

## MUSICAL ALBUMS AS “COMPILATIONS”: A LIMITATION ON DAMAGES OR A TROJAN HORSE SET TO AMBUSH TERMINATION RIGHTS?

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Under the Copyright Act of 1976, “compilations” receive rather unique treatment. First, courts may limit the amount of damages that an author of a “compilation” can recover for infringement.<sup>1</sup> Should the copyright holder of a “compilation” opt for an award of statutory damages, courts will award only one statutory damages amount for the entire compilation rather than an award for each work that it comprises, even if the works contained therein are independent and separately registered.<sup>2</sup> Additionally, a compilation is one of only a few types of works that can assume “work made for hire” status if commissioned as a “work made for hire.”<sup>3</sup> The designation as a “work made for hire” is particularly relevant for termination of transfers available under the Copyright Act.<sup>4</sup>

Generally speaking, an author has the opportunity to reclaim the copyright in his or her work by terminating a transfer previously made to another.<sup>5</sup> “Works made for hire,” however, are not subject to termination of transfers.<sup>6</sup> Therefore, a creator of a “compilation” constituting a “work made for hire” has no right to terminate that transfer.

In *Bryant v. Media Right Productions*, a 2010 case concerning statutory damages for the alleged infringement of the copyrights in two musical albums, the Second Circuit held that albums are compilations.<sup>7</sup> The court found that the songs that made up the album were “preexisting materials”

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1. *See* 17 U.S.C. § 504(c)(1) (2006).

2. *See* *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 141 (2d Cir. 2010); H.R. REP. NO. 94-1476, at 162 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.

3. *See* 17 U.S.C. § 101 (2006) (defining “work made for hire”).

4. *See* 17 U.S.C. § 203 (2006).

5. *See id.* (providing that authors may terminate a past transfer of copyright subject to certain procedures).

6. *See id.*

7. *Bryant*, 603 F.3d at 141.

that were selected and arranged in an original way, to result in a compilation.<sup>8</sup> Thus, the plaintiffs in *Bryant* were only able to recover a single statutory damage award for infringement of their copyright in the album.<sup>9</sup>

Although the holding in *Bryant* addressed statutory damages for “compilations,” it may have other consequences beyond those intended by the court. In *Bryant*, the Second Circuit followed the language of the Act in deciding that albums are “compilations” for the purposes of determining statutory damage awards,<sup>10</sup> but the court failed to acknowledge that doing so could also mean that albums would now be considered works made for hire. Musicians could begin losing the ability to terminate transfers of their music, in direct conflict with Congress’s purpose behind the termination-of-transfer and work-made-for-hire doctrines. One issue with the Second Circuit’s holding in *Bryant* is that the legislative history of the Copyright Act gives reason to question labeling an album as a “compilation.”<sup>11</sup> Further, the court failed to acknowledge the termination issue lurking in the shadows, which it should have done given the consequences of its holding.

## I. *BRYANT V. MEDIA RIGHT PRODUCTIONS*

This Part will examine the *Bryant* case itself. It will start with a description of the facts and procedural history and then move on to the Second Circuit opinion.

### A. FACTS AND PROCEDURAL HISTORY

Anne Bryant and Ellen Bernfeld (“Plaintiffs”) are songwriters who jointly own a record label, Gloryvision Ltd.<sup>12</sup> Plaintiffs created and produced two albums, *Songs for Dogs* and *Songs for Cats* (the “Albums”).<sup>13</sup> They registered both Albums with the U.S. Copyright Office, and separately registered at least some of the twenty songs from the Albums.<sup>14</sup>

Media Right entered into an agreement with the Plaintiffs, authorizing Media Right to market the Albums in exchange for a share of the proceeds from any sales.<sup>15</sup> The agreement did not give Media Right permission to

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8. *Id.* at 140–41; see 17 U.S.C. § 101 (defining “compilation”).

9. *Bryant*, 603 F.3d at 140–42.

10. *Id.* at 140.

11. See *infra* Part III.

12. *Bryant*, 603 F.3d at 138.

13. *Id.*

14. *Id.*

15. *Id.*

make copies of the Albums,<sup>16</sup> but stated that Plaintiffs would provide more copies of the album if Media Right so required.<sup>17</sup>

Media Right had previously entered into an agreement with Orchard (“Orchard Agreement”), where Orchard was to distribute albums on Media Right’s behalf—including Plaintiffs’ Albums.<sup>18</sup> Media Right informed Bernfeld that Orchard would be the company actually distributing the music,<sup>19</sup> but not that Media Right had granted Orchard the authority in the Orchard Agreement to distribute and exploit the albums via the Internet.<sup>20</sup>

Initially, Orchard only sold physical copies of the recordings, but later began making digital copies of the Albums to sell through internet-based retailers.<sup>21</sup> Orchard never informed Media Right or Plaintiffs that it was selling digital copies of the Albums or individual songs from them.<sup>22</sup> In total, Orchard generated \$12.14 in revenues from sales of physical copies of the Albums, and \$578.91 from digital downloads—of which Plaintiffs were entitled to \$331.06.<sup>23</sup> Though Orchard had paid Media Right its share of the revenues from sales of the Albums, Plaintiffs never received the payments owed due to an accounting oversight by Media Right.<sup>24</sup>

When Plaintiffs discovered that Orchard made digital copies of the Albums available online, Plaintiffs filed a complaint for direct and contributory copyright infringement against Orchard and Media Right.<sup>25</sup> Plaintiffs sought statutory damages under § 504 of the Copyright Act instead of actual damages, which would have been \$331.06.<sup>26</sup>

The U.S. District Court for the Southern District of New York held that both Orchard and Media Right had committed direct copyright infringement when they made and sold digital copies of the Albums and individual songs.<sup>27</sup> The district court also held that the albums were compilations, which are considered one work for the purpose of computing statutory damages under the Copyright Act, and thus the infringers were only liable for one award of

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *See id.*

21. *Id.* at 138.

22. *Id.* at 139.

23. *Id.*

24. *Id.*

25. *Id.* at 138.

26. *Id.* at 139.

27. *Id.*

statutory damages per album.<sup>28</sup> The district court awarded Plaintiffs the statutory minimum of \$200 per Album from Orchard—who had proven its infringement was innocent—and \$1000 per Album from Media Right—whose infringement was neither innocent nor willful—for a total of \$2400.<sup>29</sup> Plaintiffs appealed both holdings: (1) that the Albums were compilations for purposes of the Copyright Act and (2) the monetary damage amounts.<sup>30</sup>

#### B. THE SECOND CIRCUIT'S ANALYSIS

On appeal, the Second Circuit held that albums are compilations under the Copyright Act.<sup>31</sup> The court first looked at the plain language of the Copyright Act.<sup>32</sup> The court noted that a “compilation” is defined in the Act as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”<sup>33</sup> The court also mentioned that compilations include collective works, which are defined as works “in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective work.”<sup>34</sup> The court next examined the Conference Report that accompanied the Copyright Act to state that a compilation results “*regardless of whether . . . the individual items in the material have been or ever could have been subject to copyright.*”<sup>35</sup>

The Second Circuit held that “an album falls within the Act’s expansive definition of [a] compilation” because “[a]n album is a collection of preexisting materials—songs—that are selected and arranged by the author in a way that results in an original work of authorship—the album.”<sup>36</sup> The court then concluded that “[b]ased on a plain reading of the statute . . . infringement of an album should result in only one statutory damage award,” and whether each song may have received a separate copyright is irrelevant to this analysis.<sup>37</sup> The court dedicated in total, two

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 142.

32. *Id.* at 140.

33. *Id.* (citing 17 U.S.C. § 101 (2006)).

34. *Id.*

35. *Id.* (emphasis in original) (citing H.R. REP. NO. 94-1476, at 162 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659).

36. *Id.* at 140–41.

37. *Id.* at 141.

paragraphs to the issue of what the legislature meant when they coined the term “compilation.”<sup>38</sup>

Though the court’s legislative and statutory analysis was not very thorough, the Second Circuit had previously decided in *Twin Peaks* and *WB Music Corp. v. RTV Communication. Group, Inc.* that the classification of works as “compilations” for purposes of statutory damages under § 504(c)(1)’s one-award restriction<sup>39</sup> hinged on whether the copyright holder “issued its works separately, or together as a unit.”<sup>40</sup> In *Twin Peaks*, the defendant printed eight teleplays from the television series “Twin Peaks” in one book.<sup>41</sup> The plaintiff production company issued each episode in weekly installments.<sup>42</sup> The court determined that the plaintiff was entitled to a separate award of statutory damages for each of the teleplays “because the *plaintiff* has issued the works separately, as independent television episodes.”<sup>43</sup> In *Bryant*, the court concluded that, to follow *Twin Peaks*, a single damages award per Album was appropriate because the *plaintiff*, not the defendants, had issued the songs as an Album.<sup>44</sup>

In *WB Music Corp.*,<sup>45</sup> the plaintiff had separately issued thirteen songs, which the defendant then issued as a single sequence of songs in album form.<sup>46</sup> The Second Circuit held that the plaintiff could collect a separate statutory damage for each song because there was no evidence “that any of the separately copyrighted works were included in a compilation authorized by the plaintiff.”<sup>47</sup> But the *Bryant* court distinguished the result in *WB Music Corp.* from its own facts, noting that in *Bryant* “it is the copyright holders who issued their works as ‘compilations.’”<sup>48</sup>

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38. *See id.* at 140–41.

39. *Twin Peaks Prods., Inc. v. Publ’ns. Int’l Ltd.*, 996 F.2d 1366, 1381 (2d Cir. 1993) (holding that episodes of a television series with a shared plot were not a “compilation” if issued separately); *WB Music Corp. v. RTV Commc’n. Grp., Inc.*, 445 F.3d 538, 541 (2d Cir. 2006) (ruling in favor of the plaintiffs that the infringed works were not part of a “compilation” because “there is no evidence [] that any of the separately copyrighted works were included in a compilation authorized by the copyright owners.”).

40. *Bryant*, 603 F.3d at 141.

41. 996 F.2d at 1381.

42. *Id.*

43. *Bryant*, 603 F.3d at 141 (emphasis in original) (citing *Twin Peaks*, 996 F.2d at 1381).

44. *See id.*

45. *WB Music Corp. v. RTV Commc’n. Grp., Inc.*, 445 F.3d 538 (2d Cir. 2006).

46. *Bryant*, 603 F.3d at 141 (citing *WB Music Corp.*, 445 F.3d at 541).

47. *Id.* at 141 (quoting *WB Music Corp.*, 445 F.3d at 541).

48. *Id.* at 141.

The Second Circuit upheld the finding of intent that Orchard was an innocent infringer.<sup>49</sup> The court held that Orchard reasonably relied on its agreement with Media Right, which stated not only that Orchard had permission to distribute the Albums by digital download, but also that following the Orchard-Media Right agreement would not infringe any copyrights.<sup>50</sup> The district court ordered Orchard to pay two hundred dollars per album.<sup>51</sup>

The Second Circuit then addressed appellant's argument that Media Right willfully infringed their copyrights. The court noted that a copyright holder must show that the infringer "had knowledge that its conduct represented infringement or . . . recklessly disregarded the possibility" for a claim of willful infringement to stand.<sup>52</sup> Because Plaintiffs did not prove that Media Right and its president acted willfully, the court held that it was not error for the District Court to find that Media Right's infringement was not willful, and ordered Media Right to pay one thousand dollars per album in damages.<sup>53</sup> Because courts enjoy wide discretion in determining the amount of statutory damages,<sup>54</sup> and considering the factors that courts apply when "determining the amount of statutory damages to award for copyright infringement,"<sup>55</sup> the Second Circuit held that the amount of damages awarded was not in error.<sup>56</sup>

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49. *Id.* at 139.

50. *Id.* at 143.

51. *Id.* at 139. Where the plaintiff elects for statutory damages and the court finds that the infringer was innocent, the award of damages may be reduced to an amount not less than two-hundred dollars. *See* 17 U.S.C. § 504(c)(2) (2006).

52. *Bryant*, 603 F.3d at 143 (citing *Twin Peaks Prods., Inc. v. Publ'ns. Int'l Ltd.*, 996 F.2d 1366, 1382 (2d Cir. 1993)).

53. *Id.* at 139. Where a plaintiff elects for statutory damages, the infringer, with respect to any one work, is liable for a sum of not less than \$750 or more than \$30,000 as the court finds just. *See* § 504(c)(1).

54. *Bryant*, 603 F.3d at 143 (citing *Fitzgerald Pbl'g Co. v. Baylor Pbl'g Co.*, 807 F.2d 1110, 1116 (2d Cir. 1986)).

55. The factors include: (1) the infringer's state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer's cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties. *Id.* at 144 (citing *N.A.S. Import, Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 252–53 (2d Cir. 1993)).

56. *Id.* at 144.

## II. THE COPYRIGHT ACT OF 1976

To evaluate the Second Circuit’s holding regarding “compilations” damage awards and any potential ramifications, one must understand certain provisions of the Copyright Act. The subsections addressing damages,<sup>57</sup> compilations,<sup>58</sup> collective works,<sup>59</sup> termination of transfers,<sup>60</sup> and works made for hire<sup>61</sup> are of particular relevance. And where the plain language of the Copyright Act leaves any ambiguity, the legislative history of the Act can provide further clarification.

### A. STATUTORY DAMAGES

Section 504 of the Copyright Act gives copyright holders the right to seek either actual damages<sup>62</sup> or an award of statutory damages.<sup>63</sup> Should a copyright holder elect to recover statutory damages, the infringer(s) is liable for an award not less than \$750 or more than \$30,000.<sup>64</sup> Courts may reduce the award to as low as \$200 for “innocent infringement,” should the infringer prove that she was not aware and had no reason to believe that her acts constituted infringement.<sup>65</sup> In the event that the copyright owner is able to prove that the infringer acted willfully, the court has the discretion to increase the award of statutory damages to a sum of not more than \$150,000.<sup>66</sup> If the work being infringed is a compilation, all the parts of a compilation constitute one work for the purposes of awarding statutory damages.<sup>67</sup>

### B. COMPILATIONS AND COLLECTIVE WORKS

The plain language of the Copyright Act gives a rather broad, if not somewhat vague, explanation as to what types of work fall under the definition of “compilation.” Section 101 of the Copyright Act defines a

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57. *See* § 504.

58. *See* §§ 101, 103 (defining “compilation”).

59. *See* § 101 (defining “collective work”).

60. *See* § 203 (defining “terminations of transfers”).

61. *See* § 101 (defining “work made for hire”).

62. Copyright owner has to prove the infringer’s gross revenue, and the infringer is required to prove her deductible expenses. *See* § 504(b).

63. *See* § 504(c).

64. § 504(c)(1).

65. *See* § 504(c)(2).

66. *Id.*

67. An example may help to clarify: if an author had arranged a compilation that was comprised of twelve different works, the copyright holder would not be able to collect a statutory award for each of the twelve works, but rather would get one award for the compilation as a whole. *See* § 504(c)(1).

compilation as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term ‘compilation’ also includes collective works.”<sup>68</sup>

House Report 94-1476 (“House Report”) accompanying the Act expands upon the statutory definition:

copyright in a “new version” covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material . . . a “compilation” results from a process of selecting, bringing together, organizing, and arranging previously existing material of all kinds, regardless of whether the individual items in the material have been or ever could have been subject to copyright.<sup>69</sup>

Additionally, § 103 of the Copyright Act echoes that the copyright protection in a compilation “extends only to the material contributed by the author . . . as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.”<sup>70</sup>

There are three points that can be taken from the discussion above: (1) compilations are created by the collection and assembly of materials; (2) a compilation can receive copyright protection whether it is composed of copyrighted or uncopyrighted material; and (3) the protection afforded to an author of a compilation extends not to the preexisting materials used to create it, but rather to the creativity that went into the selection, coordination, and arrangement of the materials in an original way.<sup>71</sup>

In discussing “compilations” it also necessary to point out that the Copyright Act treats “collective works” as compilations.<sup>72</sup> A collective work, is defined 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.<sup>73</sup> The House Report also lists symposia and discrete writings of the same authors as further examples of “collective works.”<sup>74</sup>

68. § 101 (defining “compilation”).

69. H.R. REP. NO. 94-1476, at 57 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659.

70. § 103(b); *see also* H.R. REP. NO. 94-1476, at 57 (“[C]opyright in a ‘new version’ covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.”).

71. *See* § 101 (defining “compilation”); *see also* H.R. REP. NO. 94-1476, at 57.

72. § 101 (defining “compilation”).

73. *Id.* (defining “collective work”).

74. H.R. REP. NO. 94-1476, at 122.

C. WORKS MADE FOR HIRE AND TERMINATION-OF-TRANSFERS

Section 203 of the Copyright Act specifies that an author who has transferred the rights to his or her copyrighted work<sup>75</sup> may, after thirty-five years from the date of execution of the grant,<sup>76</sup> terminate the assignment of the copyright notwithstanding *any* agreement to the contrary.<sup>77</sup> The rationale behind the termination-of-transfer right was to provide a safeguard for authors against unremunerative transfers, given their frequently disadvantaged bargaining position.<sup>78</sup> “Works made for hire,” however, are exempt from this termination right.<sup>79</sup> The Copyright Act defines a “work made for hire” 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 for hire.<sup>80</sup>

For a creator to fall under the first prong of the “work made for hire” definition, courts consider whether the creator is an employee under general agency law.<sup>81</sup> In order for a musical album to be considered a “work made

75. Created on or after January 1, 1978. § 203(a).

76. § 203(a)(3).

77. § 203(a)(5).

78. H. REP. NO. 94-1476, at 124.

79. § 203(a).

80. § 101 (defining “work made for hire”). The statute goes on further to describe “supplementary works” and “instructional text” as follows:

[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 work, 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 and with the purpose of use in systematic instructional activities.

*Id.*

81. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989).

Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the

for hire” it therefore would have to be created by an employee in the scope of his or her employment, or it would have to be commissioned as one of the enumerated groups of works under the second prong, with an agreement stating that the album will be treated as a “work made for hire.”<sup>82</sup>

#### D. SOUND RECORDINGS AND ALBUMS

“Sound recordings” and “albums” are not synonymous. The Copyright Act defines “sound recording” as “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.”<sup>83</sup> An album, at least in the context of the *Bryant* opinion, is defined as a work that results from the fixation of only music works.<sup>84</sup> While an album fits the definition of a “sound recording,” the fact that a fixation of spoken or “other” sounds would qualify as a “sound recording” means that not all “sound recordings” are albums.

### III. DISCUSSION

It is rather complicated to analyze the validity of the Second Circuit’s decision that albums are “compilations.” “Compilations,” which include “collective works,”<sup>85</sup> are limited as to statutory damages awards for infringement.<sup>86</sup> And any work deemed to be a “collective work” or “compilation” can be considered a “work made for hire,”<sup>87</sup> which is not subject to termination of transfer.<sup>88</sup> Therefore, the Second Circuit’s ruling goes beyond the sole issue of damages. Because none of these discrete issues exist in a vacuum, one must look beyond the definition of a “compilation” to determine what exactly Congress intended when it included that term in the Copyright Act.

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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; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. *Id.*

82. *See* § 101 (defining “work made for hire”).

83. § 101 (defining “sound recording”).

84. *See Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 137 (2d Cir. 2010).

85. *See* § 101 (defining “compilation”).

86. *See* § 504(c)(1).

87. *See id.* (defining “work made for hire”).

88. § 203(a).

This analysis of the Second Circuit’s decision on whether an album is a “compilation” will take three steps. First, one examines the Second Circuit’s analysis of the statutory definition of both “compilations” and “collective works” under the Copyright Act. Second, one should turn to the legislative history that discusses “compilations” and “collective works” to see if there is any clear indication of whether an album fits into either of these categories. Third, because “compilations” can be “works made for hire,”<sup>89</sup> and because “works for hire” are not subject to termination of transfers,<sup>90</sup> the statutory language and legislative history surrounding “works made for hire” and termination of transfers should also be examined. Each of these steps will be discussed below.

#### A. THE SECOND CIRCUIT’S PLAIN LANGUAGE APPROACH

This part will examine the Second Circuit’s interpretation of the language of the Copyright Act. It will start with the Court’s analysis of the term “compilation” under the Copyright Act and then address how the court mentioned that an album could also be a “collective work,” but failed to discuss whether an album actually is a “collective work.”

##### 1. *The Second Circuit Holds that Albums Are “Compilations” Under the Statutory Language.*

The Copyright Act defines a “compilation” as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.”<sup>91</sup> The Second Circuit defined “preexisting” by applying the statutory rule of construction that gives preference to the ordinary meaning of terms.<sup>92</sup> The *Bryant* court understood the statutory definition of compilation—“a work formed by the collection of preexisting materials”<sup>93</sup>—to mean that a compilation could constitute a collection of *any* preexisting material. In other words, the court observed that songs on an album necessarily predate the album—literally speaking, songs must be authored before an album can be made—and therefore an album falls within the statutory definition.

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89. § 101 (defining “work made for hire”).

90. *See* § 203(a).

91. *See* § 101 (defining “compilation”).

92. *Johnson v. United States*, 529 U.S. 694, 707 n.9 (2000).

93. § 101 (defining “compilation”).

But applying straightforward principles of statutory interpretation to define the plain meaning of “preexisting” provides an unsatisfactory definition of “compilation.” Holding albums as “compilations” affects their eligibility for status as a “work for hire”<sup>94</sup> and the author’s right to terminate any grant of transfer.<sup>95</sup> Given that the classification of albums as “compilations” has an effect greater than just limiting statutory damages,<sup>96</sup> the Second Circuit also should have considered other relevant sections of the Copyright Act. The court then would at least be aware of the larger consequences. And this should have caused the Second Circuit to move beyond the plain meaning of a “compilation” to analyze whether an album should be eligible as a “work made for hire,” and thus potentially be barred from termination of transfers.

2. *The Second Circuit Failed to Determine Whether an Album Also Qualifies as a “Collective Work.”*

Though the *Bryant* Court did not explicitly state that albums are also “collective works,” the Court did make a passing reference that compilations include “collective works.”<sup>97</sup> This analysis next addresses whether albums might also fit under the category of “collective works.” The Copyright Act defines a “collective work” as a work in which a number of contributions, that are separate and independent works in themselves, are assembled into a collective whole.<sup>98</sup> The examples given by the Act include periodicals, anthologies, or encyclopedias.<sup>99</sup>

At first glance, the plain language of the Copyright Act suggests that albums could also be “compilations” in the form of “collective works.” But the statutory definition of “collective works” raises two questions: (1) are an albums’ songs separate and independent works in themselves—and if so, are *all* albums’ songs separate and independent works in themselves—and (2) are albums analogous to the examples provided in § 101 of the Copyright Act?

The existence of concept albums proves that not all albums’ songs are separate and independent works. Copyright scholar David Nimmer defines a concept album as “an album containing a continuous ‘story line’ (e.g., The Who’s “Tommy”), which would seem no more a collective work than a novel

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94. See § 101 (defining “work made for hire”).

95. See § 203(a).

96. See 35 U.S.C. § 504(c)(1) (2006).

97. *Bryant v. Media Right Prods.*, 603 F.3d 135, 140 (2d Cir. 2010).

98. § 101 (defining “collective work”).

99. *Id.* (defining “collective work”).

consisting of various chapters.”<sup>100</sup> An example is “American Idiot” from the popular punk-rock trio Greenday, whose songs work to tell a cohesive story of a protagonist named “Jesus of Suburbia.” While the individual songs that constitute these albums may be “independent” in that listeners can enjoy them in isolation, the songs on each record are hardly separate and independent when looking at the cohesive story told throughout the album.

The fact that anyone can go on iTunes and buy songs individually off of albums presents a relatively strong case that the individual songs on many, if not most, albums are separate and independent works with independent and separable value outside of the context of a collective whole. But it is important to remember that the *Bryant* Court broadly ruled without qualification that all albums are “compilations,” not just the particular albums at issue in the case.<sup>101</sup> While a literal reading of the statutory definition of “collective work” may suggest that some albums might qualify as a “collective work,” some albums should also fall outside of the purview of this category, yet in *Bryant*, the Second Circuit made no exceptions.<sup>102</sup>

As to the second question—whether an album is analogous to the examples of “collective works” provided in the Copyright Act—a quick comparison between the two hints that albums are not all that similar. The definition of a “collective work” includes periodical issues, anthologies, and encyclopedias as examples, and mentions that these works are ones that involve a “number of contributions.”<sup>103</sup>

Periodicals and encyclopedias generally involve a large number of separate authors working individually on their own separate pieces. Many albums involve multiple authors. But those authors—the musicians—typically work together on the songs as joint authors; it isn’t as though albums usually involve one musician writing and recording one song, with another writing and recording another song. The typical periodical or encyclopedia does not have many contributors working as joint authors on each piece, like on an album. Most albums also involve far fewer authors than a periodical or encyclopedia.

Trying to differentiate an album from an “anthology” is more problematic. Webster’s dictionary defines an “anthology” as “1: a published

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100. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.03 (Matthew Bender, Rev. Ed. 2010).

101. *Bryant*, 603 F.3d at 140.

102. *See generally Bryant*, 603 F.3d 135 (making no distinction between different types of albums, instead ruling that all albums are compilations).

103. § 101 (defining “collective work”).

collection of writings (such as poems or short stories) by different authors, example: an anthology of American poetry; 2: a collection of works of art or music, example: The band will be releasing an anthology of their earlier albums.”<sup>104</sup> The colloquial use of the term “anthology” is reserved for collections of materials either from different authors or works of the same author that span a certain time. Most people would not refer the release of an artist’s album containing all new material as an “anthology.” This understanding thus tracks the examples listed by the dictionary definition of “anthology.”

An album could be considered an “anthology,” however, under an extremely literal reading of the dictionary definition—that an album is technically a collection of music.<sup>105</sup> This interpretation of “anthology” is not consonant with any of the examples provided in the dictionary definition, or the vernacular use of the term, however, there is nothing to indicate that the list of examples provided is exhaustive. It follows that there is room for argument that an album technically fits under the definition of an “anthology,” and therefore is a collective work. However, it is a weak argument at best.

### 3. *Summary*

The statutory definition of “compilations” suggests that an album would be a “compilation” because the songs, under a very literal reading, pre-exist the album. And in most cases<sup>106</sup> courts could consider the songs that make up an album separate and independent works that are assembled into a collective whole.<sup>107</sup> Thus courts might consider albums “collective works.” But the examples of “collective works” Congress provided in the Copyright Act seem to encompass works with a formation qualitatively different than an album. And while an album may fit into very literal readings of the definitions of “compilations” or “collective works,” both definitions are rather broad and vague. Further, trying to apply plain meaning to the Copyright Act is often difficult given its tendency to be ambiguous and complicated.<sup>108</sup> While the statutory language gives some indication as to whether an album is a “compilation” or “collective work,” the guidance it

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104. *Anthology Definition*, MERRIAM-WEBSTER’S DICTIONARY, <http://www.merriam-webster.com/dictionary/anthology> (last visited December 22, 2010).

105. *See id.*

106. Excluding “theme” or “concept” albums. *See* NIMMER, *supra* note 100, at § 5.03.

107. *See* § 101 (defining “collective work”).

108. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 881 (1987).

provides, and the analysis of these terms by the court, is unsatisfactory at best.

B. LEGISLATIVE HISTORY INDICATES THAT THE SECOND CIRCUIT’S APPROACH IS FLAWED

Though the definitions of “compilations” and “collective works” in the statute itself are rather vague, the legislative history helps to expand on the types of works Congress envisioned would fit into either of the categories. While the legislative history fails to provide any exact answers as to whether an album is a “compilation” or “collective work,” it does contain relevant discussions that the Second Circuit should have taken into account when deciding that albums are “compilations.”

1. *“Compilations” According to the Legislative History*

The conversations addressing “compilations” during the discussions and comments on the drafted bill were rather scant.<sup>109</sup> Most of the discussions centered on potential consequences if a compiler created a compilation in which some of the preexisting works used were used unlawfully.<sup>110</sup> The House Report that accompanied and explained the bill also discussed “compilations,” but the emphasis of the report was (1) to distinguish “compilations” from “derivative works,” (2) to explain what protection a compilation unlawfully employing preexisting works receives, and (3) to stress that “copyright in a [compilation] covers only the material added by the later author, and has no effect one way or the other on the copyright or public domain status of the preexisting material.”<sup>111</sup>

Part of the problem is that the conversations about “compilations” are mostly in the abstract; explicit examples of “compilations” are scarce. But the legislative history does supply some concrete examples of “compilations,” even providing some examples of compilations taking the form of sound recordings. The examples in the report include sound recordings of birdcalls or sounds of racecar engines,<sup>112</sup> a sound recording comprised of a collection

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109. See H. COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 3: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 65 (1963) [hereinafter COPYRIGHT LAW REVISION].

110. See *id.* at 66–71.

111. H.R. REP. NO. 94-1476, at 57 (1976).

112. See S. REP. NO. 94-473, at 54 (1975).

of classical sonatas from the public domain,<sup>113</sup> and a teacher recording various literary materials, either from the public domain or with authorized use, for teaching purposes.<sup>114</sup>

This language suggests that compilations can take the form of a sound recording, but none of the examples listed have the same creative process as a typical musical album. Birdcalls and sounds of racecars are not copyrightable musical works.<sup>115</sup> Concertos and sonatas from over two hundred and fifty years ago have fallen into the public domain and no longer have copyright protection as musical works.<sup>116</sup> A teacher given authorization to record someone else's literary work is quite different from artists writing their own material and releasing it for the first time. While these examples given during the discussions of the bill do show that sound recordings can be compilations, they also little to clarify whether courts should consider a conventional album—typically where musicians are acting as joint authors collectively create and release new material—a “compilation.” All the examples of sound recordings taking the form of “compilations” listed in the legislative history seem to lack the creative essence of an album.

## 2. “Collective Works” as Understood by the Legislative History

Though the legislative history explaining “collective works” is slightly more illuminating than the discussions about “compilations,” there is still no clear indication of whether Congress contemplated albums as “collective works” under the Copyright Act. As noted, *supra*, the songs on most albums do appear to fit the criteria of “separate and independent” works.<sup>117</sup> However, the examples of “collective works” offered in this section create ambiguity when trying to determine if albums would fit in this group.

The examples of “collective works” that legislators gave in the House Report include “periodical issues, anthologies, symposia, and collections of the discrete writings of the same authors.”<sup>118</sup> The only new examples in this report, compared with the statutory language itself, are symposia and “collections of the discrete writings of the same authors.”<sup>119</sup> But symposia,

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113. Referring to a collection of concertos and sonatas from the Baroque-era composer Vivaldi. COPYRIGHT LAW REVISION, *supra* note 109, at 76 (statement of Edward A. Sargoy, American Bar Association).

114. *See id.*

115. *See* 17 U.S.C. § 102 (2006).

116. *See* COPYRIGHT LAW REVISION, *supra* note 109.

117. *See supra* Section III.A.2.

118. H.R. REP. NO. 94-1476, at 122 (1976).

119. *See* § 101 (defining “collective work”).

with many different speakers typically acting as distinct authors,<sup>120</sup> do not seem very similar to albums.

The example of “collections of the discrete writings of the same authors,” on the other hand, is somewhat more cryptic. It is unclear from the pluralization of “authors” whether Congress meant that the collections they were referring to needed more than one author providing discrete writings or if they were referring to any number of collections that showcased the discrete writings of a single author. It is quite possible that Congress failed to devote much thought and attention to the wording of that phrase, and thus trying to decode this phrase may be a futile exercise in semantics. But considering that there are other portions of the legislative history indicating that Congress intended the inclusion of the term “collective works” in the Copyright Act to address the problem of termination of transfers for works that have multiple independent contractor authors working on independent parts of a larger work,<sup>121</sup> it would make more sense to adopt the interpretation that Congress intended this phrase to refer to more than one author.

In addition to providing several examples of works that would generally be considered “collective works,” Congress also produced several examples of works that would *not* qualify as “collective works.” A “composition consisting of words and music, a work published with illustrations or front matter, or three one-act plays, *where relatively few separate elements have been brought together*” do not fall into the category of “collective works.”<sup>122</sup> The question then becomes, what counts as “relatively few separate elements?” Is an album more analogous to three one-act plays put together in a performance, or to a periodical or anthology? This language is fodder for a spirited debate, but little more. While ostensibly trying to provide guidance, time after time Congress continued to muddy the waters.

To complicate matters even further, the Register of Copyrights, in his first Supplementary Report delivered to Congress explaining the proposed bill, stated that “integrated works such as the usual motion picture, sound recording, dramatico-musical work” fall outside the definition of “collective works.”<sup>123</sup> The rest of the paragraph that this quote is from was copied,

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120. As opposed to joint authors.

121. *See infra* Section III.C.

122. H.R. REP. NO. 94-1476, at 122 (emphasis added).

123. SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, 89TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 6, at 69.

essentially verbatim, and placed into the House Report, yet this particular sentence is left out.<sup>124</sup> And there is no discussion in the legislative history about its removal.<sup>125</sup> It is unclear if the statement was disagreed with, or if it simply got lost in the shuffle.

### 3. *Summary*

As with the actual statutory language, any guidance that the legislative history provides about whether an album is a “compilation” or “collective work” leaves much to be desired. Examples provided by the legislative history suggest that compilations can take the form of certain sound recordings. However, those examples given do not quite parallel a typical music album. Whether or not an album qualifies as a “collective work” is also unclear. The examples of “collective works” seem to have a common theme in that the works involve multiple authors working independently of one another, not a group of authors working jointly on all the independent pieces that make up the whole. But, there is nothing in the legislative history that explicitly precludes a “collective work” from being compiled of works from one person or a group of joint authors. Further, it is unclear whether there is a minimum threshold as to the number of pieces needed to move into the realm of “collective works.” It is not explicitly clear whether courts should consider albums “compilations” or “collective works” according to the legislative history of the Copyright Act. However, the legislative history contains language that questions whether albums are actually “compilations,” and the Second Circuit neglected to address any of these issues.

#### C. THE LEGISLATIVE HISTORY DISCUSSION OF “WORKS MADE FOR HIRE” AND TERMINATION OF TRANSFERS CREATES DOUBT AS TO WHETHER ALBUMS SHOULD BE CONSIDERED COMPILATIONS

The Copyright Act allows authors to terminate a grant of a transfer or license of copyright after thirty-five years, notwithstanding any agreement to the contrary, so long as the correct procedural steps are taken.<sup>126</sup> However, this right to termination does not apply to “works made for hire.”<sup>127</sup> Thus, the term of art “works made for hire” assumed a great deal of importance in

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124. *Compare id.*, with H.R. REP. NO. 94-1476, at 122.

125. *See* H. COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PARTS 1–4: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW.

126. *See* 17 U.S.C. § 203(a) (2006).

127. *See id.*

the bill’s development.<sup>128</sup> The discussions resulted in a “carefully balanced compromise” that sought 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.”<sup>129</sup> Because both “compilations” and “contributions to collective works” are categories of works<sup>130</sup> that can be “works for hire,”<sup>131</sup> examining the development of termination rights and the “work made for hire” exception can shed some light on whether an album was a work that Congress contemplated as a “work made for hire,” and thus, if an album should qualify as a “compilation” or “collective work.”

The right to terminate transfers was placed in the Copyright Act in order to protect authors against unremunerative transfers, “resulting in part from the impossibility of determining a work’s value until it has been exploited.”<sup>132</sup> There was also a concern that publishers were able to strong-arm authors into signing away their copyrights forever, presenting take-it-or-leave-it contracts where authors were unable to bargain for more limited grants.<sup>133</sup> While Congress and certain industry representatives thought that authors needed termination rights in order to protect themselves, the book publishing and motion picture industries strongly opposed the proposed termination provision.<sup>134</sup>

#### 1. *Economic Risk and Compensation*

The two major industries that launched attacks against the termination provision were the book-publishing and motion-picture industries. One argument shared by both groups was that they assume considerable economic risks and losses in developing and exploiting new works, which original authors do not share.<sup>135</sup> In the discussions between industry representatives it was noted that many types of works, such as translations, introductions, reference books, and those works that go into encyclopedias—including the maps and pictures—are traditionally bought on a lump-sum basis, and compensation is not based on royalties.<sup>136</sup> Most books

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128. H.R. REP. NO. 94-1476, at 125.

129. *Id.* at 121.

130. Sound recordings are conspicuously absent from the list of works that can be “works for hire.” See § 101 (defining “work made for hire”).

131. *See id.*

132. H.R. REP. NO. 94-1476, at 124.

133. See COPYRIGHT LAW REVISION, *supra* note 109, at 286.

134. *Id.* at 277–300.

135. *Id.* at 277.

136. *See Id.* at 298.

other than encyclopedias—and those books that fit in special categories eligible for “works made for hire” status—are published on a royalty basis.<sup>137</sup>

It is also notable that Congress included motion pictures, contributions to collective works (i.e., contributions to an encyclopedia), translations, atlases, and supplementary works (which include introductions) as categories of works that can be “works for hire” if commissioned or specially ordered as such.<sup>138</sup> Literary works, whose authors are typically compensated on a royalty basis, are conspicuously absent from this list.<sup>139</sup> This seems to indicate that at least one factor that Congress weighed when determining the “work made for hire” categories is how the author is typically compensated.<sup>140</sup>

The music-publishing industry made economic arguments as well. The representative for the National Music Publishers Association (“NMPA”) argued that much as the movie industry takes huge economic risks, so too do music publishers.<sup>141</sup> The argument was based on the idea that few songs from any one publisher are actually going to be commercial successes.<sup>142</sup> The NMPA argued that if you take away the popular standards from publishers through termination rights, then those publishers would lose the income that allows them to exploit new compositions.<sup>143</sup> But even though the representative for music publishers voiced concerns about the economic harms of termination rights for music, neither “musical compositions” nor “sound recordings” explicitly made the list of “works made for hire.”<sup>144</sup> Encyclopedias—as collective works—and movies, on the other hand, did.<sup>145</sup>

## 2. *Number of Contributors to a Work*

An additional concern shared by both the book-publishing and the motion-picture industries was that termination could severely shorten the life of works requiring a large number of contributors for their production.<sup>146</sup>

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137. *Id.* at 295.

138. 17 U.S.C. § 101 (2006) (defining “work made for hire”).

139. *See* COPYRIGHT LAW REVISION, *supra* note 109, at 295.

140. If compensation is something that Congress considered in determining what works will be “works for hire,” it is frustrating that there is no mention this in the legislative history. However, this is of little surprise considering that Congress, admitting its limited substantive expertise, delegated industry representatives with the task of negotiating for and forming much of the substance of the Copyright Act. *See* Litman, *supra* note 108, at 880.

141. *See* COPYRIGHT LAW REVISION, *supra* note 109, at 283.

142. *Id.*

143. *See Id.* at 283.

144. *See* 17 U.S.C. § 101 (2006) (defining “work made for hire”).

145. *Id.* (defining “work made for hire”).

146. *See* COPYRIGHT LAW REVISION, *supra* note 109, at 297.

There were worries that the collective efforts of the many individual contributors would be difficult to segregate and identify.<sup>147</sup> One can imagine that the transaction costs involved in trying to renew transfers for thousands of contributors to an encyclopedia could easily shelve the work after thirty-five years. This concern resulted in a general understanding, at least between some industry representatives from both sides, that creators of movies, encyclopedias, and other reference books cannot hire every contributor as a full-time employee in order to protect the publisher’s ownership of those contributions, and thus it was suggested that termination rights should not apply to such works.<sup>148</sup> Frustratingly enough, instead of discussing this point further it was recommended that discussions on this matter be explored outside the meeting.<sup>149</sup> While it is impossible to know with any certainty whether the number of contributors of a work had any sway on the drafters of the Copyright Act, the fact that many of the works that made it on the list of “works for hire” generally involve a large number of contributors suggests that this was a concern in mind when Congress adopted the definition of “works made for hire.”

3. *Applying the Termination of Transfer and “Works for Hire” Rationales to an “Album.”*

During the discussion and comments on the 1964 Revision Bill, Irwin Karp, of the Authors League of America, argued that thousands of authors of music have never been able to “protect themselves adequately in making a grant of rights for a reasonably limited period of time.”<sup>150</sup> This indicates that musicians fit into the category of authors that Congress feared had unequal bargaining power and needed the protection of the termination provision.<sup>151</sup> The question then becomes whether an album’s characteristics are such that courts should consider an album a “work made for hire.”

Addressing the economic and compensation arguments, albums do generally involve some up-front risks, including signing bonuses to artists and recording costs.<sup>152</sup> However, the money that record companies pay up-

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147. *Id.* at 340.

148. *See Id.* at 297.

149. *Id.*

150. H. COMM. ON THE JUDICIARY, 88TH CONG., 1ST SESS., COPYRIGHT LAW REVISION PART 5: DISCUSSION AND COMMENTS ON REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 155.

151. *See* COPYRIGHT LAW REVISION, *supra* note 109, at 286.

152. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 100–02 (4th ed. 2000).

front is not a lump-sum payment to the artist(s), but is rather an advance against the proceeds of the album.<sup>153</sup> Artists generally receive royalties, but do not see any profit from an album until all monies the record company advanced—even for albums they have previously released—have been recouped.<sup>154</sup> Thus concerns regarding the economic risks associated with lump-sum payments for contributors<sup>155</sup> are mitigated in the context of musical albums when compared with movies and reference books.

The issue of numerous contributors making termination difficult on certain industries is slightly more complicated in the context of an album. An album created by a five-piece band, whose members are all working as joint authors, seems a far cry from an encyclopedia that required submissions from thousands of independent contributors. By comparison, it should be reasonably easy to track down all the members of a band should the record company hope to renegotiate the transfer of the copyright.

The possibility of complications increase when the production of an album likely includes a producer and a mixing engineer, and possibly even studio musicians—who may or may not be salaried employees of the record company or the band. However, not every album employs a bevy of actors. For example, the plaintiffs in *Bryant* wrote and produced the album by themselves.<sup>156</sup> Though it would be difficult to trace the ownership of many albums, for others it would not. But this did not stop the Second Circuit from ruling without qualification that albums, as a whole, are “compilations.”<sup>157</sup>

It is ambiguous whether most albums have qualities that force courts to label them as “works for hire.” On the one hand, the number of contributors can vary widely and there are considerable financial risks involved

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153. *Id.*

154. An example may help. All standard record contracts have worked in what is called “cross-collateralization,” which works as follows: Assume that a band is given a \$50,000 advance for its first album, and the record only earned back \$20,000. This first record would have \$30,000 in unrecouped funds. Now, assume that the same band was given another \$50,000 advance for their second album, and the record earned \$60,000. This second record would have a \$10,000 profit. However, with cross-collateralization, the \$10,000 in profit from the second album would not be shared with the band, but would rather be applied to the \$30,000 in unrecouped funds for the first album, leaving the band with a current total of \$20,000 in unrecouped funds moving forward for the next album(s). PASSMAN, *supra* note 152, at 103–04.

155. *See supra* Section III.C.1.

156. *Bryant v. Media Right Prods.*, 603 F.3d 138 (2d Cir. 2010).

157. *Id.* at 140.

considering the likelihood of a song’s profitability<sup>158</sup> and musical artists’ advances.<sup>159</sup> This might suggest that an album should be a “work for hire.”<sup>160</sup> On the other hand, Congress openly acknowledged that authors of music have not been able to protect themselves against agreements requiring wholesale relinquishments of their rights.<sup>161</sup> And the economic risk that a record company takes on with each album is greatly mitigated by record contracts that require repayment of any costs and advances.<sup>162</sup>

Taking this into consideration, it does not seem that termination rights in albums would create problems or inequities to the same degree that allowing termination of transfers for motion pictures, encyclopedias, and other reference books would. But in the end there is no conclusive proof that Congress did not intend albums to be “works for hire.” Rather, the arguments discussing what works should qualify as “works for hire” merely tip the scales in favor of albums generally *not* being “works for hire,” and only arguably so.

The Copyright Office’s circulars seem to support this inference, though. The Copyright Office states that “[g]enerally speaking, for a *new* sound recording to be a work made for hire, it must be made by an employee within his or her scope of employment.”<sup>163</sup> While a musical arrangement written by a salaried musical arranger at a music company or a sound recording created by a salaried staff engineers of a record company would be considered a “work for hire,”<sup>164</sup> the Copyright Office states that the typical album—containing newly released material from musicians who are not employees of their record companies<sup>165</sup>—does not fall into the “work for hire” category.

#### 4. “*Serious Music*” Not Eligible as a “*Work For Hire*”?

The discussions and comments on the termination provision<sup>166</sup> were not the only pieces of legislative history to touch on what works should and should not qualify as “works for hire.” In fact, in his first Supplementary Report Abraham Kaminstein, the former Register of Copyrights, stated that

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158. *See supra* Section III.C.1.

159. *See supra* Section III.C.1.

160. *See supra* Section III.C.1-III.C.2.

161. *See* COPYRIGHT LAW REVISION, *supra* note 109, at 286.

162. *See supra* text accompanying note 154.

163. U.S. Copyright Office, Circular 56, *Copyright Registration for Sound Recordings*, at 3 (rev. July 2009) (emphasis added).

164. U.S. Copyright Office, Circular 9, *Works Made for Hire Under the 1976 Copyright Act*, at 2 (rev. Apr. 2010).

165. *See supra* Section III.A.

166. *See supra* Section III.C.1-III.C.2.

“[i]t is generally conceded that there are many works, such as serious music and choreography, that are written ‘on special order or commission’ but that should not be regarded as ‘works made for hire.’”<sup>167</sup> In the midst of all the uncertainty surrounding whether an album should qualify as a “work for hire,” this statement could provide much needed clarity. If music written on special order or commission should not be regarded as a “work made for hire,” then an album of music should not either. However, the problem here lies in the Register’s choice of words, specifically that he stated *serious* music should not be regarded as a “work made for hire.”

The Register’s use of the term “serious music” is perplexing. “Serious music,” while used loosely as an aesthetic judgment, lacks any objective, definitive meaning.<sup>168</sup> Various pieces in academic journals have described “serious music” as anything from works that would commonly qualify as classical music<sup>169</sup> to opera and symphonic music,<sup>170</sup> but there is no generally accepted definition.<sup>171</sup> The term “serious music” is seen in other places in the legislative history of the Copyright Act to refer to classical music, but only as distinguished from “popular music”<sup>172</sup> or as a synonym for “classical” music,<sup>173</sup> and it only appears in the context of the discussions around compulsory licenses for music and jukeboxes.

There is no explanation in the Register’s first Supplementary Report clarifying what exactly Kaminstein intended when he used the term “serious music,” nor does the context give any clues.<sup>174</sup> There was a second Draft

167. H. COMM. ON THE JUDICIARY, 98TH CONG., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 67 (Comm. Print 1965).

168. One will not find a subject heading for “serious music” in a music dictionary. *See* THE NEW GROVE DICTIONARY OF MUSIC AND MUSICIANS (2d ed. 2001).

169. *See, e.g.*, T.W. Adorno, *A Social Critique of Radio Music*, 7 KENYON REV. 217 (1945) (referring to a Beethoven symphony).

170. Janet P. Gilbert & Mary R. Beal, *Preferences of Elderly Individuals for Selected Music Education Experiences*, 30 J. RES. MUSIC EDUC. 247, 250 (1982).

171. *See supra* text accompanying note 168.

172. *See Copyright Law Revision—CATV*: Before the Subcomm. on Patents, Trademarks, and Copyrights, 98th Cong., 2d Sess. 234 (1966) (statement of Herman Finkelstein, General Counsel, ASCAP).

173. *See Copyright Law Revision*: Hearing before the Subcomm. on Courts, Civil Liberties and the Administration of Justice Hearings (PART 2) 982 (1975) (statement of Michael Connor, Wall Street Journal).

174. *See generally* H. COMM. ON THE JUDICIARY, 98TH CONG., COPYRIGHT LAW REVISION, PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL (Comm. Print 1965).

Supplementary Report of the Register of Copyrights in 1975, from then-current Register Barbara Ringer.<sup>175</sup> This draft essentially parrots Kaminstein’s comment about “serious music,” but states that “serious composers” are “not intended to be treated as ‘employees’ under the carefully-negotiated definition [of ‘works for hire].’”<sup>176</sup> The phrasing is different, but the point is essentially the same. Though the second report does not explain what Ringer or Kaminstein meant when they said “serious music,” a separate section in the report indicates that “serious music” is something separate from “popular music,” but explains no further than this.<sup>177</sup>

From the portions of the legislative history that mention “serious music” and the two Supplemental Register’s Reports, it is extremely difficult to come to any conclusion about the term’s meaning. It is possible that that “serious music” was supposed to be equated with “classical music.”<sup>178</sup> But if this were the case, it would seem odd and without reason that certain styles of music should have the benefit of termination while other styles, such as “popular” music, may not. There are possible explanations for what Kaminstein or Ringer intended with “serious music,” but to put forth other suggestions would just be wild speculation. It is discouraging that this statement from the Register, with just a little bit of explanation, could have shed a considerable amount of light on the question of whether an album should be regarded as a “work for hire,” and thus whether an album should be regarded as a “compilation.” But as it stands, it is one more example of the legislative history creating even more uncertainty.<sup>179</sup>

D. IS THE SECOND CIRCUIT’S RULING THAT ALBUMS ARE  
COMPILATIONS CORRECT?

While it is difficult to definitively state that the Second Circuit came to the wrong conclusion in determining that all albums are “compilations,”<sup>180</sup> it is safe to say that the court failed to consider the termination-of-transfers issue lurking in background, as it should have. It is possible that the court simply thought that holding that albums are “compilations” would only affect the amount of statutory damages that a plaintiff could collect for an

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175. See THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 1975 REVISION BILL, OCTOBER–DECEMBER 1975 (DRAFT): SECOND SUPPLEMENTARY REPORT.

176. *Id.* at 100.

177. *Id.* at 90.

178. See *supra* text accompanying note 173.

179. See *supra* Section III.A–III.B.

180. *Bryant v. Media Right Prods.*, 603 F.3d 135, 140 (2d Cir. 2010).

infringement action.<sup>181</sup> But because “compilations” are eligible to be “works made for hire,”<sup>182</sup> the Second Circuit’s holding on damages could actually have a profound effect on termination rights,<sup>183</sup> which the court never acknowledged.

And it is not likely that a ruling such as this will only affect a select few. Almost every standard record contract contains boilerplate language stating that the works produced by performers are works made for hire.<sup>184</sup> While it was unclear if these “work made for hire” provisions in record contracts had any legal force,<sup>185</sup> the Second Circuit, focusing solely on an issue of statutory damages, settled the question by ruling that albums are “compilations.”<sup>186</sup>

It is uncertain whether the Second Circuit would have concluded that albums are “compilations” had they looked at the discussions about the termination-of-transfers provision and the “works made for hire” exception. However, the legislative history does hint in favor of finding that musical works—and by extension albums—were not what Congress was talking about when it created the category of “works made for hire.”<sup>187</sup> Because Congress understood musicians to need the same protection from unequal bargaining power as authors of literary works, termination rights were ostensibly included to extend protections to authors of musical and literary works alike.<sup>188</sup> And while publishers of all sorts opposed the termination provision, including music publishers,<sup>189</sup> only works commissioned by the encyclopedia and reference book publishers and the movie industry are clearly reflected in the enumerated categories of works eligible for “works

181. It is easy to see how a court that was not well-versed in copyright law—and was only dealing with “compilations” in the context of damages—could be oblivious to the fact that the term “compilation” is also included in the category of “works made for hire,” as neither the definition of “compilation” nor statutory damages provision of the Copyright Act indicates as much. *See* 17 U.S.C. §§ 101, 504(c)(1) (2006).

182. If the work is specially ordered or commissioned and there is a written agreement that they will be treated as a “work made for hire.” *See* § 101 (defining “work made for hire”).

183. *See* § 203(a).

184. *Sound Recordings as Works Made for Hire*: Before the Subcomm. on Courts and Intellectual Property, 106th Cong., 2d Sess. (May 25, 2000) (statement of Marybeth Peters, Register of Copyrights).

185. The ambiguity lied in the fact that “sound recordings” are conspicuously absent from the list of works eligible for “work for hire” status. *See* § 101 (defining “work made for hire”).

186. *See id.* (defining “work made for hire”).

187. *See supra* Section III.C.3.

188. *See supra* text accompanying notes 132–33.

189. *See supra* Sections III.C.1 and III.C.2.

made for hire” status.<sup>190</sup> The aforementioned parts of the legislative history present a relatively strong foundation for an argument that courts should not regard musical works, and therefore albums, as “works made for hire.” Accepting this interpretation of the legislative history to be true, if “compilations” can be “works made for hire,” and albums should not be regarded as “works made for hire,” it follows that an album should not be considered a “compilation.”

Admittedly this is only one interpretation of how courts should view albums in relation to “works made for hire,” though the legislative history supports this as a workable interpretation. Regardless of whether this is the correct interpretation of what the legislature had in mind when the Copyright Act was drafted, having reviewed the discussions that were carried on through the process, one cannot help but wonder if this information would have changed the conclusion of the Second Circuit. It is entirely possible that they would have still reached the same verdict. But even if they would have, the problem lies in the fact that the court did not address the “work for hire” and termination-of-transfer issues, which are inextricably linked to its decision. The Second Circuit precluded the possibility of termination for many musicians without even acknowledging the fact.

#### E. THE FUTURE IMPLICATIONS OF THE *BRYANT* DECISION

Moving forward, this decision has two important consequences. First, any copyright holder seeking statutory damages for the infringement of an album will have a significantly lower allowable minimum amount of damages. Second, musicians that have transferred the rights in their albums to record companies will almost certainly lose their termination rights.

##### 1. *Reducing the Allowable Minimum Damages*

The facts of the *Bryant* case apply to lowering damage award minimums. With damages being awarded on a per-album basis, the court awarded Plaintiffs \$2,400.<sup>191</sup> Breaking this figure down, Orchard paid \$200 per album as an innocent infringer<sup>192</sup> and Media Right paid \$1000 per album.<sup>193</sup> Had Plaintiffs’ argument prevailed—that they were entitled to statutory damages for *each* song on the Album<sup>194</sup>—the court likely would have awarded Plaintiffs a sum far in excess of \$2,400. Because there were two albums

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190. See § 101 (defining “work made for hire”).

191. See *Bryant v. Media Right Prods.*, 603 F.3d 135, 139 (2d Cir. 2010).

192. This is the statutory minimum allowed for innocent infringement. See § 504(c)(2).

193. See *Bryant*, 603 F.3d at 139.

194. *Id.* at 140.

infringed, each with ten songs, Orchard would have been liable for twenty separate infringements at \$200 each, making their total liability \$4,000. The minimum amount that the court could have ordered Media Right to pay as a non-innocent infringer was \$750,<sup>195</sup> putting Media Rights minimum liability for the twenty infringements at \$15,000. If the court ordered both parties to pay the statutory minimums per infringement, the total award to Plaintiffs would have been \$19,000. It is easy to see that classifying an album as a “compilation” has a profound effect on the minimum amount of damages that can be awarded as opposed to awarding damages on a per song basis: \$19,000 is a far cry from \$2,400.

Though it may seem that limiting albums to a single damage award significantly reduces damages for infringement—as the Second Circuit has now lowered the damages floor for these works—it should be noted that courts have broad discretion in setting the amount of statutory damages.<sup>196</sup> Courts have the power to raise damages to \$30,000 for infringement,<sup>197</sup> and as high as \$150,000 per work if the owner proves the infringement was willful.<sup>198</sup> And in the *Bryant* case, it may not have seemed fair that the infringers would be liable for no less than \$19,000 in damages when the actual damages Plaintiffs proved were only \$331.06,<sup>199</sup> thus prompting a judge to think that one damages award per album would be more equitable. However, when one factors in the cost of attorneys fees, especially considering that the trial court ruling was appealed, the sum of \$19,000 certainly seems more reasonable.

## 2. *Effect on Termination of Transfers*

The other important consequence stemming from the Second Circuit’s ruling that albums are “compilations” is that the court’s holding likely precludes most musicians from being able to terminate transfers to the material on albums. Though the Copyright Act allows authors to terminate the grants of rights to their copyrighted material, as discussed above, this termination right does not apply to “works made for hire.”<sup>200</sup> As “compilations” are one of the works eligible for “work made for hire”

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195. See § 504(c)(1). For the sake of argument, the statutory minimum of \$750 per infringement is used here instead of the \$1,000 per infringement that Media Right was actually found to be liable for. See *Bryant*, 603 F.3d at 139.

196. *Fitzgerald Pbl’g Co. v. Baylor Pbl’g Co.*, 807 F.2d 1110, 1116 (2d Cir. 1986).

197. See § 504(c)(1).

198. § 504(c)(2).

199. See *Bryant*, 603 F.3d at 139.

200. § 203(a).

status,<sup>201</sup> this means that albums, as “compilations,” can be ineligible for termination. Though a musician would have to sign an agreement stating that the album be treated as a “work made for hire” in order for it to truly assume “work for hire” status,<sup>202</sup> most recording contracts do include such language.<sup>203</sup> So while the *Bryant* decision seems like a straightforward ruling affecting only the amount of statutory damages that can be awarded for an album, in reality it also opened up an entirely new can of worms in the area of termination rights due to the term “compilation” being used in sections of the Act relating to both issues. And the Second Circuit, at least from the *Bryant* opinion, seems to be wholly unaware of this potentially significant termination issue.<sup>204</sup>

#### IV. CONCLUSION

The *Bryant* Court limited the minimum amount of damages courts may award for an album. The ruling that albums are “compilations” also has an effect on musicians’ right to terminate transfers. What is less clear is whether the Second Circuit was correct in ruling that albums actually are “compilations.” Albums seem to fit within the rather broad statutory definition of “compilations,” but the references made to compilations and collective works in the legislative history accompanying the Copyright Act do not seem completely analogous to an album that a band would typically release. Further, the legislative history discussing termination of transfers and “works for hire” mentions that musicians are in need of protection against unremunerative transfers. And albums do not seem to share many important characteristics with those works that made it into the list of “works for hire.”

At a minimum, the legislative history raises some questions about whether an album should be considered a “compilation.” It is unfortunate that the Second Circuit neglected to delve deeper into the legislative history and confront these questions, but this lack of analysis is especially troublesome considering the termination issue lurking in the background. Because holding that an album is a “compilation” will likely eliminate many musicians’ right to terminate, the termination issue is something that the court should have acknowledged and addressed.

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201. See § 101 (defining “work made for hire”).

202. See *id.* (defining “work made for hire”).

203. See *supra* note 184.

204. See generally *Bryant*, 603 F.3d 135 (the Second Circuit never mentions the termination-of-transfer issue in the *Bryant* opinion).

