Remastering Termination Rights: Why Remastered Sound Recordings Should Never Be Considered Derivative Works as to Circumvent Copyright Termination

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Introduction

Before music recording artists like Billy Joel, The Police, Journey, and Kool & the Gang rose to international stardom, they transferred or licensed all of their sound recording copyrights to labels, via recording contracts, in exchange for royalties and advancements.[1] The terms of such contracts are reflective of idiosyncratic negotiations, industry customs, and the weak bargaining power of recording artists compared to the record label.[2] Even so, artists have a second bite at the apple: the Copyright Act of 1976[3] allows artists to terminate any prior grant "notwithstanding any agreement to the contrary" at least thirty-five years after the initial grant for works created "on or after January 1, 1978."[4] Termination rights safeguard authors and improve bargaining positions by giving authors a second opportunity "to negotiate more advantageous grants in their

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[1] *See* Chambers v. Time Warner, Inc., 282 F.3d 147, 150 (2d Cir. 2002); Christian L. Castle, *Reversion Rights: Will 2013 Be A Game-Changer?*, CHRISTIANCASTLE.COM (Dec. 27, 2012), https://perma.cc/BCL2-Q46N; Ed Christman, *Inside the Secretive, Difficult Struggle Between Artists & Labels Over Album Copyrights*, BILLBOARD (Sept. 28, 2017), https://perma.cc/7QG8-XFW4.

[2] *See* KEMBREW MCLEOD, PETER DICOLA, JENNY TOOMEY & KRISTIN THOMSON, CREATIVE LICENSE: THE LAW AND CULTURE OF DIGITAL SAMPLING 79 (2011).

[3] Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541.

[4] 17 U.S.C. §§ 203(a), (a)(5).

works after the works ha[ve] been sufficiently 'exploited' to determine their 'value.'"[5]

With the advent of copyright termination in 2013, record labels—the traditional owners of sound recordings—are at risk of losing their cash cows, as record labels rely on revenue generated from established performers.[6] To illustrate, classic sound recordings, like Survivor's "Eye of the Tiger" from 1982, may continue to generate "hundreds of thousands of dollars per year in sales and licensing revenue."[7] As thousands of songs become eligible for termination each year, record labels could face an increasing number of termination notices. But record labels have made their stance abundantly "clear that they will not relinquish recordings they consider their property without a fight."[8]

Record labels will likely defend their post-1978 sound recordings from the section 203 termination provision with one of two exceptions: the work made for hire exception[9] or the derivative works exception.[10] This Comment focuses on the latter. Normally, the exclusive right to create derivative works rests with the copyright holder of a preexisting work.[11] Under the derivative works exception, however, the rights to derivative works created prior to termination remain with the creator, notwithstanding termination.[12] Thus, one opportunistic way for record labels to avoid termination is to file copyrights for remastered sound recordings as derivative works.[13] Remastering analog sound recordings for digital use can provide clearer audio, prime the recordings for digital

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[5] Milne v. Stephen Slesinger, Inc., 430 F.3d 1036, 1046 (9th Cir. 2005) (citing H.R. REP. NO. 97-1476, at 124 (1976)).

[6] *See* Eriq Gardner, *Copyright Battle Comes Home*, LAW.COM (Oct. 8, 2009), https://perma.cc/D9XP-7GF9.

[7] Matthew Belloni & Eriq Gardner, *Tom Petty, Bob Dylan Vs. Music Labels: The Industry's New Copyright War*, HOLLYWOOD REP. (Feb. 10, 2012), https://perma.cc/Z9VA-PW6G.

[8] Larry Rohter, *Record Industry Braces for Artists' Battles Over Song Rights*, N.Y. TIMES (Aug. 15, 2011), https://perma.cc/NQ7M-BSMH.

[9] *See* 17 U.S.C. § 203(a). For an in-depth treatment of the termination works for hire exception in the context of sound recordings, see David Nimmer & Peter S. Menell, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC'Y U.S.A. 387 (2001).

[10] *See id.* § 203(b)(1); *see also id.* § 101 (defining "derivative work" as: "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'").

[11] *See id.* § 106(2).

[12] *See id.* § 203(b)(1).

[13] *See* Eliot van Buskirk, *Copyright Time Bomb Set to Disrupt Music, Publishing Industries*, WIRED (Nov. 13, 2009), https://perma.cc/P6LK-L66X.

mediums,[14] and allow the record company to retain the remaster post-termination if held as a derivative work.[15]

The Ninth Circuit Court of Appeals addressed the issue of whether remastered sound recordings are derivative works in *ABS Entertainment, Inc. v. CBS Corp*.[16] While *ABS Entertainment* did not concern termination, the decision provides the foundational analysis to assess whether a remastered sound recording constitutes a derivative work.[17] The Ninth Circuit applied the two-pronged "distinguishable variation" test (the "*Durham* test") established in *Durham Industries, Inc. v. Tomy Corp*.[18] Under the *Durham* test, a derivative work is granted a separate copyright if two criteria are met: (1) the derivative work's original aspects "must be more than trivial"; and (2) "the original aspects of a derivative work must reflect the degree to which it relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material."[19]

In the context of termination rights, this Comment analyzes the *Durham* test as applied to remastered sound recordings in *ABS Entertainment* and argues that remastered sound recordings are not derivative works because remastered sound recordings (1) will never possess more than trivial originality since remasters identically preserve the master's character and possess negligible aural enhancements, and (2) characterizing remasters as derivative works would substantially hinder the terminating party's ability to license the master recording for sampling, remixes, and audiovisual derivative works.[20] This Comment

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14 *See* Matt Diehl, *Behind the Hype of Remastering Old Albums*, POPULAR MECHS. (Jan. 28, 2016), https://perma.cc/NT78-P93J; Sean Evans, *Do Remastered Records Actually Sound Better?*, GEAR PATROL (Apr. 18, 2019), https://perma.cc/3DN8-MRF6.

15 *See* 17 U.S.C. § 203(b)(1); *see also* van Buskirk, *supra* note 13.

16 908 F.3d 405 (9th Cir. 2018). The main issue concerned federal copyright preemption, which is beyond the scope of this Comment. For a discussion of copyright preemption see Danielle Ely, Comment, *We Can Work It Out: Why Full Federalization of Pre-1972 Sound Recordings is Necessary to Clarify Ambiguous and Inconsistent State Copyright Laws*, 23 GEO. MASON L. REV. 737 (2016).

17 *See* Chase A. Brennick, Note, *Termination Rights in the Music Industry: Revolutionary or Ripe for Reform*, 93 N.Y.U. L. REV. 786, 803–04 (2018); *see ABS Ent.*, 908 F.3d at 414–19.

18 630 F.2d 905 (2d Cir. 1980); *see also ABS Ent.*, 908 F.3d at 414 (citing *Durham*, 630 F.2d at 909).

19 *ABS Ent.*, 908 F.3d at 414 (quoting U.S. Auto Parts Network Inc. v. Parts Geek, Ltd. Liab. Co., 692 F.3d 1009, 1016 (9th Cir. 2012)).

20 *See id.* at 423–25; MCLEOD ET AL., *supra* note 2, at 9–10; Ent. Rsch. Grp., Inc., v. Genesis Creative Grp., Inc., 122 F.3d 1211, 1220 (9th Cir. 1997); *see also* Brennick, *supra* note 17, at 803. This proposition is not without opposition. *Compare* Jon Peritz, Note, *Closing a Loophole in Musician's Rights: Why Digital Remasters of Analog Sound Recordings Are Not Derivative Works Protected by the Copyright Act*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 385, 387 (2013) (arguing that remastered sound recordings are not derivative works and would interfere with the terminating-party's reproduction and distribution rights), *with* James J. Schneider, Note, *Defeating the Terminator: How Remastered*

concludes that record labels will be unable to successfully invoke the derivative works exception to preserve digital remasters for post-termination exploitation.[21]

Part I explains the landscape of the copyrightability of sound recordings by discussing the history of and requirements for master sound recordings, termination rights, licensing master recordings in samples, remixes, and audiovisual works, and the processes of mastering and remastering. Part II discusses the *Durham* derivative works test as applied to sound recordings in *ABS Entertainment*. Part III applies *ABS Entertainment* in light of termination rights and argues that courts should never hold digital remasters to be derivative works because remasters contain a trivial amount of originality and—even if remasters are sufficiently original—remasters held as derivative works will hinder the right to prepare derivative works for recording artists who recovered their masters via termination.[22]

I. The Copyright Landscape of Sound Recordings and Termination Rights

To assess the originality of remastered sound recordings, one must understand the copyright protection afforded to sound recordings and the technical processes of mastering and remastering. Section A provides a brief history of the copyrightability of sound recordings and explains copyright requirements. Section B explains termination rights and the derivative works exception. Section C discusses the exclusive right of licensing sound recordings for derivative works. Lastly, Section D describes the technical processes of mastering and remastering.

A. *Copyright Protection of Sound Recordings*

To understand the significance of master sound recordings, it is crucial to address the history of the copyright protection afforded to sound recordings and the requirements for sound recordings to receive copyright protection.

Albums May Help Record Companies Avoid Copyright Termination, 53 B.C. L. REV. 1889, 1892 (2012) (arguing that remastered sound recordings are sufficiently derivative works and will not substantially interfere with termination rights).

[21] *See* 17 U.S.C. § 203(b)(1).

[22] *See id.*

1. History of the Copyrightability of Sound Recordings

The US Constitution grants Congress the express power to promote the progress of creative artistry by securing the right of authors to enjoy a monopoly in their works for a limited duration.[23] While Congress granted copyright protection to written works in 1790,[24] musical compositions did not receive protection until the 1909 Copyright Act.[25]

After 1909, anyone could freely duplicate a recorded musical composition under federal law by obtaining permission from the composition's copyright holder; however, this left the owner of the recording itself uncompensated.[26] As a result, Congress enacted and President Nixon signed the Sound Recordings Act of 1971, which expressly granted separate copyright protection to sound recordings in addition to the preexisting protection afforded to musical compositions.[27]

2. Requirements for Copyright Protection

Copyright protection only extends to expressive works which (1) fall under one of the eight enumerated categories of works, (2) are fixed in a tangible medium of expression, and (3) are original works of authorship.[28]

First, sound recordings are one of the eight enumerated categories of works afforded copyright protection.[29] The Copyright Act defines "sound recording" as a fixed "series of musical, spoken, or other sounds."[30] Sound recording copyrights are distinct from musical composition copyrights, which are a separate enumerated category of protected works.[31] Whereas a music composition copyright protects the melodies, notes, chords, and

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23 *See* U.S. CONST. art. I, § 8, cl. 8 (granting the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

24 *See* Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124 (1760) (repealed 1802).

25 *See* Copyright Act of 1909, Pub. L. No. 60-349, § 5(e), 35 Stat. 1075, 1076 (1909) (repealed 1976).

26 *See* DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 362 (9th ed. 2015).

27 *See* Sound Recordings Act of 1971, Pub. L. No 92-140, 85 Stat. 391 (1971); *see also* PASSMAN, *supra* note 26, at 364; Schneider, *supra* note 20, at 1893–94. For an extensive history on the copyrightability of sound recordings, see Melvin L. Halpern, *Sound Recording Act of 1971: An End to Piracy on the High ©'s*, 40 GEO. WASH. L. REV. 964 (1972).

28 *See* 17 U.S.C. § 102(a).

29 *See id.* § 102(a)(7).

30 *Id.* § 101.

31 *See* Erickson v. Blake, 839 F. Supp. 2d 1132, 1135 n.3 (D. Or. 2012) (comparing § 102(a)(2) with § 102(a)(7)); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.10(A)(2) [hereinafter NIMMER] (2018).

other aspects of a musical work, a sound recording copyright protects the particular performance captured on hard disk, tape, vinyl, or any other format.[32] The coexisting music copyrights for sound recordings and musical works conveniently accommodate music industry dynamics because recording artists and songwriters are often different people.[33] This Comment solely analyzes rights related to sound recordings held by recording artists or their record labels.

Second, a sound recording is "fixed" when it is embodied in a sufficiently permanent tangible medium of expression that can be communicated directly or indirectly.[34] Phonorecords are the material objects that store sound recordings.[35] Examples of phonorecords include cassettes, compact discs, cartridges, tapes, and vinyl.[36] Moreover, a digital audio file is also a phonorecord for the purposes of copyright registration.[37] The master recording, which is the finalized original version of a recorded work "from which all copies are made," is the fixed copyrighted work submitted to the Copyright Office.[38]

Third, copyright protection only extends to works of authorship that are original.[39] "Originality" is "the *sine qua non* of copyright" protection and means that "the work was independently created by the author (as opposed to copied from other works), and . . . possesses at least some minimal degree of creativity."[40] Overall, the originality requirement is "fluid" and lacks "objective criterion."[41] In the copyright world, creativity means the author invoked some amount of intellectual labor in fixing the

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32 *See* MCLEOD ET AL., *supra* note 2, at 75–76; *see also* 17 U.S.C. § 102(a).

33 *See* MCLEOD ET AL., *supra* note 2, at 76–77.

34 *See* 17 U.S.C. § 101.

35 *See id.*

36 *See* NIMMER, *supra* note 31, § 2.10[A][1][a].

37 *See* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 803.4(B) (3d ed. 2017) [hereinafter COMPENDIUM (THIRD)].

38 PASSMAN, *supra* note 26, at 78; *see also* COMPENDIUM (THIRD), *supra* note 37, § 2122.5(A); David Roos, *How Do They Remaster CDs and DVDs*, HOWSTUFFWORKS, https://perma.cc/NS3Q-UCDD.

39 17 U.S.C. § 102(a). While the Copyright Act does not define the term author, "the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection." Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989) (citing § 102(a)). Under this definition of author for the purposes of this Comment, recording artists are the authors of sound recordings as they provide the expression fixed in a sound recording. *See* Brennick, *supra* note 17, at 788 n.3.

40 Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991); *see also* ABS Ent., Inc. v. CBS Corp., 908 F.3d 405, 414 (9th Cir. 2018).

41 Steven S. Boyd, *Deriving Originality in Derivative Works: Considering the Quantum of Originality Needed to Attain Copyright Protection in a Derivative Work*, 40 SANTA CLARA L. REV. 325, 328 (2000).

work.[42] Since the "requisite level of creativity is extremely low, even a slight amount" of creativity is sufficient for a work to be original.[43] While most works will surpass the low creativity threshold, works which lack a "creative spark" or only possess a trivial amount of creativity will not qualify for copyright protection.[44] Specifically, works that merely copy a preexisting work without expressive changes do not exceed the low creativity threshold.[45] With respect to sound recordings, Justice Oliver Wendall Holmes described the original identity and character as "something irreducible, which is one man's alone."[46] Examples of a sound recording's originality include "[t]he emphasis or shading of a musical note, the tone of voice, the inflection, the timing of a vocal rendition, [and whether it is] musical or spoken."[47]

B. *Termination Rights and the Derivative Works Exception*

Copyright ownership of any work "vests initially with the author or authors of the work."[48] As recording artists are the authors of sound recordings, the recording artists would normally be vested with copyright ownership of their sound recordings;[49] however, recording artists usually transfer their copyrighted sound recordings to record labels in exchange for a cash advance, royalties, and promotional services.[50] If the recording artist made a bad deal—as in, the sound recording is worth more than the artist's initial compensation—or if the artist simply wants the rights to her sound recording back, termination rights enable the recovery of previously transferred copyrights via grant "notwithstanding any agreement to the contrary."[51]

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42 *See* Balt. Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 668 n.6 (7th Cir. 1986).

43 *See Feist*, 499 U.S. at 345.

44 *Id.*

45 *See* L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 490 (2d Cir. 1976).

46 Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903).

47 NIMMER, *supra* note 31, at § 2.10[A][2][a].

48 17 U.S.C. § 201(a).

49 *See* Brennick, *supra* note 17, at 788 n.3 (2018).

50 *See* MCLEOD ET AL., *supra* note 2, at 76; PASSMAN, *supra* note 26, at 86.

51 17 U.S.C. § 203(a)(5); *see also* Mills Music, Inc. v. Snyder, 469 U.S. 153, 173 n.39 (1985) (quoting H.R. REP. NO. 94-1476, at 124 (1976)).

1. A Second Bite at the Apple via Termination

Copyright law has always "struggled to deal with the equitable and efficient division of value and control between creators and the enterprises that distribute their works."[52] Congress established termination rights "because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited."[53] Since termination rights only apply to post-1978 works, 2013 marked the first opportunity to terminate grants as thiry-five years had passed.[54]

Under section 203 of the Copyright Act, authors may terminate a prior grant during a five year period at the conclusion of thirty-five years after the initial grant.[55] A termination notice can be filed with the Copyright Office between twenty-five to thirty-three years after the initial grant.[56] To illustrate, a party who granted a copyright on January 1, 2000, could file a termination notice between 2025 and 2033 and could terminate the grant between 2035 and 2040.[57] Upon successful termination, the recording artist can exploit her copyrighted sound recording independently or with a record label, which effectively results in a second bite at the apple.[58] Should the recording artist choose to negotiate with a new record label or renegotiate with the prior record label, termination rights would be a bargaining chip and likely result in a new contract with more favorable terms.[59] Perhaps more importantly, the reversion could result in new revenue streams from remasters or other licensing ventures.[60]

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52 Peter S. Menell & David Nimmer, *Pooh–Poohing Copyright Law's "Inalienable" Termination Rights*, 57 J. COPYRIGHT SOC'Y U.S.A. 799, 801 (2010).

53 *Mills Music*, 469 U.S. at 173 n.39 (quoting H.R. REP. NO. 94-1476, at 124 (1976)); *see also* NIMMER, *supra* note 31, at §§ 9, 11.01.

54 *See* Schneider, *supra* note 20, at 1894; *see also* 17 U.S.C. § 203. Works that obtained federal copyright protection prior to 1978 are subject to "renewal rights," but that topic is beyond the scope of this Comment. *See* 17 U.S.C. §§ 203, 304. For a detailed discussion of renewal rights, see NIMMER, *supra* note 31 at § 9.05.

55 *See* 17 U.S.C. § 203(a)(3).

56 *See id.* § 203(a)(4)(A); *see also* U.S. Copyright Office, *Notices of Termination*, https://perma.cc/Y25K-XC4V.

57 *See* 17 U.S.C. § 203(a)(4)(A); *see also* PASSMAN, *supra* note 26, at 356.

58 *See* Mark H. Jaffe, *Defusing the Time Bomb Once Again—Determining Authorship in a Sound Recording*, 53 J. COPYRIGHT SOC'Y U.S.A. 139, 148–49 (2005).

59 *See id.*

60 *See id.* at 150.

2. The Derivative Works Exception Spoils the Apple

> A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant *after its termination*, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.[61]

This derivative works exception to the termination provision could be a potential roadblock for artists' reversionary rights.[62] Derivative works require independent original authorship.[63] The preparation of a derivative sound recording entails using "the actual sounds fixed in the sound recording" to remix, rearrange, or otherwise alter the quality or sequence of the fixed sounds.[64] Protection of a derivative work only extends to material that the derivative work's author contributes to that is distinguishable from preexisting material found in the parent work.[65]

Record labels seeking to circumvent termination rights may do so by creating derivative works because this exception allows licensees of derivative works who hold licenses granted prior to termination to continue using those derivative works post-termination.[66] However, under section 203(b)(1), the record label would not be allowed to create more derivative works post-termination.[67] But if a record label created a sufficiently derivative work that is nearly identical to the underlying work, such as a remaster, the label would effectively circumvent termination rights.[68]

C. *The Exclusive Right of Licensing Master Recordings for Derivative Works*

The copyright holder of a master recording possesses a bundle of exclusive rights and the economic value of the master recording comes from the exploitation of such rights.[69] This Comment focuses on the right to prepare derivative works. The predominant source of sound recording

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61 17 U.S.C. § 203(b)(1) (emphasis added).

62 *See id.*

63 *See* Woods v. Bourne Co., 60 F.3d 978, 990 (2d Cir. 1995) ("In order for a work to qualify as a derivative work it must be independently copyrightable." (citing Weissmann v. Freeman, 868 F.2d 1313, 1320–21 (2d. Cir 1989)); *see also* Schneider, *supra* note 20, at 1901.

64 *See* 17 U.S.C. §§ 106(2), 114(a)–(b) (providing limitations to rights expressed in § 106 for sound recordings).

65 *See id.* § 103(b); *see also* NIMMER, *supra* note 31, at § 3.03[A].

66 *See* 17 U.S.C. § 203; *see also* Schneider, *supra* note 20, at 1899.

67 *See* 17 U.S.C. § 203(b)(1).

68 *See id.*

69 *See* JONATHAN STERNE, MP3: THE MEANING OF A FORMAT 191 (2012); *see also* 17 U.S.C. § 106.

licensing revenue comes from derivative works, which result in a significant stream of revenue for record labels.[70] Whenever an entity desires the right to reproduce a copyrighted sound recording in another work, the entity must have a license or will likely face an infringement action.[71] Three licensable, lucrative derivative works are the use of a sound recording in audiovisual works, the use of a recording in samples, and remixing a recording.[72]

While samples, remixes, and audiovisual works that contain master recordings are still subject to a derivative works test (as outlined in Part II), such works are presumptively derivatives by definition.[73] Samples, remixes, and audiovisual works are not subject to mandatory statutory licensing ("compulsory licensing"), which allows the copyright holder of the sound recording to charge virtually any rate.[74] As the most-frequent owners of the master recording, record labels reap the licensing revenue unless a recording contract provides otherwise.[75] One typical contractual arrangement allocates 50% of the licensing revenue to the artist, less certain deductions, and 50% to the record label.[76] However, upon the exercise of termination rights, the artist would begin receiving all

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70 *See, e.g.*, DAVID ARDITI, ITAKE-OVER: THE RECORDING INDUSTRY IN THE DIGITAL ERA 52 (2015); NIMMER, *supra* note 31, at § 30.03; PASSMAN, *supra* note 26, at 349.

71 *See* ARDITI, *supra* note 70, at 52. To establish a claim for copyright infringement, the owner of the copyright must first prove (1) valid ownership, and (2) that the alleged infringer had access to the copyrighted material and produced work substantially similar to protected elements of the preexisting work. *See* Ent. Rsch. Grp., Inc., v. Genesis Creative Grp., Inc., 122 F.3d 1211, 1217 (9th Cir. 1997).

72 *See* ARDITI, *supra* note 70, at 52–54; NIMMER, *supra* note 31, at § 30.03; *see also Licensing 101 for Musicians: Samples, Remixes, Covers, and More*, FRONT RUNNER MAG. (Jan. 2, 2018), https://perma.cc/U7XU-B6PE.

73 *See* 17 U.S.C. § 101 ("A 'derivative work' is based upon one or more preexisting works, such as a . . . motion picture version . . . ."); *id.* § 114(b) (stating that "the right to prepare derivative work[s]" based on a sound recording is limited to works that have "rearranged, remixed, or otherwise altered [the sound recording] in sequence or quality"); *see also* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 803 n.18 (6th Cir. 2005) ("A recording that embodies samples taken from the sound recording of another is by definition [] 'rearranged, remixed, or otherwise altered in sequence or quality.'" (quoting § 114(b))).

74 *See* 17 U.S.C. §§ 114–15; PASSMAN, *supra* note 26, at 349.

75 *See* PASSMAN, *supra* note 26, at 349.

76 *See* MCLEOD ET AL., *supra* note 2, at 79–80. It must be noted that licensing revenue is generally split evenly between the owner of the sound recording copyright and the owner of the musical composition copyright. *See* JASON B. BAZINET, MARK MAY, KOTA EZAWA, THOMAS A SINGLEHURST, JIM SUVA & ALICIA YAP, PUTTING THE BAND BACK TOGETHER: REMASTERING THE WORLD OF MUSIC 11 (2018), https://perma.cc/8F9J-PV37. This means that record labels usually receive fifty percent of aggregate licensing revenue. *See id.* Accordingly, recording artists usually receive twenty-five percent of aggregate revenue. *See id.*

licensing revenue for new licensing ventures—such as sampling and mixing deals—that benefitted the record label pre-termination.[77]

The use of a sound recording in an audiovisual work[78] requires a synchronization license, which permits the licensee to sync the recording with specified media such as video games or movies.[79] After accounting for transaction costs, synchronization licenses for preexisting sound recordings generate revenue for record labels and could provide marketing opportunities across entertainment media.[80] For example, television producers often license sound recordings for over-the-air broadcasts, with payments ranging from around $10,000 to more than $50,000 "depending on whether they're licensing an obscure song or a well-known hit, and also how prominently it's used."[81] Video game companies normally pay advances around $5,000 to $10,000 for sound recordings, and even more if the recording is used in a commercial.[82] A major movie studio generally pays around $15,000 for a minor usage of a sound recording, or $100,000 for a major usage.[83] And if a major movie studio uses a sound recording during the opening credits, they may end up paying advances upwards of $300,000.[84] Clearly, synchronization licenses could produce substantial revenue when paid directly to artists who have recovered their sound recordings via termination.

Additionally, master use licenses for remixes and samples are "potential treasure troves."[85] Sampling is a common practice in numerous genres of popular music, such as hip-hop, disco, and electronic dance music, which involves incorporating segments of a preexisting sound recording with a new recording.[86] An example of sampling is the use of the

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77 *See* 17 U.S.C. § 203.

78 *See id.* § 101 (defining "audiovisual works" as: "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.").

79 *See* ARDITI, *supra* note 70, at 51–54; *see also* PASSMAN, *supra* note 26, at 265.

80 *See* ARDITI, *supra* note 70, at 52; *see also* MCLEOD ET AL., *supra* note 2, at 10 (explaining that the transaction costs of licensing agreements are the time, money, and resources which parties expend to negotiate a deal).

81 PASSMAN, *supra* note 26, at 246.

82 *See id.* at 248.

83 *See id.* at 266.

84 *See id.*

85 MCLEOD ET AL., *supra* note 2, at 157; *see also* NIMMER, *supra* note 31, at § 30.03[C][1]; *Licensing 101*, *supra* note 72.

86 *See* Newton v. Diamond, 388 F.3d 1189, 1192 (9th Cir. 2004); MCLEOD ET AL., *supra* note 2, at 7.

bass line from David Bowie and Queen's "Under Pressure" in "Ice Ice Baby" by Vanilla Ice.[87]

The process of successfully obtaining a license, known as "clearing," usually results in a lump-sum buyout payment or royalty agreement.[88] Royalty rates and buyout prices are determined based on a variety of factors.[89] Buyout payments for sample licenses can range from $500 to $15,000 for each sample, or even $100,000 per sample when sampling popular artists like Marvin Gaye.[90] Royalty rates can range from $0.01 to $0.15 per record.[91]

A remix is a new version of a preexisting record that has recombined and rebalanced preexisting instrumental or vocal tracks or different vocal or instrumental audio tracks.[92] Remix licenses can range from $100 to $20,000 and remix royalties are usually split evenly between the remixing artist and the owner of the master recording.[93] Artists that are hired to create remixes are usually given an advance but generally do not receive any royalties.[94] An example of a commercially successful remix is Kygo's remix of the Whitney Houston cover of Steve Winwood's "Higher Love," which contains a lengthy sample of Houston's vocal track.[95]

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87 *See* MCLEOD ET AL., *supra* note 2, at 4.

88 *See id.* at 153 (citing PASSMAN, *supra* note 26, at 307–08).

89 For a list of some factors which influence a buyout amount or royalty rate that pertain to the sampled musician and song being sampled, see *id.* at 154 (listing factors including "[q]uantitative portion of the recording or composition used," "[q]ualitative importance of the portion used," "[w]hether the sample comes from the chorus, the melody, or the background," "[w]hether the sample comes from the vocal portion or the instrumental portion," "[r]ecognizability of the portion sampled," "[w]hether the sampled musician had a major label or distributor," "[p]opularity of the sampled recording or composition," and "[l]evel of the sampled musician's commercial success and fame").

90 *Id.* at 153, 160.

91 *Id.* at 153.

92 *See* DAVID J. GUNKEL, OF REMIXOLOGY: ETHICS AND AESTHETICS AFTER REMIX 15 (2015).

93 *See* Budi Voogt, Jeffrey Yau & Ruth Jiang, *The Producer's Guide to Remixing: How to Pick Tracks, Get the Rights and Still Release Original Music*, HEROIC ACADEMY (Dec. 31, 2019), https://perma.cc/B8CS-8LRT.

94 *See* Hugh McIntyre, *A-Trak Talks 10 Years of Remixing and Why Remix Deals Need to Change*, FORBES (Nov. 3, 2016), https://perma.cc/26JE-FNNX.

95 *See id.*; *see also* WHITNEY HOUSTON, *Higher Love*, on I'M YOUR BABY TONIGHT (Arista Records, Inc. 1990). As of February 24, 2020, Kygo's remix of "Higher Love" amassed over 102 million views on YouTube and 294 million streams on Spotify within six months of the first release. *See Kygo & Whitney Houston—Higher Love (Official Video)*, YOUTUBE (Aug. 25, 2019), https://perma.cc/GPN9-XALU; *Kygo's Artist Profile*, SPOTIFY, https://perma.cc/UQ96-FRPN.

D. *Mastering and Remastering Sound Recordings*

To assess the question of whether a remastered recording constitutes a derivative work as discussed in Parts II and III, a technical understanding of the mastering and remastering processes is necessary. Section 1 walks through the process of mastering sound recordings and Section 2 explains the process of remastering sound recordings.

1. The Process of Mastering Sound Recordings

Before master recordings are distributed, two separate parties—a mixing engineer and a mastering engineer—must finalize the recorded sound.[96] The penultimate stage of the sound recording process is mixing, the blending of recorded tracks to create a near-final sonic image called the mix.[97] A mix is created by blending multiple recorded tracks from various instruments and converting the separate sounds into a single sound signal.[98] Mixing involves processing that signal by changing the spatial relationships between different sounds ("panning"), balancing the levels of each track, adjusting the volume of particular frequencies ("equalization"), and adding various other effects.[99] Once the tracks have been mixed, the mastering engineer takes over.[100]

Mastering, the final step prior to manufacturing a sound recording, is the conclusive sonic manipulation of the mix where the goal is to achieve technical excellence, as the recording will be sold to consumers.[101] The process of mastering is a quality control measure that involves a myriad of adjustments to the mix.[102] The mastering engineer arranges the order of songs, adds space in between songs, ensures the volume of each song is constant between songs, eliminates pops, clicks, and digital errors (called distortion), and generally makes the recording as loud as the technology will allow.[103] Additionally, the mastering engineer corrects the mixing

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[96] *See* MICHAEL ZAGER, MUSIC PRODUCTION: FOR PRODUCERS, COMPOSERS, ARRANGERS, AND STUDENTS 136–138 (2d ed. 2012).

[97] *See id.* at 137.

[98] *See* GUNKEL, *supra* note 92, at 15.

[99] *See* JAY HODGSON, UNDERSTANDING RECORDINGS: A FIELD GUIDE TO RECORDING PRACTICE 73 (2010); ZAGER, *supra* note 96, at 138–41. Other effects include reverberation, compression, modulation, and delay. *See* HODGSON, *supra* note 99, at 138; ZAGER, *supra* note 96, at 272–73.

[100] *See* ZAGER, *supra* note 96, at 137.

[101] *See id.*

[102] HODGSON, *supra* note 99, at 189, 191.

[103] *See* ZAGER, *supra* note 96, at 137. Making a sound recording as loud as possible during the mastering process is commonly referred to as the "loudness war." *See* ALLAN WATSON, CULTURAL PRODUCTION IN AND BEYOND THE RECORDING STUDIO 45 (2015). For recordings of pop music to be

engineer's mistakes and reapplies equalization techniques and other mixing effects.[104] The final step is to format the sound recordings for specific playback mediums of media.[105]

2. The Process of Remastering Sound Recordings

Simply stated, remastering is conducting the mastering process again to attain an improved sound quality and enhance playback with new listening mediums.[106] Sound recording is constantly evolving in terms of aesthetics and technological advancements.[107] Mastering engineers can use the most modern technology to remaster sound recordings with techniques unavailable when the original sound recording came out in order to make additional improvements such as eliminating hums, sibilance, or unwanted silence.[108]

Sound quality can also be improved by correcting a musician's recording performance mistakes or even adding sounds.[109] For instance, on the master recording of the classic Beatles song "Day Tripper," the guitarist "flubs" the last note of a scale at 1:39 and 2:32; however, in the remastered version, the mastering engineer corrected the erroneous guitar riff.[110] The fiftieth anniversary version of Led Zeppelin's live album, "The Song Remains the Same," provides another example of remastering—the remastered version features "an extended John Bonham drum solo during 'Moby Dick'" that was not in the original.[111]

Sound recordings are also remastered to utilize evolving playback formats.[112] In fact, the role of mastering engineers has historically been to remaster recordings on physical analog mediums (such as tapes or vinyl)

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competitive in the music market, the sound recording is processed in a specific way that makes it sound louder than other music played at the same volume. *See id.* at 45; ZAGER, *supra* note 96, at 137.

104 *See* HODGSON, *supra* note 99, at 191.

105 *See id.* at 228.

106 *See* Schneider, *supra* note 20, at 1902; Matt Gluskin, *Repress, Reissue and Remaster Explained*, WAX TIMES (Sept. 7, 2014), https://perma.cc/N7MM-474K.

107 *See* HODGSON, *supra* note 99, at 228.

108 *See* Diehl, *supra* note 14.

109 *See* TIM J. ANDERSON, MAKING EASY LISTENING: MATERIAL CULTURE AND POSTWAR AMERICAN RECORDING 144 (2006); TED MONTGOMERY, THE BEATLES THROUGH HEADPHONES: THE QUIRKS, PECCADILLOES, NUANCES AND SONIC DELIGHTS OF THE GREATEST MUSIC EVER RECORDED 125–26 (2014).

110 MONTGOMERY, *supra* note 109, at 125–26.

111 Kory Grow, *Led Zeppelin Plan Lavish, Remastered 'Song Remains the Same' Reissue*, ROLLING STONE (June 21, 2018), https://perma.cc/6Z69-AT5S.

112 *See* HODGSON, *supra* note 99, at 228.

and convert them to digital formats such as CDs or computer files.[113] Analog-to-digital conversion is a technical process where a conversion device processes an analog sound signal and converts it to a digital waveform, which essentially consists of coded ones and zeroes.[114] During the conversion, the mastering engineer can manipulate the digital waveform with effects such as compression or reverberation.[115] The digital waveform can then be stored digitally and played on computers in formats such as MP3 or WAV.[116] Digital remasters enable exploitation of the analog predecessor for use with such digital mediums.[117] Overall, digital remasters are often considered "conspicuously clearer" than the analog master.[118]

II. Applying the *Durham* Test of Distinguishable Variation to Sound Recordings: *ABS Entertainment, Inc., v. CBS Corp.*

Section A of this Part explains the facts, issue, and procedural history of *ABS Entertainment* pertinent to the discussion of whether remastered sound recordings constitute derivative works.[119] Section B provides the court's holding, defines the *Durham* test of distinguishable variation for derivative works, and explains the court's application of the *Durham* test to remastered sound recordings.[120]

A. *Relevant Facts, Issue, and Procedural History*

Four record labels—ABS Entertainment, Inc., Malaco, Inc., Brunswick Record Corp., and Barnaby Records, Inc. (collectively, "ABS" for the purposes of the lawsuit)—owned copyrighted sound recordings by a variety of recording artists including Al Green, the Everly Brothers, King Floyd, Ray Stevens, the Lost Generation, and Mahalia Jackson.[121] ABS had engaged in the music business for decades, where they distributed, sold, and licensed "the reproduction, distribution, and performance of sound

113 *See* WATSON, *supra* note 103, at 44.

114 *See* ZAGER, *supra* note 96, at 267.

115 *See id.*

116 *See id*.

117 *See* Roos, *supra* note 38.

118 Diehl, *supra* note 14.

119 *See* ABS Ent., Inc. v. CBS Corp., 908 F.3d 405, 413–25 (9th Cir. 2018).

120 *See id.* at 414 (discussing Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 909 (2d Cir. 1980)).

121 *See* ABS Ent., Inc. v. CBS Corp., No. 2:15-cv-15-6257-PA-AGR, 2018 WL 3966179, at *2–3 (C.D. Cal. May 30, 2016).

recordings for use in albums, CDs, audiovisual works, and for streaming and downloading music over the Internet."[122]

As playback technology advanced from analog to digital formats, ABS hired mastering engineers to remaster their analog recordings for digital formats.[123] ABS sought to optimize the sound recordings for new digital formats by utilizing standard and modern remastering techniques to accurately reproduce their analog sound recordings.[124] The remastered sound recordings exclusively contained sounds fixed in ABS's original master recordings with no sounds rearranged or removed; rather, the remasters had only certain particular technical aural enhancements such as adjusted equalization, altered channel assignments, and some edited sounds.[125] ABS did not intend for the remasters to be any different in character from their respective masters.[126] While unstated in the record, the digital remasters enabled ABS to license their sound recordings for sampling and audiovisual works.[127]

CBS Corporation and CBS Radio, Inc. (collectively, "CBS") allegedly streamed or broadcasted at least forty-eight of ABS's remastered recordings of works fixed before 1972.[128] CBS did not pay ABS directly for streaming or broadcasting their remastered recordings.[129] CBS only needed to pay ABS directly if the broadcasted pre-1972 sound recordings were governed by state law and not federal law, since pre-1972 sound recordings are not protected by federal copyright law.[130] However, CBS claimed the remastered pre-1972 works were derivative works fixed after 1972 and, consequently, that federal law applied.[131] Therefore, CBS chose to comply with federal law and paid certain statutory licensing fees for the digitally streamed content but did not pay for broadcasting the recordings

122 *Id.* at *4.

123 *See ABS Ent.*, 908 F.3d at 410–11.

124 *See id*. at 411.

125 *See id.* at 411–12.

126 *See id.* at 411.

127 *See, e.g.*, *Licensing/Sampling*, BRUNSWICK RECORDS, https://perma.cc/U828-WJE7. Barnaby Records licensed samples to artists such as Beyoncé, Jay-Z, and Common. *See id.* Barnaby Records also licensed remastered recordings for audiovisual works such as the movie "Coming to America," the television show "The Sopranos," and advertisements for Starbucks, Wal-Mart, and ESPN. *See id.* Similarly, Malaco Records licensed some of their remastered recordings for Louis Vuitton and Heineken to use in advertisements. *See Advertising Placements*, MALACO MUSIC LICENSING, https://perma.cc/UW56-W6EN.

128 *See ABS Ent.*, 908 F.3d at 413.

129 *See id.* at 411.

130 *See* 17 U.S.C. § 301(c) (2012) (later amended 2018) ("[N]o sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067."); *see also ABS Ent.*, 908 F.3d at 411.

131 *See ABS Ent.*, 908 F.3d at 412.

over terrestrial radio pursuant to the safe harbor for performances on terrestrial radio.[132]

As a result, ABS brought suit against CBS in the federal district court for the Central District of California.[133] ABS alleged that CBS's streaming and broadcasting of their remastered pre-1972 sound recordings constituted unfair competition, copyright infringement, and conversion and misappropriation under California state law.[134] ABS also argued that federal copyright law did not apply since the master recordings were fixed before 1972, and therefore the remastered recordings broadcasted and streamed by CBS would not be subject to the Copyright Act's licensing schemes.[135] In response, CBS argued the remastered recordings constituted derivative works, and were thus "subject only to federal copyright law."[136] While the preemption issue is necessary to explain the arguments, the relevant issue for purposes of this Comment is whether the remastered sound recordings constituted derivative works.[137]

The district court granted summary judgment for CBS and held that the remastered recordings were derivative works containing original expression and therefore were governed by federal copyright protection, meaning that CBS did not violate ABS's rights under California state law.[138] The district court only applied the *Durham* test's first prong and explained the remastered recordings constituted sufficiently original derivative works because they contained additional reverberation, altered channel assignments, equalization adjustments, and a different overall tone color of the sounds.[139]

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132 *See id.* at 411; *see also* 17 U.S.C. § 114.

133 *See ABS Ent.*, 908 F.3d at 411.

134 *See id.*; *see also* CAL. BUS. & PROF. CODE § 17200 (West 2018) (protecting against unfair competition); CAL. CIV. CODE § 980(a)(2) (West 2018) (protecting an author's property rights in pre-1972 sound recordings); Ely, *supra* note 16 (discussing the relationship between federal preemption and pre-1972 sound recordings).

135 *See ABS Ent.*, 908 F.3d at 410–13; *see also* 17 U.S.C. § 301(c) (2012) (later amended 2018).

136 *ABS Ent.*, 908 F.3d at 412. Since the decision, Congress passed the Orrin G. Hatch—Bob Goodlatte Music Modernization Act and the case will likely settle out of court. *See* Pub L. No. 115-264, 132 Stat. 3676; *see also ABS Ent.*, 908 F.3d at 427–28. *Compare* 17 U.S.C. § 301(c), *with id.* § 1401(e)(1) ("[T]his section preempts any claim of common law copyright or equivalent right under the laws of any State arising from a digital audio transmission or reproduction that is made before the date of enactment of this section of a sound recording fixed before February 15, 1972, if [certain compulsory licensing requirements and criteria are met]."), *and id.* § 1401(e)(1)(B)(i) (providing up to three years of backpay for broadcasted or streamed sound recordings if certain requirements and criteria are met).

137 *See ABS Ent.*, 908 F.3d at 412.

138 *See* ABS Ent., Inc. v. CBS Corp., No. 2:15-cv-15-6257-PA-AGR, 2018 WL 3966179, at *28–29, 32 (C.D. Cal. May 30, 2016).

139 *See id.* at *17–18, 25–29.

B. *Circuit Holding and the Durham Derivative Works Test of Distinguishable Variation*

The Ninth Circuit Court of Appeals reversed the grant of summary judgment for CBS and held the issue of whether the remastered sound recordings constituted derivative works presented a triable issue of fact.[140] To determine whether a work contains sufficient originality to be a considered a derivative work, the court applied the two-prong *Durham* test of distinguishable variation.[141] Each prong functions as a slightly different way of asking the same underlying question of whether a derivative work satisfies the constitutional requirement that protected works must contain original expression.[142]

Under the first prong, original aspects of the new work must exceed the threshold of trivial variation.[143] And under the second prong, "the original aspects of a derivative work must reflect the degree to which it relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material."[144] When both prongs are met—meaning the new work has more than trivial variation and would not impact the protected underlying work in any way—the new work is a distinguishable variation from the underlying work, with a different identity and character, which is sufficient for a finding that the new work is an independently copyrightable derivative work.[145]

1. "Werking" Out the First Prong: Derivative Works Must Have More Than Trivial Originality

The first prong's central inquiry is "whether the derivative work is original to the author and non-trivial."[146] Whereas the district court found that the remastered sound recordings had non-trivial perceptible changes sufficient to meet the section 114(b) "quality" standard for derivative sound recordings, the Ninth Circuit found that conclusion to be legal

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140 *See ABS Ent.*, 908 F.3d at 424.

141 *See id.* at 414 (explaining the test from Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 909 (2d Cir. 1980)); *see also* U.S. Auto Parts Network, Inc. v. Parts Geek, LCC, 692 F.3d 1009, 1016 (9th Cir. 2012) (applying *Durham*, 630 F.2d at 909)).

142 *See U.S. Auto Parts*, 692 F.3d at 1016 (quoting Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991)).

143 *Id.* (quoting *Durham*, 630 F.2d at 909).

144 *Id.* (citing *Durham*, 630 F.2d at 909).

145 *See ABS Ent.*, 908 F.3d at 415, 419.

146 *U.S. Auto Parts*, 692 F.3d at 1017.

error.[147] The court read the term "quality" as referring to the sound recording's identity and character, rather than an overall measurement of improvement.[148] Since the mastering engineers neither removed or added sounds to the master nor resequenced the master recordings, the court held the recordings did not have an improved sound "quality" and thus presumptively lacked the necessary originality.[149]

To determine the essential identity and character of the remasters, the court primarily relied on three factors from *Meshwerks, Inc. v. Toyota Motor Sales U.S.A.*[150]: (1) merely translating a derivative work into a new and different medium does not confer a sufficiently original character; (2) a comparison of the start and end works without considering the intermediary process; and (3) the author's intent to create something different and new.[151] The three factors are a non-exhaustive list of considerations to determine the essential identity and character of a remastered recording and no factor is dispositive.[152] This Section discusses each factor in turn.

a. *Translating a Work to a New Medium Constitutes Trivial Originality*

As to the first consideration, technical improvements connected with the translation of an analog master recording into a digital remaster do not meet the originality threshold.[153] As the Meshworks court noted, "the fact that a work in one medium has been copied from a work in another medium does not render it any less a 'copy.'"[154] The court looked to several cases applying the *Durham* framework to assess the change in medium from analog to digital.[155] In *Durham*, the Second Circuit Court of Appeals held that manufacturing toys resembling animated Disney characters lacked originality because nothing recognizable to the author's individual contribution existed, despite the change in medium.[156] Similarly, in *Meshwerks*, the Tenth Circuit Court of Appeals held that digital wire-frame models of Toyota automobiles were indistinguishable from the underlying

147 *ABS Ent.*, 908 F.3d. at 420 n.7 (discussing § 114(b)).
148 *Id.*
149 *See id.* at 419–20.
150 528 F.3d 1258 (10th Cir. 2008).
151 *See ABS Ent.*, 908 F.3d at 416 (citing *Meshworks*, 528 F.3d at 1267–68).
152 *See id.* at 418–19.
153 *See id.* at 417–19.
154 *Meshwerks*, 528 F.3d at 1267 (quoting NIMMER, *supra* note 31, at § 8.01[B]).
155 *See ABS Ent.*, 908 F.3d at 415–19.
156 *See* Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 910–11 (2d Cir. 1980).

automobiles since the digital models merely depicted the three-dimensional automobiles in a digital two-dimension medium.[157]

While the remastered recordings at issue in *ABS Entertainment* had a different loudness range, altered sound balance, improved timbre, and a different spatial arrangement, such changes were merely incidental to the digital medium.[158] The analog masters on vinyl lacked the expansive sound range that digital versions could reproduce and the remastering process allowed for the above technical improvements associated with the digital medium.[159] Therefore, the court found the digital remasters had the exact same identity and character as the analog masters but in a different playback medium.[160]

b. *Comparing the Start and End Products*

To answer the question of whether the remastered recordings possessed distinguishable variation from the masters, the court compared the recordings.[161] A bedrock principle of copyright protection is that the final product of the purported derivative work is compared to the original work irrespective of (1) the conversion process and (2) author's skillful or creative labor.[162] The court illustrated this start-to-end comparison with a helpful hypothetical:

> A remastering, for example, of Tony Bennett's "I Left My Heart in San Francisco" recording from its original analog format into digital format, even with declicking, noise reduction and small changes in volume or emphasis, is no less Bennett's "I Left My Heart in San Francisco" recording—it retains the same essential character and identity as the underlying original sound recording, notwithstanding the presence of trivial, minor or insignificant changes from the original. That is so even if the digital version would be perceived by a listener to be a brighter or cleaner rendition.[163]

This hypothetical demonstrates that trivial changes like noise reduction, declicking, or a clearer sound do not determine a work's eligibility for copyright protection; rather, a sound recording's character is defined by the musical elements unique to a performance, such as "emphasis or the shading of a musical note, the tone of voice, the inflection, [and] the timing of a vocal rendition."[164] Since the musical elements in the remastered recordings remained the same, with no added, removed, or

[157] *See Meshwerks*, 528 F.3d at 1265, 1267.

[158] *See ABS Ent.*, 908 F.3d at 420.

[159] *See id.*

[160] *See id.*

[161] *See id.* at 417–19.

[162] *See Meshwerks*, 528 F.3d at 1268.

[163] *ABS Ent.*, 908 F.3d at 418.

[164] *Id.* at 417 (quoting NIMMER, *supra* note 31, at § 2.10).

remixed sounds, the court held the remasters constituted mere copies of the respective master sound recordings.[165] Therefore, although a mastering engineer may exercise skillful or creative labor in remastering a sound recording, the process of remastering does not guarantee separate copyrightability for the remaster as a derivative work.[166]

c. *Licensor's Intent to Create Original Material*

Authorial intent can shed light on the issue of whether a purportedly derivative work has the requisite degree of originality or is merely a copy.[167] When an artist positively "sets out to be unoriginal—to make a copy of someone else's creation, rather than to create an original work—it is far more likely that the resultant product will, in fact, be unoriginal."[168]

In *ABS Entertainment*, the Ninth Circuit Court of Appeals noted that a mastering engineer's duty when remastering a recording is typically to "preserve and protect the essential character and identity of the original sound recording, and to present *that original sound recording* in the best light possible."[169] ABS needed to remaster their analog sound recordings for digital use and they hired mastering engineers to recreate better versions of the masters.[170] While not dispositive, ABS's demonstrated intent supported the court's finding that the remasters lacked originality, particularly as no evidence in the record suggested that ABS desired to make substantive and distinguishable variations of the masters or change the essential character of the master recordings in any way.[171]

Therefore, in light of the above considerations, the court held that a genuine issue of material fact existed as to whether the remastered sound recordings possessed more than trivial originality and suggested that any improvements present in the remasters resulted from the incidental change of medium and did not impact the identity and character of the masters.[172] But the court did not hold that remastered sound recordings cannot be derivative works, only that remasters created "as a copy of the original analog sound recording will rarely exhibit the necessary originality to qualify for independent copyright protection."[173]

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165 *See id.* at 418–19.

166 *See id.* at 419 (citing *Meshwerks*, 528 F.3d at 1268).

167 *See Meshwerks*, 528 F.3d at 1268.

168 *Id.*

169 *ABS Ent.*, 908 F.3d at 423.

170 *See id.* at 421–23.

171 *See id.* at 421.

172 *See id.* at 423.

173 *Id.*

2. Second Prong: Reliance on Preexisting Material Cannot Affect the Scope of Copyright Protection Afforded to Preexisting Material

As to the second prong, the Ninth Circuit held a genuine issue of material fact existed as to whether holding the remastered sound recordings as derivative works would affect the scope of copyright protection afforded to the master recordings.[174] Under the *Durham* test's second prong, the issue is whether recognizing the purportedly derivative work as a derivative work would impact the ability of the copyright owner of the preexisting work to exercise her exclusive rights.[175] Accordingly, the second prong requires that the purportedly derivative work must overtly "reflect the degree to which it relies on preexisting material" and cannot affect the scope of the preexisting material's copyright protection in any way.[176] "This prong ensures that a derivative work author . . . who contributes the requisite [more-than-trivial] amount of creative authorship" under the test's first prong does not encroach upon the exclusive rights possessed by the owner of the protected preexisting work.[177] A new work that fails the second prong protects the underlying copyright holder's right to create and authorize future derivative works without the "concern for aggressive enforcement against those later derivative works by the earlier derivative work copyright holder."[178]

Since the district court failed to apply the second prong altogether, the Ninth Circuit remanded for further consideration but provided some guidance without fully exploring the second prong.[179] The court compared the *ABS Entertainment* facts to those in *Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*,[180] where Entertainment Research Group ("ERG") created costumes of protected cereal box characters such as "Toucan Sam" and "Cap'n Crunch."[181] In *Entertainment Research Group*, the Ninth Circuit Court of Appeals noted that "if ERG had copyrights for its costumes, any future licensee who was hired to manufacture costumes

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174 *See id.* at 424.

175 *See ABS Ent.*, 908 F.3d at 423–24.

176 *Id.* at 423 (quoting U.S. Auto Parts Network, Inc. v. Parts Geek, LLC, 692 F.3d 1009, 1016 (9th Cir. 2012)).

177 *Id.* at 424 (citing *U.S. Auto Parts*, 692 F.3d at 1017).

178 *Id.*

179 *See id.*

180 122 F.3d 1211 (9th Cir. 1997).

181 *See ABS Ent.*, 908 F.3d at 424 (discussing *Ent. Rsch. Grp.*, 122 F.3d at 1224); *see also Ent. Rsch. Grp.*, 122 F.3d at 1218.

depicting these characters would likely face a strong copyright infringement suit from ERG."[182]

With *Entertainment Research Group* in mind, the court observed that in *ABS Entertainment* if ABS licensed use of their analog master recordings for remixes or samples, a separate party holding the rights to a derivative remaster could sue the licensee for infringement.[183] Since the analog master recordings and derivative digital remaster recordings would have slight (if any) discernable differences, a licensee's remixes and works utilizing samples would risk an infringement action from the owner of the remaster.[184] Further, the accessible digital remasters would be more marketable to prospective licensees.[185] Just as ERG would have a "de facto monopoly" on future costumes depicting the underlying cereal box characters, any owner of a derivative remaster would have a "de facto monopoly" on future derivative works incorporating the underlying analog master in a digital format.[186] Therefore, ABS's right to authorize the creation of derivative works from the master recordings would be hampered since prospective licensees could face litigation, making the digital remasters more marketable at the expense of ABS's masters being less marketable.[187] Accordingly, the court held that a genuine issue of material fact existed under the second prong, as derivative digital remasters may interfere with the rights attached to the analog masters.[188]

III. Why Remasters Should Never be Derivative Works Under *ABS Entertainment*

While termination rights could put valuable master sound recordings back in the hands of artists, record labels can take steps to minimize the loss of master sound recordings.[189] Record labels could minimize their losses by taking advantage of the derivative works exception to the termination provision.[190] If a record label successfully created derivative remasters prior to termination, the label could secure post-termination

[182] *Ent. Rsch. Grp.*, 122 F.3d at 1224.

[183] *See id.*

[184] *See id.*

[185] *See id.*

[186] *Id.*

[187] *See* ABS Ent., Inc. v. CBS Corp., 908 F.3d 405, 424 (9th Cir. 2018).

[188] *See id.*

[189] *See* 17 U.S.C. § 203(b); *see also* Randy S. Frisch & Matthew J. Fortnow, *Termination of Copyrights in Sound Recordings: Is There a Leak in the Record Company Vaults?*, 17 COLUM.-VLA J.L. & ARTS 211, 235 (1992).

[190] *See* 17 U.S.C. § 203(b).

use which could dramatically interfere with a recording artist's termination rights.[191]

In light of termination rights, this Section argues that under *ABS Entertainment*, record labels will be unable to invoke the derivative works exception by remastering sound recordings because (1) remasters do not possess more than trivial originality since remasters only have mechanical sonic improvements with no bearing on the recording's identity and character, and (2) remasters will always hinder the terminating party's right to license derivative works based on the master recording.[192]

The analysis may be conducted considering the following hypothetical. Imagine that in 2018, the band Journey successfully terminated prior grants of its analog "Don't Stop Believin'" master, previously held by a fictional record company ("Record Company").[193] As section 203 requires, Journey sent its termination notice just over two years before termination in 2016.[194] One day prior to termination, Record Company sought to take advantage of the derivative works exception and released the only digitally remastered "Don't Stop Believin'" in existence.[195] Assume now that the remastered "Don't Stop Believin'" does not possess any added or removed sounds but does have altered channel assignments, different panning, reduced clicking noises, and is both compressed and equalized.

A. *First Prong: A Remaster's Mechanical Improvements Are Always Trivial*

As discussed above, a new work based on a preexisting work must have more than trivial originality to be considered a derivative work.[196] In assessing the originality of remastered sound recordings, since remasters generally do not possess rearranged, remixed, or resequenced sounds, the originality threshold can only be surpassed if the remaster alters the sound quality.[197] In *ABS Entertainment*, the court took "quality" to mean character and identity of the sound recording rather than aural improvements.[198] This Section argues that under the court's prescribed definition of quality,

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191 *See* Brennick, *supra* note 17, at 802.

192 *See ABS Ent.*, 908 F.3d at 413–25.

193 *See* JOURNEY, *Don't Stop Believin'*, *on* ESCAPE (Columbia Records 1981).

194 *See* 17 U.S.C. § 203(a).

195 *See id.*; *see also* Tuneen E. Chisolm, *Whose Song is That? Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act*, 19 YALE J.L. TECH. 274, 328–29 (2017).

196 *See ABS Ent.*, 908 F.3d at 414.

197 *See* 17 U.S.C. § 114(b).

198 *See ABS Ent.*, 908 F.3d at 420 n.7 (discussing § 114(b)).

remasters do not possess an altered character and identity sufficient to exceed the triviality threshold.[199]

1. A Record Label That Remasters a Sound Recording Does Not Intend to Create Original Material

In assessing originality, the *ABS Entertainment* court made clear that while authorial intent is not dispositive, it is persuasive evidence that a final product merely contains trivial contributions.[200] With respect to termination rights, a remaster held to be a derivative work with minimal derivations would maximize the terminating party's ability to exploit the master.[201] Accordingly, a record label seeking to circumvent termination rights by remastering a sound recording would intend a near-replica of the master rather than creating distinguishable original material.

2. A Comparison of Start and End Products Reveals Remasters Only Possess Trivial Aural Improvements Incidental to the Change in Medium

Regardless of any technical skill or labor necessary to remaster a sound recording, remasters without added or remixed sounds are nearly identical to the respective master and lack original expression.[202] In comparing an analog master and digital remaster without added or remixed sounds, the issue is whether the remaster is simply an unoriginal clone of the remaster or whether the remaster contains new copyrightable expression.[203] A remastered sound recording with additional sounds, such as an added drum solo, would present a clean severance between the remaster and master: the new drum solo is likely to contain added expression.[204] On the other hand, distinguishable expression present in a remastered sound recording without additional sounds becomes entangled with expression present in the master, and record labels would

199 *See id.*

200 *See id.* at 418–19.

201 *See* Peritz, *supra* note 20, at 414.

202 *See id.* at 418; *see also* Meshwerks, Inc. v. Toyota Motor Sales U.S.A, 528 F.3d 1258, 1268 (10th Cir. 2008) ("[W]e look only at the final *product*, not the process, and the fact that intensive, skillful, and even creative labor is invested in the process of creating a product does not guarantee its copyrightability.").

203 *See* 1 HOWARD B. ABRAMS & TYLER T. OCHOA, THE LAW OF COPYRIGHT § 2:3 (2018).

204 *See* U.S. COPYRIGHT OFFICE, CIRCULAR NO. 56, COPYRIGHT REGISTRATION FOR SOUND RECORDINGS 2–3 (2017), https://perma.cc/27TE-YT3S; *see also* Grow, *supra* note 111; Michael J. Madison, *The End of the Work as We Know It*, 19 J. INTELL. PROP. L. 325, 341 (2012).

argue that the entire remastered sound recording is protectable based on the panning, equalization, altered channel assignments, and declicking present throughout the entire remaster.[205]

In light of the entanglement problem, a remastered recording is an unoriginal copy of the master and contains no protectable expression.[206] Edits made during the remastering process are functionally driven considerations and do not amount to originality protected by copyright.[207] Although new channel assignments, adjusted equalization, and altered panning effects are likely perceptible, those changes merely have the potential to improve the sound recording's "crispness" incidental to the change in medium and do not alter musical notes, rhythmic inflections, or other musical elements necessary to distinguish the remaster's character.[208] As the court pointed out, a crisper digital remaster of "I Left My Heart in San Francisco" retains the exact same character and identity as the underlying master.[209]

While the court in *ABS Entertainment* held that remastering effects would "rarely exhibit the necessary originality to qualify for independent copyright protection," no amount of remastering effects could distinguish a remastered recording that accurately preserves the master's character.[210] Suppose Record Company digitally remastered "Don't Stop Believin'" for playback in a three-story enclosed experimental sound lab with 124 speakers capable of 360-degree audio.[211] Even if the remaster could be heard from all 124 speakers, the altered channel assignments constitute a utilitarian change necessary to play the remaster in the experimental sound lab.[212] Perhaps listening to a remastered "Don't Stop Believin'" amplified from 124 speakers sounds clearer than the mastered recording amplified from two speakers; however, under *ABS Entertainment*, since the remaster retains the identical musical character and identity found in the original, the remaster only has trivial differences compared to the master.[213]

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205 *See* ZAGER, *supra* note 96, at 132–33, 138–41; Peritz, *supra* note 20, at 412–13; *see also* 17 U.S.C. § 103(a).

206 *See* ABRAMS & OCHOA, *supra* note 203, at § 2:3.

207 *See* ABS Ent., Inc. v. CBS Corp., 908 F.3d 405, 418 (9th Cir. 2018).

208 *See id.*

209 *See id.*; *see also* Durham Indus., Inc. v. Tomy Corp., 630 F.2d 905, 908–09 (2d Cir. 1980) ("The three Tomy figures are instantly identifiable as embodiments of the Disney characters in yet another form: Mickey, Donald and Pluto are now represented as small, plastic wind-up toys.").

210 *ABS Ent.*, 908 F.3d at 423.

211 *See* Adi Robertson, *Step Into the Cube: Virginia Tech's Giant Virtual Reality Room*, THE VERGE (Mar. 13, 2015), https://perma.cc/manage/create?folder=55649.

212 *See ABS Ent.*, 908 F.3d at 415; Robertson, *supra* note 211.

213 *See ABS Ent.*, 908 F.3d at 418; Robertson, *supra* note 211.

Moreover, prior to *ABS Entertainment*, record labels may have argued that remasters contain original expression because remastering techniques and digital to audio conversion require skillful labor, but after the case that argument is less likely to hold water.[214] Despite the court's prudent acknowledgement that mastering engineers often make creative contributions to sound recordings, the court made clear that even creative efforts that do not add to or change the underlying work constitute a trivial contribution for the purposes of copyright protection.[215] This remains true even when a process is intricate and expensive because a near-exact or perfect duplicate of an original work cannot be afforded copyright protection.[216] Therefore, under the first prong as applied in *ABS Entertainment*, a remaster without added or remixed sounds would never possess more than trivial originality.[217]

B. *Second Prong: Digital Remasters Held as Derivative Works Would Destroy the Terminating Artist's Ability to Create Derivative Works*

Under the second *Durham* prong, a derivative work cannot affect the scope of protection afforded to the underlying work whatsoever.[218] Holding a remaster with miniscule variations as a derivative work would "put a weapon for harassment in the hands of mischievous [record labels that have an] intent on appropriating" or interfering with use of the master recording post-termination.[219] A terminating artist's ability to license her newly acquired master recording for samples, remixes, and audiovisual works would be drastically devalued by a record label with a derivative remastered sound recording in terms of authorizing derivative works.[220]

Post-termination, artists like Journey could (1) independently administer its newfound master recordings, (2) transfer the masters to a different record label, or (3) retransfer the masters to the original record

214 *See ABS Ent.*, 908 F.3d at 418; *contra* Alexander G. Comis, Note, *Copyright Killed the Internet Star: The Record Industry's Battle to Stop Copyright Infringement Online; A Case Note on* UMG Recordings, Inc. v. MP3.com, Inc. *and the Creation of a Derivative Work by the Digitization of Pre-1972 Sound Recordings*, 31 SW. U. L. REV. 753, 770 (2002) (arguing that a remastered recording has new copyrightable expression because remastering requires artistic skill).

215 *See ABS Ent.*, 908 F.3d at 418–19, 423; *see also* Meshwerks, Inc. v. Toyota Motor Sales U.S.A, 528 F.3d 1258, 1268 (10th Cir. 2008).

216 *See* ABRAMS & OCHOA, *supra* note 203, at § 2:8.

217 *See ABS Ent.*, 908 F.3d at 417.

218 *See* U.S. Auto Parts Network, Inc. v. Parts Geek, LLC, 692 F.3d 1009, 1016 (9th Cir. 2012) (quoting Ent. Rsch. Grp., Inc., v. Genesis Creative Grp., Inc., 122 F.3d 1211, 1220 (9th Cir. 1997)).

219 L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 492 (2d Cir. 1976).

220 *See ABS Ent.*, 908 F.3d at 424.

label transferee.[221] Suppose Journey decided to independently administer "Don't Stop Believin'" or sign with a new record label. If Journey created a digital remaster for licensing purposes, Journey could be directly sued by Record Company for infringement. And if Journey licensed its analog master to a third party for use in remixes, samples, or audiovisual works, the licensee would presumably convert the analog master to a digital format, add effects, or improve the recording's clarity.[222] In the event that the licensee's improvements to the newly digitized master resemble the remaster, the licensee would likely face an infringement suit brought by Record Company.[223]

This high risk of infringement would deter potential record labels from signing Journey and potential licensees from negotiating with Journey, which could result in a loss of substantial revenue.[224] "Don't Stop Believin'" has been featured in many prominent audiovisual works such as the Muppets, Yogi Bear, Saturday Night Live, Family Guy, and Scrubs.[225] Given the immense popularity of "Don't Stop Believin'" and Journey's clout as a popular artist, future synchronization licenses of the master could yield upwards of $50,000 plus royalties for each deal.[226] Additionally, "Don't Stop Believin'" has been sampled in over eighteen songs and presumably will be sampled many more times in the future, which could also result in thousands of dollars in licensing revenue and royalties.[227] Given the threat of litigation from Record Company, these valuable licensing transactions would be less likely to occur, reducing Journey's ability to authorize derivative works.[228]

A licensee's uncertainty of facing litigation from Record Company paired with Record Company's inability to license the "Don't Stop Believin'" remaster would have a chilling effect on Journey's ability to license the master recording and give Record Company a "de facto monopoly" on new derivative works.[229] In the case of termination rights, Record Company would then have considerable leverage over Journey.[230] If Journey wanted to exploit its master recording for licensing revenue,

221 *See* Brennick, *supra* note 17, at 815.

222 *Cf.* Roos, *supra* note 38.

223 *See ABS Ent.*, 908 F.3d at 424.

224 *See id.*; MCLEOD ET AL., *supra* note 2, at 7; PASSMAN, *supra* note 26, at 268–69.

225 *See Journey TV & Film Sync Placements*, TUNEFIND, https://perma.cc/ZP3X-5QVJ.

226 *See* JOURNEY, *supra* note 193; *see also* ARDITI, *supra* note 70, at 50–51.

227 *See* MCLEOD ET AL., *supra* note 2, at 152–53, 160; *see also* JOURNEY, *supra* note 193.

228 *See ABS Ent.*, 908 F.3d at 424.

229 *Id.*; *see also* 17 U.S.C. § 203(b)(1); PASSMAN, *supra* note 26, at 358; Ruth Towse, *Copyright Reversion in the Creative Industries: Economics and Fair Remuneration*, 41 COLUM. J.L. & ARTS 467, 484 (2018).

230 *See* Frisch & Fortnow, *supra* note 189, at 226.

Journey would need to resign with Record Company or negotiate a licensing deal with Record Company. A failure to resign or negotiate with Record Company would effectively freeze all potential licensing ventures for Journey. Therefore, a record label's ability to prevent derivative works would hinder an artist's right to authorize derivative works via licensing in a post-termination context. Such a scenario fails the second prong of *Durham*.[231]

Conclusion

As termination rights continue to ripen, recording artists like Journey, the Police, Billy Joel, and Kool & the Gang will be able to recover their valuable master sound recordings from record labels regardless of prior grants to the contrary.[232] Record labels will fight back under the derivative works exception to termination rights and claim remastered sound recordings are derivative works, which would permit record labels to exploit the remastered sound recordings post-termination.[233] However, in the wake of *ABS Entertainment*, record labels will be unable to invoke the derivative works exception for remastered sound recordings because remasters (1) never possess more than trivial originality without added or remixed sounds, and (2) holding remasters as derivative works would significantly limit the terminating artist's right to license derivative works for remixes, sampling, and audiovisual works.[234] Given the fact that termination reversions recently began in 2013, the precedential dust has yet to settle.[235] Recording artists and record labels alike expect copious litigation to ensue.[236]

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231 *See ABS Ent.*, 908 F.3d at 424; Towse, *supra* note 229, at 484.

232 *See* Castle, *supra* note 1; *see also* 17 U.S.C. § 203; Christman, *supra* note 1.

233 *See* 17 U.S.C. § 203(b)(1); *see also* Rohter, *supra* note 8.

234 *See ABS Ent.*, 908 F.3d at 423–25.

235 *See* 17 U.S.C. § 203.

236 *See* Castle, *supra* note 1.