEM: CONGRESSIONAL INTENT & CURRENT CASELAW

"[T]he termination right was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product."[9] This is because, "[u]nlike real property and other forms of personal property, a copyright is by its very nature incapable of accurate monetary evaluation prior to its exploitation."[10] Thus, this right "was enacted for the benefit of authors,"[11] as upon termination "all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests."[12] Therefore, upon effective

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brand). Justin Jacobson, After You Create An Entity: The 'Loan-Out & Music Production Companies (Nov. 14, 2016), available at https://www.tunecore.com/blog/2016/11/create-entity-loan-music-production-companies.html#:~:text=The%20"loan%2Dout"%20company,venue%20or%20a%20sponsoring%20brand.

[8] See generally Waite v. UMG Recordings, Inc, No. 19 Civ. 1091, ECF Nos. 68, 89 (S.D.N.Y. 2020) (LAK); see also Eriq Gardener, Judge Will Clarify Whether Many Musicians Can Later Reclaim Rights From Record Labels, THE HOLLYWOOD REPORTER (Aug. 11, 2020, 7:17 PM), https://www.hollywoodreporter.com/thr-esq/judge-will-clarify-musicians-can-reclaim-rights-record-labels-1306773.

[9] Mills Music, Inc. v. Snyder, 469 U.S. 153, 172–73 (1985).

[10] Corcovado Music Corp. v. Hollis Music, Inc., 981 F.2d 679, 683 (2d Cir. 1993) (quoting 2 M. Nimmer & D. Nimmer, Nimmer on Copyright, § 9.02, 9–23 (1989)) (discussing the reasoning behind the copyright renewal term); see also Kenneth Abdo, Timothy Matson & Jacob Abdo, Termination of Music Copyright Transfers: The Renegotiation Reality, 2 LANDSLIDE 2, 2 Nov./Dec. 2018 ("There are many stories of unknown—sometimes teenaged—artists who signed deals under terms that limited record and publishing companies' financial risk while maximizing their reward for the duration of copyright (which now extends 70 years from the life of the author). The termination right mitigates this inequitable outcome by giving artists an opportunity to renegotiate their earliest agreements.") Id.

[11] See Mills Music Inc., 469 U.S. at 154 (discussing 17 U.S.C. §§ 304, 203).

[12] 17 U.S.C. § 203(a). However, this right does not foreclose on the record company's right to continue to exploit any derivative works derived from the grant of the original copyright. Id. § 203 (b)(1); see also H.R. REP. 94-1476, at 127.

termination, the exclusive rights afforded to owners of sound recordings revert back to the author as the lawful copyright owner.[13]

Nevertheless, there are some exceptions enumerated in Section 203, upon which record companies rely to preclude recording artists from exercising their right to terminate and recapture their copyrights. In particular, works-made-for-hire are ineligible for copyright termination.[14] Accordingly, record companies have asserted that (i) the recording agreements provide that the sound recordings were works-made-for-hire, and (ii) the recording artists are employees-for-hire.[15] Therefore, recording artists are not eligible for copyright termination and recapture.[16] Additionally, record companies have taken the position that, if a recording artist used a loan-out company to enter into a recording agreement, a work-made-for-hire relationship was established between the artist and the loan-out company itself.[17]

The issue of recording artists who are prevented from terminating their grants and recapturing copyrights from record companies—due to the fact that they used their loan-out company to enter into such agreements—was recently addressed in Waite et al. v. UMG Recordings, Inc. et al.[18] In Waite, the plaintiffs, similarly situated recording artists, brought a class action against Universal Music Group ("UMG"), in the Southern District of New York, seeking a declaratory judgment that the artists "are not barred" from terminating their grants under Section 203, even if a loan-out company "was involved in the contractual transaction relating to the original grant."[19] The recording artists entered into an agreement with their respective loan-out companies and assigned their copyright interest to them. The loan-out companies assigned their copyright interest to MCA Records, EMI America Records, A&M Records, and Capitol Records,

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[13] With the exclusive rights afforded to copyright owners pursuant to 17 U.S.C. § 106.

[14] Pursuant to 17 U.S.C. §§ 203(a), 201(b); see also H.R. REP. 94-1476, at 121 ("[I]n the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner of copyright unless there has been an agreement otherwise.").

[15] William Henslee & Elizabeth Henslee, You Don't Own Me: Why Work for Hire Should Not Be Applied to Sound Recordings, 10 J. MARSHALL REV. INTELL. PROP. L. 695, 712-713 (2011) (discussing how this language in recording agreements "is standard and typical industry practice."); see also Waite et al v. UMG Recordings, Inc. et al, No. 19-CV-01091 LAK, ECF No. 68, 10-11 (Mem. Op.) (S.D.N.Y. March 31, 2020) (citing Aday v. Sony Entertainment, 1997 WL 598410 (S.D.N.Y. Sept. 25, 1997)); see also Passman, supra note 6, at 335 "To be a work for hire, however, you need more than just that language." Id.

[16] However, "[i]n virtually every instance . . . the companies and artists have come to an agreement to settle the claims." Passman, supra note 6, at 336.

[17] See Compl., Waite, No. 19-CV-01091 LAK, ECF No. 1-2, Ex. B at 4 (S.D.N.Y Feb. 2, 2019). (Responses to copyright termination notices from record companies to artists included language such as: "The sound recordings were created by you within the scope of your employment by the Furnishing Companies, which presumably were formed for the purpose of permitting you to be treated as an employee of such companies."). Id.

[18] Id. at ECF Nos. 68, 89 (S.D.N.Y 2020).

[19] Id. at ECF No. 1, at 15 (S.D.N.Y Feb. 2, 2019).

predecessors of UMG. Since the copyrights were registered in the plaintiffs' names, Waite and Ely filed their copyright termination notices, personally.[20]

Judge Kaplan ruled that "[o]nly grants 'executed by the author' (or statutorily designated successor) may be terminated. Therefore, third-parties to a contract and loan-out companies, which 'loan' out an artist's services to employers and enter into contracts on behalf of the artist, do not have a termination right under the statute."[21] This creates adverse consequences for recording artists who used their loan-out companies to enter into a recording agreement. Even more problematic for recording artists is that this opinion was rendered, without ruling on whether the sound recording was a work-made-for-hire.[22] This issue is also troublesome for record companies, as "a competing objective is for the existing assignee to receive reasonable notice of what rights of theirs are being affected through the exercise of the artist's termination right."[23]

Simply put, if it is determined that the work-made-for-hire clause in the recording agreement is deemed ineffective and a work-made-for-hire relationship has not been created between the recording company and the recording artists, but the artists' use of loan-out companies to grant assignments of copyrights abrogated their right to terminate the grant and recapture their copyrights, the resulting risks will be serious for all parties concerned.

III. THE HINDERING EFFECT OF LOAN-OUT COMPANIES

The decision in Waite rested on the reasoning that "the statutory text is clear: termination rights exist only if the *author* executed the grant."[24] The analysis of whether or not the sound recordings were works-made-for-hire was not determinative of the memorandum opinion.[25] Hence, the interpretation of Section 203 was premised upon the initial grant of the recording artist's sound recording to their loan-out company and then the grant of the copyright from the artist's

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[20] See Second Amend. Comp., Waite, No. 19-cv-01091 LAK (S.D.N.Y Sept. 2, 2020), ECF No. 95, at ¶¶ 72, 96. Both John Waite (personally) and his loan-out company signed the record company agreements. Additionally, the plaintiffs did not allege in their first complaint that they had a separate, intermediary, written grant or assignment between the artists and their respective loan-out companies. Transcript of Oral Argument, Waite, No. 19-cv-01091 LAK, (S.D.N.Y Feb. 3, 2020), ECF No. 66, at 18-19.

[21] Id. at ECF No. 89, at 8 (citing 17 U.S.C. § 203(a)).

[22] Id. at 8-12.

[23] Mtume v. Sony Music Entm't, 408 F. Supp. 3d 471, 477 (S.D.N.Y. 2019) (quoting Siegel v. Warner Bros. Entm't Inc., 690 F. Supp. 1048, 1052 (C.D. Cal. 2009) (internal quotations omitted).

[24] Mem. Op., Waite, No. 19-cv-01091 LAK (S.D.N.Y March 31, 2020), ECF No. 68, at 21 (March 31, 2020) (emphasis in original).

[25] Id. at 6 ("Plaintiffs' claims cannot be dismissed based on Section 203's 'works made for hire exception.'"). The court reviewed the work-made-for-hire issue as to whether the statute of limitations applied (determining whether the notice of termination was timely filed). However, the issue of whether or not there was a valid work-made-for-hire, for purposes of whether the recording artists had a right to recapture their copyrights under Section 203, was not addressed. Id. at 6-7.

loan-out company to their record company. The reasoning was "[t]he third parties are […] grantees rather than grantors."[26]

Even though it was acknowledged that recording artists use their loan-out companies strictly as tax-planning devices, the reasoning set forth in Waite was that "people cannot use a corporate structure for some purposes – e.g. taking advantage of tax benefits – and then disavow it for others."[27] However, is it fair that the mere use of a corporate entity can expropriate authors of their rights under Section 203? Is there any justification for examining the "corporate" relationship between authors and their loan-out companies, the result of which might afford both the artists and the record companies greater clarity in the current claims as well as in the future?

If a recording artist's use of a loan-out company in agreements with record companies may deprive them of their recapture right, might there be other approaches available to the artist?

IV. PROPOSALS & IMPLEMENTATIONS

This paper proposes three approaches for authors to utilize in attempting to reap the benefits of their loan-out company, while exercising and preserving their recapture rights pursuant to Section 203.

A. LOAN-OUT COMPANY RECAPTURES COPYRIGHTS PURSUANT TO AUTHOR'S CAPITAL CONTRIBUTION

When an author forms a loan-out company, it is common corporate practice for the author to enter into an agreement with the loan-out company so formed, pursuant to which the author contributes to the capital of the company all of its right, title and interest in and to its registered copyrights.[28] The consideration for such contribution to the capital of the loan-out company is the issuance by the loan-out company of all of the equity in the company.[29] If the loan-out is a corporation, the transaction is recorded in the stockholder records[30]; and if the loan-out is a limited liability company, the author records the transaction in its capital account.[31]

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[26] Id. at 20.
[27] Id. at 21.
[28] See generally Contribution Agreement, WESTLAW, Practical Law Standard Document 6-500-4617.
[29] Id.
[30] Capital contributions can also be "reported in the shareholder's equity section of the balance sheet." Adam Hayes & Margaret James, Contributed Capital, INVESTOPEDIA (Nov. 8, 2020), available at https://www.investopedia.com/terms/c/contributed-capital.asp.
[31] The artist (managing-member) of the LLC should also establish and maintain a capital account, which will be "increased by the value of each capital contribution." Alan S. Gutterman, BUSINESS TRANSACTIONS SOLUTIONS § 60:183. "The LLC Operating Agreement often will detail a schedule of additional capital contributions that the members commit to making throughout the life of the LLC." Belle Wong, How to Add Capital Contributions to an LLC, (June 19, 2018), available at https://www.legalzoom.com/articles/how-to-add-capital-contributions-to-an-llc.

In that regard, note that 17 U.S.C. § 201(a) states that "[c]opyright in a work protected under this title vests *initially* in the author or authors of the work."[32] The use of the word "initially" arguably presupposes that all rights to a copyrighted work, including authorship, may be transferred at a later point in time.

Indeed, it is also standard practice for the author to execute and deliver to the loan-out company (contemporaneously with the execution and delivery of the so-called "Capital Contribution Agreement") an Intellectual Property Assignment Agreement, pursuant to which the author assigns to the loan-out company, not only the author's registered copyrights, but also all issuances, extensions, and renewals thereof.[33] There is no obvious reason to infer that the sound recordings are therefore, works-made-for-hire because the relationship between the author and their loan-out company would be one of entity and equity holder, not employer and employee.[34]

In the interest of clarity, perhaps such agreements, in the future, should add the words "terminations pursuant to Section 203 of the Copyright Act" to the words "issuances, extensions, and renewals." Moreover, note that Section 203(a)(2)(A)-(D), "grants the [author's] family the right to terminate the copyrights owned by the limited liability company during the termination period."[35] Thus, if the author's initial transfer to their loan-out company "can be undone" upon its death by its surviving spouse and/or heirs, shouldn't a structure be accepted whereby the author—who is alive and available—may transfer authorship to its loan-out company?

Finally, should it matter that the loan-out company, rather than the author, is a party to the recording agreement? Consistent with industry standards, each of the recording artists in Waite were required to "execute a guaranty that he will personally perform the services contracted for by the loan-out corporation."[36] Indeed, such "inducement letters" were acknowledged "as an alternative and reliable means to effect a transfer to [the recording company] of the copyright in and to the subject sound recording"[37] and they were effectively the "only way to ensure that [the

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[32] 17 U.S.C. § 201(a) (emphasis added).

[33] See generally Intellectual Property Assignment Agreement, WESTLAW, Practical Law Standard Document 1-385-2746.

[34] See Charbonnet v. Malveaux, No. CV 15-799 JWD-RLB, 2017 WL 740337, at *9 (M.D. La. Feb. 24, 2017) (quoting Woods v. Resnick, 725 F. Supp. 2d 809, 825 (W.D. Wis. 2010) (holding that the work-made-for-hire doctrine was inapplicable when the plaintiff, a co-owner of his LLC, created a copyright (a logo), recorded it with the Copyright Office, and made a capital contribution of the work to his company. Therefore, an owner of a company, "unlike an employee or independent contractor…has an inherent right to control the business."). Id. Additionally, the Operating Agreement between the artist and its respective loan-out company shall also explicitly state that any and all copyrights, including sound recordings, are not works-made-for-hire.

[35] Michelle B. Spell & Jodi Lipka, The Pitfalls Concerning Copyrights That Every Estate Planning Professional Needs to Know When Representing Authors and Artists, ART & ADVOCACY, Vol. 18, (Sept. 2014).

[36] George G. Short, The Loan-Out Corporation in Tax Planning for Entertainers, 44 LAW AND CONTEMPORARY PROBLEMS 4, 71, 1982.

[37] Pls.' Memo. Of Law in Supp. Of Mot. For Leave to File Sec. Amended Compl., Waite, No. 19-cv-01091 LAK, ECF No. 74-2, at 19, 21 (May 8, 2020 S.D.N.Y).

record companies] received the contemplated grants of the exclusive rights to the sound recording created by the artists."[38]

If this approach is not enforceable, on the grounds that it constitutes "an agreement to the contrary,"[39] either of the following two alternative approaches may be viable.

B. AUTHOR RECAPTURES SOUND RECORDING NOTWITHSTANDING ITS CAPITAL CONTRIBUTION OF OWNERSHIP

If authorship and ownership rights are divisible,[40] and the author[41] can assign only its ownership rights but not its authorship rights, then shouldn't the author, notwithstanding its status as an equity-holder in the loan-out company, retain its authorship rights for purposes of Section 203? If the work-made-for-hire language in the artist's recording agreement is deemed ineffective, then the artist's authorship rights have thereby been preserved, as if they were never transferred.

To implement this approach, the author makes its contribution to the capital of the loan-out company in the form of a contribution and assignment of *ownership*[42] (not authorship) of the copyright, retaining the original registration with the Copyright Office.[43] If the author has thereby

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[38] Id. at 14.

[39] 17 U.S.C. § 203(a)(5). Additionally, the Supreme Court's description of the Copyright Act of 1976 "provides an inalienable termination right." Stewart v. Abend, 495 U.S. 207, 230 (1990) (citing 17 U.S.C. §§ 203, 302) (emphasis added); New York Times Co. v. Tasini, 533 U.S. 483, 497 (2001). This language was codified within the statutes to clarify Congressional intent, as the 1909 Copyright Act, did not expressly provide for an inalienable termination right, "allowing authors to assign away at the outset all of their rights to both the initial and the renewal term." Peter S. Menell & David Nimmer, Judicial Resistance to Copyright Law's Inalienable Right to Terminate Transfers, 33 COLUM. J.L. & ARTS 227, 228 n.8 (2010) (quoting Fred Fisher Music Co., Inc. v. M. Witmark & Sons, 318 U.S. 643, 655-656 (1943)). However, in precluding the authors in Waite from exercising recapture rights because their loan-out companies executed the grant, the court acknowledged that a strict interpretation of the Copyright Act must be adhered to, even if it may not have "worked as Congress likely envisioned." Mem. Op., Waite, No. 19-cv-01091 LAK (S.D.N.Y March 31, 2020), ECF No. 68, at 21 (March 31, 2020) (quoting Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, 139 S. Ct. 881, 892 (2019)).

[40] See Everly v. Everly, No. 3:17-CV-01440, 2020 WL 5642359, at *8 (M.D. Tenn. Sept. 22, 2020) (Discussing that ownership and authorship delineate similar, yet distinct rights under copyright law); see also id., 958 F.3d 442, 449-457 (6th Cir. 2020).

[41] "The author of a sound recording is the performer featured in the recording and the producer who captured and processed the sounds that appear in the final recording." U.S. Copyright Office, Copyright Registration for Sound Recordings, CIRCULAR NO. 56, 3 (Rev. Mar. 2019), available at https://www.copyright.gov/circs/circ56.pdf. Although an "author" has not been explicitly defined within the statute, the definition has been construed in dictum as the "party who actually creates the work, that is, the person who translates idea into fixed, tangible expression entitled to copyright protection." Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730 (1989).

[42] Pursuant to 17 U.S.C. §§ 201(d), 204.

[43] See generally 17 U.S.C. § 205(a).

retained its authorship rights, then shouldn't the right to terminate and recapture the copyright remain with the author?

To put this proposal into effect, a broad interpretation of the meaning of "execute" is necessary in constructing the context of "[o]nly a grant of a transfer or license of copyright or any right under a copyright, *executed* by the author is subject to termination under Section 203."[44] A liberal reading of "execute," was applied to the issue of gap grants within the Waite opinion.[45] Execute can also be defined as "to perform or complete (a contract or duty) and to put completely into effect."[46]

Within this context, a recording artist's loan-out company could have certainly *signed* the recording agreement, but absent the personal guaranty[47] within the author's inducement letter,[48] the grant is not *put completely into effect* until the *author performs* under the agreement. Further, the inducement letter allows the record company to enter into an agreement providing the record company with assurances that the author's obligations carry the same significance as if the author was a party to the agreement. Effectuating the initial grant of the artist's sound recordings as proper, yet dismissing the artist's authorship right, is an artifice.

Employing this reasoning allows for the author to transfer its ownership in the sound recording (as a capital contribution) to its loan-out company, transferee A. Transferee A then transfers its ownership interest to transferee B, a record company. This approach should allow for

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[44] Mem. Op., Waite, No. 19-cv-01091 LAK (S.D.N.Y Aug. 10, 2020), ECF No. 89, at 8 (internal quotations omitted) (emphasis added).

[45] Id. at 15 ("While defendant correctly notes that 'execute' can mean 'to sign,' that is not its only meaning. It is defined also as 'to perform or complete (a contract or duty) and to 'put completely into effect.' And in the context of Section 203's applicability to gap grants, 'execute' does not unambiguously mean 'to sign.'") (quoting BLACK'S LAW DICTIONARY (11th ed. 2019); Merriam-Webster.com, https://merriam-webster.com/dictionary/execute).

[46] Id. at 15 (quoting Merriam-Webster.com, https://www.merrian-webster.com/dictionary/execute (last visited July 14, 2020)).

[47] Recording artists are personally guarantying their services and that they will be "financially responsible" if their loan-out company does not perform under the recording agreement. See Passman, supra note 6, at 190.

[48] Language used within the inducement letters in Waite had the artist to agree: "I shall, at your request, do all such acts and things as shall give to you the rights, privileges and benefits as you would have had under the Agreement if [Artist's loan-out company] had continued to be entitled to my recording services, and I shall make the same available to you, and such rights, privileges and benefits shall be enforceable on your behalf against me." Pls.' Memo. Of Law in Supp. Of Mot. For Leave to File Sec. Amended Compl., Waite, No. 19-cv-01091 LAK, ECF No. 74-2, at 26-27 (May 8, 2020 S.D.N.Y). Essentially, this not only guarantees that the artist will perform the service, regardless of the status of the company, it also ensures that the artist will perform the services, personally.

the author to still be able to terminate his or her "initial transfer" to transferee A, which then effects transferee A's ownership interest with transferee B.[49]

This approach is also reminiscent of the Second Circuit case, Donaldson Publishing Co. v. Bregman, Vocco & Conn, Inc.[50] In Donaldson, the songwriter's copyrights, were obtained by his music publishing corporation,[51] the shares of which were owned equally between the two other shareholders.[52] The Second Circuit concluded since the copyrights were not works-made-for-hire, Donaldson's heirs "properly obtained the renewal copyrights for the songs" as they were "children of *the author*" since the relationship of Donaldson "who had died, to [the] corporation, which had obtained original copyrights under agreement was not that of an employee for hire."[53] This decision was rendered, despite the fact that: (i) a shareholder of Donaldson's corporation executed agreements with Fox Film Corporation and Paramount Publix Corporation, on behalf of the corporation, as Donaldson's attorney-in-fact, and (ii) renewal rights were also intended "to be *exclusive* to *authors* and their families."[54]

Acknowledging that the facts in the Donaldson case are not quite analogous as they involve renewal rights, not termination rights, a publisher, not a record company, copyrights in songs, not sound recordings—it employs reasoning as to the importance of examining corporate formation, status, and the relationship between the author and the author's loan-out company.

C. Author(s) Receiving Their Rights in the Form of a Distribution From Their Loan-Out Company

The third approach is offered on the basis that it does not require an advance determination of whether the author may contribute and assign its authorship rights to the loan-out company in the form of a capital contribution and contemporaneous assignment of copyright interests.

Subject to the applicable state laws, a loan-out company would be permitted to distribute to its equity holder (i.e., author) any or all of its assets in the form of a distribution[55], whether or

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[49] See Lydia P. Loren, Renegotiating the Copyright Deal in the Shadow of the 'Inalienable' Right to Terminate, Florida Law Review, Vol. 62, 1335 n.25 (2010), available at http://www.floridalawreview.com/wp-content/uploads/2010/01/Loren_BOOK.pdf.

[50] Donaldson Publishing Co. v. Bregman, Vocco & Conn, 375 F.2d 639, 643 (2d Cir. 1967), cert denied 389 U.S. 1036) (U.S. Jan. 15, 1968).

[51] However, Donaldson held the dramatic and synchronization rights.

[52] Donaldson Pub. Co. v. Bregman, Vocco & Conn, Inc., 253 F. Supp. 841, 842 (S.D.N.Y. 1965), rev'd, 375 F.2d 639 (2d Cir. 1967). However, due to royalty overdrafts within his corporation, Donaldson "treated this overdraft as a debt which was discharged when, at Douglas' request, Donaldson surrendered his stock in the corporation in exchange for a general release relieving him of all liability arising from the operation of the business." Id. 375 F.2d at 641.

[53] Id. at 639.

[54] Menell & Nimmer, supra note 39, at 228 (emphasis added) (internal quotations omitted).

[55] A *"distribution* means any cash and other property paid by the Company to a Member in his, her or its capacity as a Member." Gutterman, supra note 32 at § 60:129; 60:190. Further, the artist's (managing-member's) Capital Account "will be decreased by the value of each Distribution made

not in a liquidation.[56] If this transaction does not constitute a prohibited assignment under the recording agreement, the author would succeed to whatever rights it contributed and assigned to the loan-out company in the first instance. That is to say, if the author had the right to contribute and assign its authorship rights, then such rights will have been returned to the author by way of the dividend or equity distribution. If not, then at least the author has recovered the ownership rights previously held by the loan-out company.

This approach coupled with a plain reading of Section 203, should not deprive an author from receiving its capital contribution of copyrights made in exchange for a percentage of the equity interest, simply because the loan-out company, executed the grant of the copyright with the record company. Once the recording artists receive a distribution of their return of capital, they can terminate the grant with their recording company as the author(s) of the sound recording and exercise their recapture rights consistent with Section 203.

Furthermore, under Section 203(b) "all rights under this title that were covered by the terminated grants revert to the author."[57] Thus, "termination shall be effected by serving an advance notice in writing, signed by the number and proportion of owners of termination interests . . . or by their duly authorized agents."[58] Assuming *arguendo*, the author is ineligible to exercise its termination right because it did not execute the agreement with the record company, the author should be able to effectuate this right as a "duly authorized agent" of the loan-out company, by serving written notice "upon the grantee or grantee's successor in title."[59]

IV. CONCLUSION

As ample sound recordings are ripe for copyright termination in the coming years, there are growing issues surrounding recording artists who used, or are contemplating using, loan-outs to sign agreements with their record companies, personally guaranteeing their performance

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to the Member by the Company."; id. at § 60:183; see also 26 C.F.R. § 1.118-1. Understanding there are inherent tax consequences, but that the distribution is presumably fruitful, rendering the transaction justifiably, worthwhile.

[56] An artist can voluntarily liquidate or dissolve their loan-out company by discharging all debts, satisfying liabilities and creditors, returning the distributions and capital contributions back to the managing-member (the artist), and filing dissolution documents. See id. at § 60:187. Artists utilizing this approach must heed the inherent tax consequences and comply with the state laws of their loan-out company. Once the loan-out is dissolved, the artist will no longer receive personal liability protection. However, the artist could form a new loan-out company and make the same contribution of capital. This approach would not be a scheme to defraud nor a sham transaction because the artist's contribution of capital and assignment of their copyright to their (former) loan-out company would be granted in writing and recorded with the Copyright Office prior to the artist's privity with their record company. Thus, the record company would be acutely aware that the artist would not be divested of its authorship rights.

[57] 17 U.S.C. § 203(b).

[58] Id. § 203(a)(4).

[59] Id.; see generally Scorpio Music S.A. v. Willis, No. 11-CV-1557 BTM-RBB, 2012 WL 1598043, at *5 (S.D. Cal. May 7, 2012).

through inducement letters, yet being precluded from terminating and recapturing their copyrights. There are serious implications stemming from the recent opinion in Waite, which jettisons artists from their termination and recapture rights because their loan-out companies executed their agreements with their record companies.

To the extent that recording artists can avail themselves of any of the approaches described above, at least both artists and recording companies will have a clearer understanding of what to expect when loan-out companies are used to enter into recording agreements.