No. 21-711

IN THE
Supreme Court of the United States

MARKHAM CONCEPTS, ET AL.,
Petitioners,
v.
HASBRO, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF PUBLIC KNOWLEDGE, LITA ROSARIO-RICHARDSON, ESQ., LIBRARY FUTURES INSTITUTE, AND FIGHT FOR THE FUTURE AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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INTEREST OF AMICI CURIAE

Public Knowledge[1] is a non-profit organization that is dedicated to preserving the public's access to knowledge and promoting creativity through balanced intellectual property rights. Public Knowledge advocates on behalf of the public interest for a balanced copyright system.

Lita Rosario-Richardson, Esq., is an attorney who represents musicians in copyright actions (including termination cases), administration of copyrights, negotiation of mechanical, synchronization, sample clearances, and performance licenses for music in all media. She was a founder and the VP of Business and Legal Affairs for University Music Group, Inc., and has negotiated distribution and publishing agreements with all four major record distribution and music publishing companies. She has represented musicians including George Clinton, Crystal Waters, Missy Elliott, SISQO, DRU HILL, and numerous others.

Library Futures Institute is a nonprofit organization that champions the right to equitable access to knowledge. Their mission is to empower libraries to take control of their digital futures and

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[1] Pursuant to Supreme Court Rule 37.3(a), Parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than amicus, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

provide non-discriminatory, open access to culture for the public good.

Fight for the Future is a nationwide digital rights organization working for a more equitable internet that empowers people with access to knowledge, culture, and information. From leading the digital protests that defeated the Stop Online Piracy Act to providing infrastructure for the Union of Musicians and Allied workers in their campaigns for justice at Spotify, Fight for the Future has spent the past ten years deeply invested in fighting not only for digital rights and digital access across the spectrum of creativity and culture, but for a better creative ecosystem for artists as well.

SUMMARY OF ARGUMENT

Termination rights are important, and the "work made for hire" exception is the biggest hurdle to exercising those rights. On both a practical and theoretical level, the "instance and expense" test muddies the waters and deprives artists of their statutory right to terminate licenses under 17 U.S.C. § 304. The test itself is applied inconsistently, causing uncertainty that ripples across an enormous sea of creative and economic activity. Nowhere is this more keenly felt than among musicians, for whom "work for hire" status has become an unavoidable point of contention in any termination action. Finally, the historical conditions and terms afforded to Black musicians lends termination rights an outsized importance—and their uncertainty a corresponding burden. To resolve this uncertainty and ensure that artists can effectively avail themselves of their statutory rights, the Court should grant certiorari.

ARGUMENT

Despite nearly a decade of extensive (and expensive) litigation from artists seeking to terminate grants and licenses, "public success stories are virtually non-existent." Dylan Gilbert et al., MAKING SENSE OF THE TERMINATION RIGHT: HOW THE SYSTEM FAILS ARTISTS AND HOW TO FIX IT 20 (2019). Much of this dysfunction sits at the feet of language that exempts a "work made for hire" from the termination regime. 17 U.S.C. § 304(c). Of all the statute's Byzantine caveats and demands, "perhaps none is more fundamental an impediment" to artists exercising their statutory rights than the one at issue in this case. *Siegel v. Warner Bros. Entm't, Inc.,* 658 F. Supp. 2d 1036, 1041 (2009). How courts interpret the "work made for hire" exception has an outsize impact on our culture writ large, but also on musicians,[2] and particularly on musicians of color.

I. THE "INSTANCE AND EXPENSE" TEST CAUSES CHAOS IN THE TERMINATION REGIME

A. The "Instance And Expense" Test Is Applied Inconsistently

Application and interpretation of the instance and expense test is "consistently inconsistent." Thomas M. Deahl II, *The Consistently Inconsistent "Instance and Expense" Test: An Injustice to Comic*

[2] We use "musician" to include both recording artists (vocalists and instrumentalists) and songwriters alike.

Books, J. MARSHALL REV. INTELL. PROP. L. 91 (2014). This Court has previously acknowledged the unworkable, overbroad nature of the test, which

> leaves the door open for hiring parties, who have failed to get a full assignment of copyright rights from independent contractors … to unilaterally obtain work-made-for-hire rights years after the work has been completed as long as they directed or supervised the work, a standard that is hard not to meet when one is a hiring party.

Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 750 (1989) (quoting Marci A. Hamilton, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1304 (1987)).

Nor do courts seem to agree what each prong means. The Second Circuit has, on the instance test alone, held that it asks whether the "motivating factor in producing the work was the employer who induced the creation,'" *Siegel*, 508 F.2d 914, *or* whether the hiring party "had the right to direct and supervise" the work, *Playboy Enters. v. Dumas*, 53 F.3d 549, 554 (1995), and has even gone so far as to hold that "[t]he right to direct and supervise...need never be exercised." *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 635 (2004).

The expense prong fares little better. The Second Circuit has held that "expense" may mean "the resources the hiring party invests in the creation of a work," *Marvel Characters, Inc. v. Kirby*,

726 F.3d 119, 139 (2013); it may alternately mean the money invested post-creation, in the course of publishing and promoting the work. *Id* at 143 (construing expense to include "expenditures over and above" those rendered to support the creation of the work). Provision of tools and overhead may be controlling, 380 F.3d 638 (noting that use of a dance studio space "arguably satisfying the 'expense' component of the 'instance and expense' test); it may not be. 53 F.3d 555 (holding that the source of the artist's tools "ha[s] no bearing on whether the work was made at the hiring party's expense"). Payment via lump sum "suggests a work-for-hire arrangement," 726 F.3d 140, but payment in royalties "is never conclusive" and should not be used to "frustrate" the 1909 Act with "conceptualistic formulations of the employment relationship." *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (1972).

Artists facing an "instance and expense" analysis simply do not know what to expect—and, given the inconsistency in the test's interpretation, have no way to find out.

B. The "Instance And Expense" Test Generates Massive Economic Uncertainty

Modern American culture rests on a foundation of works produced under the Copyright Act of 1909. While it is difficult to determine the exact total of economic activity generated these works generate, we can get a sense of their scope and reach. To wit: five of the top 10 top-selling albums of all time were created under the auspices of the 1909

Act, collectively accounting for 135 million records sold. RECORDING INDUS. ASS'N OF AM., GOLD & PLATINUM: TOP 100 ALBUMS, https://www.riaa.com/gold-platinum/?tab_active=top_tallies&ttt=T1A#search_section; (last visited Dec. 7, 2021). Of the ten best-selling books of all time, four were products of the 1909 Act, totaling over 425 million copies. Tom Fish, *The 30 Best Selling Books of All Time*, NEWSWEEK (Sep. 13, 2021), https://www.newsweek.com/best-selling-books-all-time-1628133. Works made under the 1909 Act also serve as the source material for some of the most popular (and lucrative) works of our own era; of the top ten highest-grossing film franchises worldwide, a full seven of them—representing over $63.52 billion in gross ticket sales—either released their first installment, or are derived from source material created, under the 1909 Act.[3] Sarah Whitten, *The 13 highest-grossing*

[3] Although 17 U.S.C. § 304(c)(6)(A) excludes derivative works "prepared under authority of the grant before its termination" from termination, the ongoing popularity of film remakes may represent a substantial revenue source for authors of terminated works. *See, e.g.*, Ayman Mohyeldin, *Hollywood fills 2021 with a heaping platter of reboots and remakes*, MSNBC (Nov. 28, 2021), https://www.msnbc.com/ayman-mohyeldin/watch/hollywood-fills-2021-with-a-heaping-platter-of-reboots-and-remakes-127376453517; Bettina Makalintal, *People Don't Actually Like Remakes, but Studios Keep Making Them*, VICE (Jul. 11, 2019), https://www.vice.com/en/article/

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In light of the cultural and economic value of these works, it is no surprise that a steady stream of artists have attempted to terminate eligible grants. Between 1977 and 2019, over 65,400 § 304 termination notices were filed at the Copyright Office. Joshua Yuvaraj et al., Data for 'U.S. Copyright Termination Notices 1977-2020: Introducing New Datasets', U. Melbourne (Feb. 9, 2021), https://doi.org/10.26188/14880330. This translates to more than four notices per day, unabated, for four decades. Amid this steady march of terminations, the "instance and expense" test is a landmine sitting in the middle of a field of culture, primed for the unwary.

C. The Test Undermines Congress' Explicit Rationale In Creating Termination Rights

The termination regime was designed as a means of "safeguarding authors against unremunerative transfers" that occurred due to "the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's prior value until it has been exploited." H.R. Rep. No. 94-1476 at 124 (1976). Most creators come to the negotiating table not knowing the value of their

9kx4yz/ people- dont- actually- like- remakes- but- studios- keep- making- them.

future work. Many agree to terms that may (or may not) provide for their immediate sustenance, but grossly underestimates the long-term value of their creations. Termination rights give artists a way to share in the value of their work *ex post*, by allowing them to terminate or re-negotiate licenses that more accurately reflect the work's value.

II. MUSICIANS ARE PARTICULARLY HARD-HIT

Termination rights are uniquely crucial to musicians. Information asymmetries between artist and licensee are particularly acute in the music industry, where "the value of [the work] often turns on the amount of marketing and promotion dollars (not to mention time and energy) expended by record labels and publishers." Bobby Rosenbloum, *A Very Welcome Return: Copyright Reversion and Termination of Copyright Assignments in the Music Industry*, 17 ENT. & SPORTS L. 3, 4 (1999). Data bears this out: a full 97% of § 304 termination notices are for musical works. Joshua Yuvaraj et al., *U.S. Copyright Termination Notices 1977-2020: Introducing New Datasets*, J. EMPIRICAL LEGAL STUD. (forthcoming 2022) (manuscript at 27), https://ssrn.com/abstract=3880708.

Unsurprisingly, publishers and record labels are hostile to termination rights. Record labels have consistently opposed the notion that recording artists are authors for the purposes of the Copyright Act.[4] Labels and publishers alike resist termination

[4] The recording industry's official position is that "all sound recordings are either collective works or contributions to compilations," under the rationale

notices when filed. And the burden of this industrial-scale resistance to artists' rights falls the heaviest on those who have historically been most exploited: musicians of color.

A. The work-for-hire test has been made into a threshold question for any musician seeking to exercise termination.

"Work made for hire" clauses are ubiquitous in both pre- and post-1976 Act music industry contracts. Daniel Gould, *Time's Up: Copyright Termination, Work-For-Hire and the Recording Industry*, 31 COLUM. J.L. & ARTS 91, 96 (2007). By itself, this would not be too concerning; courts have held that contract terms may serve as indicia of whether something is a "work made for hire," but are not themselves dispositive. 4 Melville Nimmer & David Nimmer, COPYRIGHT §11.07[A][2]. *See also Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 290-91 (2002) (enforcing work made for hire agreements as written would "provide a blueprint by which publishers could effectively eliminate an author's termination right"); *Donaldson Pub. Co. v. Bregman, Vocco & Conn, Inc.*, 375 F.2d 639, 640-42 (1967) (the language of a songwriter's contract did not by itself

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that "there are several separate contributions made in creating a sound recording," at least some of which are made by the label itself. Dustin Osborne, *What's Mine Is Mine: Why Sound Recordings Should Never Be Considered Works Made for Hire*, 28 ENT., ARTS & SPORTS L. J. 50, 52 (2017).

render him an employee of his publisher); *Murray v. Gelderman*, 566 F.2d 1307, 1310-11 (1978) (a contractual term which granted the artist greater control over the work does not preclude work-for-hire status).

To hedge against a potential adverse court decision, however, most major label contracts also include "backup" assignments. These contain terms to the effect that "if the work made for hire language is not effective, the authors of the sound recording transfer their interest in the copyright to the record company." Stephen Adams, *Copyright Issues for Sound Recordings of Volunteer Performers*, 8 VAND. J. ENT. & TECH. L. 119 (2005).

But, despite these "for hire" clauses, those same contracts expressly state that the artists are not employees of the record company. Indeed, "record companies typically provide benefits to and pay taxes for their regular employees, but do not do so for their artists." Scott T. Okamoto, *Musical Sound Recordings as Works Made for Hire: Money for Nothing and Tracks for Free*, 37 U. S.F. L. REV. 783, 800 (2003). The trajectory of an artist's career, and her relationship to her label, can seem Kafka-esque:

> [First,] Artist enters into contract with record company by which he or she produces songs and sound recordings for the company as works made for hire. [Then,] Artist is guaranteed no minimum wage, no workers' compensation benefits, no disability, health or unemployment insurance,

> and no assurance that his or her work will be manufactured and sold. … [Finally,] Company owns Artist's work forever as a work made for hire and may do with it what it pleases, making money in a variety of ways that may or may not redound to the Artist as well, or taking it off the market entirely.

Joseph B. Anderson, *The Work Made for Hire Doctrine and California Recording Contracts: A Recipe for Disaster*, 7 HASTINGS COMM. & ENT. L.J. 587 (1995).

Work-made-for-hire clauses owe their persistence to several factors. First, artists lack the bargaining power needed to remove them. The recording industry is staggeringly concentrated, with three labels—Universal Music, Sony Music, and Warner Music—together controlling nearly 70% of the global market for recorded music. Jimmy Stone, *The State of the Music Industry in 2020*, TOPTAL https:// www. toptal. com/ finance/ market-research- analysts/ state- of- music- industry (last visited Dec. 7, 2021). Publishing is little better, with 58% of the market controlled by three major players—publishers who are, not coincidentally, vertically integrated with the "Big Three" record labels. Id. Individual artists, no matter how well established, are hard pressed to negotiate against such behemoths; even Taylor Swift, an international multi-platinum artist with a personal net worth of more than $360 million, was unable to negotiate for control of her sound recording rights. Hillary Hoffower and Taylor Nicole Rogers, *Taylor Swift dropped two surprise albums in 2020 — take a look*

at how the pop superstar makes and spends her $365 million fortune, BUSINESS INSIDER (Dec. 14, 2020), https://www.businessinsider.com/taylor-swift-net-worth-spending-2018-8; Shirley Halperin, *Scooter Braun Sells Taylor Swift's Big Machine Masters for Big Payday*, VARIETY (Nov. 16, 2020), https://variety.com/2020/music/news/scooter-braun-sells-taylor-swift-big-machine-masters-1234832080/.

Second, the intermediaries who insist on these clauses genuinely attempt to enforce them, precedent notwithstanding. Work-for-hire clauses serve to bolster a radical (albeit legally fanciful) belief that it is the label or publisher, rather than the artist, that creates the work. Major labels have insisted for decades that sound recordings are—and should be categorically considered—works made for hire. Yuvaraj 35. This belief is so animating that in 1998, when efforts to convince legislators to categorize all sound recordings as works made for hire failed, the Recording Industry Association of America went *around* Congress to "surreptitiously procure an illegitimate 'technical amendment' to the law" that categorized all sound recordings as works made for hire. Yuvaraj 35. To see the dire import of a "work for hire" designation, the Court need look no further than the reaction to this change; it sparked a "firestorm of protest" from disenfranchised artists, who mobilized in unprecedented fashion to successfully demand repeal of the law. Yuvaraj 35; Gould 108. *See also* Bill Holland, *Artists' Concerns Often Differ From Those of the Labels and the RIAA*, BILLBOARD (Apr. 16, 2005) (quoting artist advocate Ann Chaitovitz saying "When we found out, we went crazy. Artists were galvanized").

Perhaps the most deleterious effect of "work made for hire" clauses, however, is that they force any terminating artist to first detour through federal court. Disputing a work made for hire clause "create[s] a legal question of fact that must be resolved by a court" before termination may proceed. Gilbert 16. Far from harmless administrative fluff, these provisions "generate uncertainty, inefficiency, and significant costs," leaving artists "unable to even reach the doorstep of termination." Gilbert 16, 23. That is, in the eyes of many musicians, by design. A class action lawsuit brought by legacy musicians alleged that Sony and Universal Music Group, which together control 52% of the global market for recorded music, have relied on work-made-for-hire contract boilerplate to justify a policy of "routinely and systematically refus[ing] to honor" termination notices. Stone; Eriq Gardner, *Musicians Attempt Class Action Against UMG, Sony to Reclaim Rights to Recordings*, THE HOLLYWOOD REPORTER (Feb 5, 2019), https:// www. hollywoodreporter. com/ business/ business- news/ musicians- attempt- class-action-umg-reclaim-rights-recordings-1182853/.

B. The Burden Of The "Instance and Expense" Test Falls Most Heavily On Musicians of Color

The story of American popular music is one of "black roots, white fruits." Reebee Garofalo, *Crossing Over: From Black Rhythm & Blues to White Rock 'n' Roll* 112 (2002). It is difficult to overstate the role that black musicians have had in the development of our modern musical landscape. All but "barred from [live] radio performances," black

performers in the early 1950s found a small but powerful foothold in the playlists of popular disc jockeys—and the rest, as they say, is history. Garofalo 115. But although Black artists built the DNA of modern American music, their systemic exploitation by labels and publishers "validates the assertion that the history of American contract law and issues of race and culture are inextricably intertwined." K.J. Greene, *"Copynorms," Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. 1179, 1194 (2008); Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 6 (1995). These musicians worked for pennies—if they were paid anything at all. The founder of Modern Records (a label that represented, among others, B. B. King and Etta James) casually recounted that many of the musicians that entered their recording booth never saw a dime of compensation:

> We used to bring 'em in, give 'em a little bottle of booze and say, "Sing me a song about your girl." Or, "Sing me a song about Christmas." They'd pluck around a little on their guitars, then say "OK" and make up a song as they went along. We'd give them a subject and off they'd go. When it came time to quit, we'd give them a wave that they had ten seconds to finish.

Eliot Tiegel, *It Takes More Than a Jug of Booze,* BILLBOARD: WORLD OF SOUL 26 (Jun. 23, 1967).

Those musicians that did sign a contract fared little better; even as their music filled the airwaves, they "lacked access to good advice about record contracts, royalty payments, marketing, promotion, or career development" and were "routinely swindled out of their publishing rights and underpaid for record sales." Garofalo 123. Black entertainers were seen as a source of cheap labor, particularly as black music (often referred to as "race records") surged in popularity. Id. The attitudes of the day were neatly summarized by a conversation between a representative for Columbia Records, and the then-President of Atlantic Records, who later recounted it to an interviewer:

> He wanted to make a deal whereby Columbia would distribute for Atlantic records because we seemed to be very good at what he called "race" records. So I said, "Well, what would you offer us?" He said, "Three percent." "Three percent!" I said, "We're paying our artists more than that!" And he said, "You're paying those people royalties? You must be out of your mind!" Of course he didn't call them "people." He called them something else.

Garofalo 124. The history of 20th century popular music is littered with examples; Arthur "Big Boy" Crudup, a pioneering recording artist whose songs fueled Elvis Presley's rise to fame, received no royalties for his recording work and, after trying and failing for decades to secure overdue royalties for his

songwriting, died penniless in 1974. Greene 1198; David Szatmary, ROCKIN' IN TIME 29 (1991).

Termination rights represent a (sometimes quite literal) lifeline for these artists. Termination provides them with the opportunity to regain control of their work, or else to demand fair remuneration. Both options empower these artists to shake off the burden of exploitative contracts and assert control over their creative destinies. These musicians—exploited, underpaid, and "subjected to record deals that did not provide them with long-term financial stability"—are those whom this regime must serve. Gilbert 16.

CONCLUSION

For the above reasons, the Court should grant certiorari.

Respectfully submitted,

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