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Recording Artists, Work For Hire, Employment, and Appropriation.

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<draft>

Abstract

Authorship and ownership exist in a curious relation in U.S. copyright law. In theory and common sense, authorship underwrites and is the condition of ownership, but in practice ownership can establish authorship retroactively. Distinctions between proprietary and non-proprietary creative cultural workers, in this view, turn in no essential way on evidence of “creativity” or the investment of “personality” in cultural creation. This paper examines a legislative struggle between recording artists and the recording industry over the status of their stock-in-trade, sound recordings. In 2000, recording artists obtained the repeal of a 1999 law allocating authorship and ownership of recordings to their record company contractors through the former’s assertions not of authorship in the commonsense understanding, but through the artists’ legal ability to alienate their employed backup musicians, engineers and other creative personnel. Analyzing this struggle against the backdrop of a historical/theoretical consideration of the dynamics of domination and dispossession naturalized in the employment relationship, I show how the political-economic organization of creative production in the cultural industries depends crucially on and further naturalizes this legal “furniture of the social world” (Ellerman, 1992), as much or more than it does on immanent aspects of cultural products or production processes.

“Efficiency arguments...and inalienability arguments are like oil and water; they do not mix” (Ellerman 1992, 158).

1. Work For Hire and Musicians Rights

Authorship and ownership exist in a curious relation in U.S. copyright law. In theory, authorship underwrites and is the condition of ownership, but in practice it often seems that ownership establishes authorship retroactively, as its own ground. Because it is the

basis for the monopoly control of copyrights and claims on profits, the authorship / ownership complex is central to the relations of production of popular music. Because the stakes at issue are so high, the determination of which music makers can and cannot claim the mantle of authorship depends on the results – sometimes long-encrusted, sometimes fresh and raw – of political struggles. This chapter concerns the paradoxical and often contentious relations of “featured artists” to the sound recordings they produce, their record label contractors, and their back-up musicians, producers, engineers and other creative collaborators as mediated, in this case, through a 2000 struggle over U.S. copyright law.

In November of 1999, Congress passed an obscure amendment into American law that would have significant repercussions for the relations of recording artists, studio musicians and personnel, and the recording industry. The amendment, buried in a 1,740 page spending bill, changed the wording of US copyright law to include “sound recordings” in the list of “commissioned works” eligible for “work for hire” status. Work for hire doctrine is that element of copyright law that governs intellectual property produced in the workplace and, in certain circumstances, under commission. Since the turn of the 20th century intellectual property produced by American employees, unless otherwise specified in the employment contract, has the employer as its legal author and owner. For much of the century, this allocation of authorship and ownership was also operative with respect to works produced under commission, by freelancers or independent contractors, outside the employment relation. Since the 1978 implementation of the 1976 Copyright Act, the authorship and ownership of works produced under commission has been more closely regulated, with nine categories of such works eligible

for legal appropriation by commissioning parties. The 1999 addition of “sound recording” to this list of categories eliminated the legal basis for artist authorship and ownership, changing at a stroke the balance of power between recording artists and the record labels who commission their work. Under conventional recording contract language, recording artists would no longer legally be recognized as the authors and proprietors of their sound recordings (the sonic expressions that become concretized in CDs, cassettes, and LPs, also protected in the form of digital files).

Within a few weeks of discovering this change, recording artist advocates got the word out, and soon a coalition of artists and advocates were calling on Congress to repeal the law. The Subcommittee on Courts and Intellectual Property of the US Congress held a hearing in May of 2000, at which interested parties and experts offered testimony concerning the purpose, magnitude and results of the change. Artists and their advocates argued that the change was an act of appropriation; the industry maintained that the change merely clarified predominant practice. By year’s end the law had been repealed “without prejudice.” The artists’ defense of their authorship, however, depended on their ability to define themselves as *employers* legally entitled to dispossess their employee collaborators. This chapter will examine this interaction of copyright law, authorship rhetoric and working conditions in the music industry.

This episode made clear to artists that, while they often share some goals with their record companies (for example, a shared general interest in copyright protection), at the level of social relations their interests are sharply divergent, and spurred the development of an artists rights movement made up of professional, labor, and advocacy groups. This development has led to a much greater and more active representation of the interests of

recording artists and musicians in general in the U.S. Congress and the California and New York state legislatures. Most importantly from the perspective of this study, copyright's "millennial flip flop" (Nimmer 1978/2005) shows how the resistance to alienation through claims of authenticity (framed, in this case, in terms of Romantic authorship) often requires the those claims be borne on the backs of subordinate others – that the "illegitimate" dispossession of one group can be defended against through the enforcement of the "legitimate" dispossession of another group.

The account in this chapter will focus on the paradoxical relationships between the rhetorics employed by the two opposing sides in this struggle over authorship and property. Having set out this political dimension of the relations of popular music production and its (legislative) representation in the first part of the chapter, I will then move to a consideration of the employment relation in capitalism in its capacity of supplying the conditions of possibility for the recording artists' response to the RIAA's legislative efforts.

2. Sound Recordings as Works Made for Hire

On November 16, 1999, Margaret Cone, a lobbyist working at the time for the American Federation of Radio and Television Artists (AFTRA) received a tip that a pending bill threatened to affect the interests of her client. Buried in Section 1011 ("Technical Amendments") of the "Satellite Home Viewer Act," she found what she'd been warned about: "(d) Work Made for Hire. --Section 101 of title 17, United States Code, is amended in the definition relating to work for hire in paragraph (2) by inserting 'as a sound recording', after 'audiovisual work'." Cone later told an interviewer that upon

finding this passage, her “knees literally gave way.” Regaining herself, she went to the offices of the House of Representatives “to find out how bad it was.” A few days later, the 1,740 page spending bill to which the Satellite Act had been affixed was passed, shortly thereafter to be signed by President Clinton. She had discovered the language too late to ask for changes (Boehlert 2000).

There are two important copyrights associated with any recorded pop song, the composition copyright and the sound recording copyright. The former is the song in its immaterial form of words and melody. Unless a composition is the product of an employee or has been specially commissioned for use in a work-for-hire eligible final product, its copyright is the property of composer(s) and/or lyricist(s), who typically assign it to a publishing company for the purpose of promotion and commercial exploitation.

The latter copyright is that which is associated with the embodiment of a particular performance in a recording medium – the sounds captured on a record, tape, CD or digital file. Sound recordings were made eligible for copyright in 1972, when a new right was created to protect owners of sound recordings from market incursion by counterfeiters.¹ At the turn of the 20th century, a single player piano manufacturer – Aeolian – had locked up exclusive rights to the production of piano rolls of almost all popular compositions. Fearing monopolization and restraint of trade in the booming new music industry, the Congress established a “compulsory mechanical license” as part of the 1909 Copyright Act that would allow any producer of “mechanical” reproductions (initially piano rolls, but soon audio recordings – see Sanjek and Sanjek 1991: 12) to

¹ The establishment of the right detached the property from the physical object of the tape, and simultaneously extended the property to all physical instances of the sound recording. See Drahos (1996) for discussion.

record and distribute such reproductions of any previously published song. Permission to record and distribute, previously the right of the copyright owner to grant or deny, was thereafter automatically triggered by agreement to pay the “statutory rate” in mechanical royalties for every copy sold. Thus, any producer of (mechanical) sound recordings could release a recording of any published song, regardless of the wishes of the copyright holder, as long as he or she paid the owner of the song’s copyright the statutory rate: a couple of pennies per song, per record sold at the turn of the century, to increase according to a schedule set by Congress.²

The compulsory license contributed to the fantastic growth of the recording industry in the early part of the 20th century, but it also made possible rampant and difficult-to-prosecute bootlegging of sound recordings (Marshall 2005). In the 1950s and 1960s, entrepreneurs willing to work on the shady side could thus profit by taking advantage of the prior investments in recording, production, and promotion of the “legitimate” record labels. Such entrepreneurs would simply reproduce a popular album, or lesser known recordings by now-famous artists, distribute them to various outlets for sale, and have only to pay the statutory license fee to stay within the law. Several states enacted laws against this type of bootlegging in the late 60s, but the recording industry wanted federal protection. They lobbied Congress and by late 1971 a bill was passed creating a new right – a copyright in sound recordings – which empowered the federal government to prosecute counterfeiters, and added to the legal and economic power of the recording industry through the creation of a new monopoly.

² “As of January 1, 2006 the statutory mechanical rate is as follows: 9.10 Cents for songs 5 minutes or less – or – 1.75 Cents per minute or fraction thereof over 5 minutes” (Harry Fox Agency 2006).

3. Work For Hire and Termination of Transfers

A work made for hire is one for which authorship (and therefore ownership for the life of the copyright) resides not in the direct producer but in that producer's employer or contractor. To determine whether a given intellectual property is a "work made for hire," the law provides a "two prong" test. First, *all* copyright-eligible material produced by an *employee* (as defined in Reid, 490 U.S. 730, 751 [1989]) is by definition work for hire; regardless of who actually creates it, the legal author/owner of any work produced by an employee is the employer.³ The second prong concerns works made on special commission, not by employees but by freelancers or independent contractors. Under the 1909 Copyright Act commissioned works were treated as employee works. The framers of the 1976 Copyright Act, however, intended to eliminate work for hire eligibility for all commissioned works and shifted the law in favor of direct producers. "In a 1963 preliminary draft bill," writes Marci Hamilton, "the Copyright Office defined 'work made for hire' as 'a work prepared by an employee within the scope of the duties of his employment, but not including work made on special order or commission' Thus, contrary to the case law interpreting the 1909 Act, no commissioned works would have been deemed works made for hire." (1291). Nevertheless, the motion picture and publishing industries, learning of Congress' intentions, were able through intensive lobbying and discussion with representatives of groups of freelancers and independent contractors in their fields, to obtain exceptions for forms of commissioned works central to their businesses (Stewart 1984). These exceptions constitute the nine legislated categories of commissioned works that are eligible for work for hire status:

³ Again, this is notwithstanding a contract to the contrary, in which the employer grants authorial rights to the employee. This situation is exceedingly rare.

- a contribution to a collective work (such as an encyclopedia or dictionary)
- a part of a motion picture or other audiovisual work
- a translation
- a supplementary work
- a compilation
- an instructional text
- a test
- answer material for a test
- an atlas

If a work falls under one of these categories, and there is a contract specifying that the work is a work made for hire, then the contracting party is the author, and the actual creator has no rights to the work. Sound recordings, not protected by copyright law at the time that list was established, did not come up for discussion.

The 1976 Act declares, with the exception of works made for hire, that all copyrights revert to their authors thirty-five years after “transfer,” that is, after the assignment of the copyright to a record label, book publisher or other party. This is known as “termination of transfer,” and was intended to offer what Congressman Howard Berman (D-Ca) later called a “second bite at the apple” (transcript, United States Copyright Office and Sound Recordings as Work Made For Hire; Hearing Before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary House of Representatives, May 25, 2000: 112 [hereafter “Hearing”]). “From the beginning of the copyright law revision process in 1965,” writes Hull (2005: 309) “Congress sought to provide authors with some means to protect themselves against “unremunerative transfers” made prior to any determination of the true value of the work” as would happen after some years in the market. Termination doesn’t happen automatically – the author must initiate a statutory process of termination no less than two and no more than ten years prior to the termination date. It is, however, an *inalienable* right – you don’t have to exercise it (your

existing contract will remain valid and you will remain the lawful owner), but you can't sell it. If you're an author, you can reclaim your copyrights thirty-five years after transferring them, no matter what your contract actually says. If your production is work for hire, you have no rights, ever, to that which you've produced.

While “prong one” of work for hire specifies the allocation of authorship and ownership according to the nature of the relationship between the direct producer and the hiring party, “prong two” can be understood to regulate labor relations through the definition of certain kinds of properties: depending solely on a determination of the legal status of the property at issue, the “natural author” may be virtually relegated to the status of employee or may enjoy proprietorship. In the case of commissioned works, copyright law stipulates that there must be a contractual agreement to the effect that the work-for-hire eligible produce will be the property of the commissioning party, but the publishing, motion picture, and other mass media industries have so concentrated their market power that most freelancers in these fields have little choice but to relinquish their rights in order to practice their professions (see Stewart 1984).

Critical observers of the “millennial flip flop” saw what they called a “pre-emptive strike” (Holland 2000A) by the recording industry, through the RIAA, to secure sound recordings before the artists responsible for late 70s hits start the termination process for income-generating songs. This would enable the maintenance of a secure catalog, far beyond the 35 year termination of transfers period: 95 years from date of first publication for corporate authors. “Catalog,” or a recording company's copyright holdings, is a body of income properties of varying or potential market value. In 1972, record company catalogs became considerably more valuable with the establishment of the copyright in

sound recordings, the ability legally to exclude others from using the property without permission. Federally-enforced intellectual property monopolies – made possible through the sound recording copyright – have enabled catalog to generate rivers of secure profit, long after costs have been recouped, with less risk in marketing. The commercial success of the recent Elvis Presley and Beatles “#1 Hits” albums are high-profile indicators of the value of catalog; there are likely to be vast amounts of catalog from the 70s, 80s and 90s that will be similarly exploitable.

Copyrights granted after the 1976 Act became law in 1978 will begin be subject to reversion in 2013; natural authors are already able to initiate the process necessary for termination of transfers. “It is a safe assumption,” writes Strohm (2003/2004), “that record companies have already begun to receive termination notices from their artists under contract.” As the reversion of late 70s sound recording copyrights looms, experts on both sides disagree as to whether or not sound recordings can be considered works made for hire. Several cases, while not decisive, suggest that no matter what the contract says, if it’s not on the list of the enumerated categories of works, then it’s not eligible for work-for-hire status.⁴ The 1999 addition of “sound recording” to the list of categories in the 1976 Copyright Act, however, decided the matter, without hearings or the solicitation of comments from interested parties.

Following Cone’s discovery, a battle raged in the pages of *Billboard*, the premier music industry trade journal. Bill Holland, *Billboard*’s Washington correspondent, wrote

⁴ “See, e.g., *Lulirama*, 128 F.3d at 877 -- 878 (5th Cir. 1997) (holding that advertising jingles were not specially ordered or commissioned within the audiovisual work category); *Staggers v. Real Authentic Sound*, 77 F. Supp. 2d 57, 64 (D.D.C. 1999) (concluding without discussion that “a sound recording does not fit within any of the nine categories”); *Ballas v. Tedesco*, 41 F. Supp. 2d 531, 541 (D.N.J. 1999) (concluding without discussion that sound recordings that were to be put on a CD were not works for hire, in part because they did not fit in one of the nine categories)” (Mentzer 2001: 20).

over thirty stories – many of them cover stories – that included interviews with major players in the “musician community,” the RIAA and other industry organizations, and members of the subcommittee. The controversy rated little attention in the mainstream press, for whom the Napster case was much sexier, but after weeks of argument in the trade journals, Chairman of the Subcommittee, Rep. Howard Coble (R – NC), scheduled a hearing.

4. The Hearing

At 10:03 AM on May 25, 2000 the work for hire hearing began in room 2141 on the second floor of the Rayburn House Office Building; it was to last just under four hours. In attendance were several artists as well as supporters, including banjo maestro Earl Scruggs, recognized and saluted by Chairman Coble, and girl group vocalist Ronnie Spector, “who burst into ‘Be My Baby’ after being introduced, to the delight of the attendees and lawmakers” (Holland 2000B) – an appropriate opening in an argument over the properties some artists describe as their offspring. Following the opening statements of several member of the Subcommittee, Register of Copyright Marybeth Peters offered testimony as the highest government official in the Copyright Office suggesting that the change under discussion “was a substantive amendment to the law, not a technical amendment as some have claimed” (Hearing: 78). The witnesses offering testimony and answering Committee members’ questions were, in order of appearance Hilary Rosen, president and CEO, Recording Industry Association of America, Paul Goldstein of Stanford (on behalf of the RIAA), Marci Hamilton of the Cardozo School of Law (on behalf of recording artists), Sheryl Crow, and Michael Greene, president and CEO of the

National Academy of Recording Arts & Sciences, Inc. (also on behalf of recording artists). In addition, letters from 35 interested parties, including the members of the Artists Coalition – a group formed by Sheryl Crow and Don Henley for the purpose of presenting a united front in Washington on the issue of work for hire (soon, significantly, to become the *Recording Artists Coalition*) – were entered into the record. No artists testified in support of the RIAA’s position. That evening, Bill Holland reported, Joni Mitchell interrupted her concert at the Merriweather Post Pavilion in nearby Columbia, Maryland, to announce her support of the hearing to her audience of 6,000 fans (Holland 2000C).

5. Efficiency vs. Inalienability

After first arguing that the new law was necessary to enable the enforcement of “anti-cybersquatting” legislation (it wasn’t)⁵, and then arguing that sound recordings were *already* works for hire via certain interpretations (which put them in the position of arguing that “we didn’t seek this change because we thought it was necessary” [Hearing: 185]), the RIAA settled on their last and most aggressively argued justification: economic efficiency. Rosen and Goldstein concentrated the bulk of their testimony around the prohibitive “transaction costs” that would result if all conceivable ownership claims made possible by the inherently collaborative process of studio recording could not be precluded with concentration of ownership in a single (corporate) entity. Paul Goldstein asserted in his written testimony that

⁵ “Cybersquatting” describes the act of registering as an Internet domain name the name of another in order to extort from the other an exorbitant payment to obtain the domain name.

[b]y allowing the parties to definitively confer for-hire status on these works, [the inclusion of sound recordings among the categories of work for hire eligible commissioned works] promotes marketability by making it possible for parties to eliminate an otherwise chaotic state of copyright title, centering full ownership in a single individual or entity and thus facilitating the secure and fluent transfer of ownership interests over the life of the copyright (Hearing: 140).

Since most commercial sound recordings are of necessity collaborative products resulting from the cooperation of many creative contributors, they argued, without such concentration of ownership termination of transfers would require record labels wishing to continue the exploitation of a terminating grant to track down and negotiate a new license with all the creative contributors and/or their heirs.

Rosen argued with respect to what she called “the most important point of all...that work for hire status benefits everyone involved in the creation and distribution of recorded music – including artists and producers, as well as record labels – because work for hire status is essential to preserve the marketability of highly collaborative works like sound recordings” (Hearing: 129). Rosen paints a picture of the industry grinding to a halt over the administrative nightmare promised by termination:

If highly collaborative works were subject to the termination right, they would get tied up in endless disputes and negotiations over copyright ownership among any and all of the individuals who had any colorable claim of authorship (not to mention their various heirs, assigns and employers). And almost everybody who participates in the creation of a sound recording would have a bona fide claim of authorship under U.S. copyright law – including the producer, the engineers, the mixers, the background vocalists, the owners of samples used in the recording, and others – along with each member of the group of featured recording artists. Regardless of whether the artists’ representatives testifying today believe that is a proper interpretation, the fact is that “author” is not defined in the copyright law, and we’re likely to see years of litigation over which creative participants are entitled to ownership rights in the work—exactly the result the work for hire doctrine was created to avoid (Hearing: 129).

It is very likely that this argument seemed disingenuous to the musicians as well as the musician attorneys at the hearing. First, it is well known in industry circles that most session personnel work under contracts that specify what in the industry is called “participation” – whether, what kind, and how much of a claim on ownership rights any of them might have. Most back up musicians, engineers, and some producers are the employees of recording artists. On the other hand, however, many producers and some celebrity engineers will often only work when guaranteed participation in the form of percentages of artist royalties.⁶ In the second place, where the contracting unit is a band, there will usually be a preexisting agreement between band members as to how credit and ownership are to be allotted. Such a contract between band members could possibly preclude copyright law’s treatment of “joint authors.” This is all standard industry practice. The RIAA knew that, as well as the musicians and attorneys at the hearing. It is likely that many of the subcommittee members, or at least their staffs, if they had done any homework on the situation, would have known it too.

Why then did the RIAA hammer away at this point with such energy and conviction? The prospective loss of a number of relatively cost-free income properties (“the time bomb in the record company vaults” – see Nimmer and Menell [2001]) was something for the industry and the RIAA to get exercised about. Copyright industries are driven by a constant desire to turn intellectual property into the virtual equivalent of real property – to be held, for all practical purposes, in perpetuity with no obligation to (natural) authors or the commons. Consider copyright “ur-lobbyist” Jack Valenti, who once told Congress “Creative property owners must be accorded the same rights and protection resident in all

⁶ Typically, where producers, engineers, managers or others have worked in exchange for “points,” their cut is subtracted from royalties from dollar one, as the income from the recording comes in, *before* the recording has recouped, *before* the artist sees a penny.

other property owners in the nation...” (Hunter, 2004). It is plausible that they believed focusing on this line of argument would deflect accusations that the change in law was unvarnished appropriation in anticipation of a threat to revenue. The RIAA needs to preserve its relations with the artists who, Rosen admits, “are the lifeblood of the record business” (quoted in Wienraub 2002); this argument allowed them to preserve some degree of face with artists while still maintaining their highly aggressive profile. Their insistence on it nevertheless points to the violence at the heart of work for hire that not only copyright industries but recording artists themselves rely on. Rosen’s dystopian vision continues:

Think about the disruption that would ensue if, 35 years after its creation, each of the multitudes of authors involved in each and every track of an album could reclaim copyright ownership of that track. Each of such claims would have to be researched, and litigated. Imagine trying to reconstruct the facts on each such claimant 35 years after the fact. Rights in the recordings of a single group would differ from album to album if there were changes in band membership. Disagreement over the rights to a single track on an album could prevent the entire album from being sold (Hearing: 129).

This warning of the administrative hell to come is bolstered by the RIAA’s Hobbesian conception of human nature and their neoliberal conception of the role of markets and corporations in bringing justice and order to social life. The *fact* of rights is understood as the *promise* that those rights, held by rapacious, atomistic individuals, will be exercised agonistically.

In most cases, every co-author would have an undivided right to license the sound recording on a non-exclusive basis. Thus, one of the co-authors interested in a quick buck could collect a one-time fee from a record distributor, preventing the other authors from negotiating a better deal with a competitor. Or one of the co-authors could grant a cheap license to an Internet music service to distribute the recording for free in order to attract site traffic, leaving the other artists with dramatically reduced prospects for future royalties. Since the traditional way to maximize

commercial revenues is by granting exclusive licenses, any one author could hold up all the others for a greater share or higher price as a condition of agreeing to join in a single exclusive license. Moreover, the absence of a central administrator and the practical inability to get all joint authors to sign a license could prevent certain meaningful deals from being consummated (Hearing: 130).

Joint authors are to be seen as rapacious opportunists, considering only the “quick buck,” with no thought for their co-authors, the possibility of collective strength, their own reputations, or the morrow. Work for hire eligibility thus protects these Hobbesian artists from themselves and each other. Moreover, Rosen’s conception of the principal purpose of copyright is deeply interested. Granting exclusive licenses may “maximize commercial revenues,” but none of the major copyright systems in the Western world were expressly founded on such a proposition (Kretschmer and Kawohl 2004). Finally, Rosen reminds us that thanks to Section 1011(D), this vision of the wheels of musical commerce grinding to a halt in the midst of a rash of intraband litigation and claimant-sleuthing was all a dream: “None of these risks actually exist because sound recordings are eligible for work made for hire status. And that is why the work for hire doctrine – which guarantees the continued ability to exploit the work commercially – is so ingrained in industry practice” (Hearing: 131).

In reality, it is ingrained because of the unequal bargaining power of musicians and labels. Since the creation of a copyright in sound recordings, record labels have made a practice to include boilerplate language in contracts that specifies that recordings produced under the contract are works made for hire (and record labels customarily register those works with the Copyright Office as works made for hire, though the fact of such registration is in no way decisive for the status of the property). Jay Cooper, the attorney representing Sheryl Crow, testified before the committee that it is in almost all

cases impossible to negotiate that language out of the contract. Cooper was later to represent the artist community in negotiations with the RIAA over repeal language, and then to become an officer of the Recording Artists Coalition. Bob Goodlatte, a Republican Congressman from Florida, questioned Cooper about work for hire language in recording contracts.

Goodlatte: Would the record company agree to the deal if it did not contain a work for hire provision? [...]

Cooper: No, it would not.

Goodlatte: Have you ever been able to simply strike the work for hire provision from a contract?

Cooper: No, I have not been successful in doing that.

Goodlatte: So it is pretty clear that the work for hire provision is essential to the entity with which you are negotiating?

Cooper: Again, it contains the alternate provision, which says basically that if it is not a work for hire, then this will be deemed an assignment [transfer] of copyright.

Goodlatte: Do you tell your client that you think the provision is invalid and you expect to challenge its validity sometime in the future?

Cooper: Yes, I do. [...]

Goodlatte: Did the initial contract you worked on for Ms. Crow contain a work for hire provision?

Cooper: Yes, it did.

Goodlatte: And once Ms. Crow gained commercial success, I imagine you were able to get a better deal for her.

Cooper: We were able to get a better deal for her, but the language is still in there.

Goodlatte: Did you revise or renegotiate her contracts?

Cooper: Yes, I did.

Goodlatte: Did the renegotiated contract contain the work for hire provision?

Cooper: Yes, it did.

Goodlatte: And did you try to get it taken out?

Cooper: Yes, we did.

Goodlatte: So you know that this provision is pretty important to the companies. Is that correct?

Cooper: Well, it has been my position, as well as many other of my contemporaries, that that language is not effective any more than employment language is effective or any more than perpetuity language is effective. [...] We were well aware of the fact that the copyright law never provided that recordings would be a work for hire and never listed them as one of the [work-for-hire eligible] categories.

Goodlatte: But nonetheless you could not get that contract negotiated without it?

Cooper: That is correct. [...]

Goodlatte: Obviously, it means something to them for them to state that in every single contract.

Cooper: I would assume that it is their honest attempt to try and make it a work for hire, but I do not believe it has been effective as such.

(Hearing, 214-217)

Cooper's responses show that even the most powerful stars cannot get this language out of their contracts. Bill Holland later reported that the RIAA had been pursuing the addition of sound recordings to the categories of works eligible for work for hire status more or less actively for over ten years, and that the entertainment industry, particularly the holders of massive catalogs such as Universal Music Group, had been very heavy political contributors, especially to the campaigns of those politicians on the operative committees (Holland 2000D, 2000E).

Professor Goldstein's presentation of the "chaos theory" was less florid and even more direct than Rosen's. Yet, as I suggested above, in addition to the contradiction of the chaos theory by the facts of the social relations of recording, there were also contradictions within his argument and between his arguments and those of the RIAA in general. Goldstein framed his reading of the chaos theory in terms of "transaction costs" – barriers, posed by the necessity of dealing with unruly mobs of ownership claimants, to the smooth flow of profits and transfer of rights. I will briefly consider some of his testimony before moving to the artist community responses.

Goldstein argued that sauce for the goose is sauce for the gander. Work for hire protects featured artists from session personnel's future ownership claims. The fact that record labels seek to assert and protect their monopolies in albums the same way featured artists do their monopolies in songs should be seen to legitimize the claims of the former

based on the established and time-honored practices of the latter. There is no ambiguity in featured artists' appropriation of the produce of side musicians' creative labor via work for hire – as employers, the categories into which fall the works they pay others to produce for them are immaterial, the mere fact of the employment relation places ownership unequivocally in their employers.

Goldstein wrapped up his brief verbal testimony (witnesses were allowed 5 minutes each) with a closing statement that contradicts some of the logic of Rosen's argument in interesting ways: "The genius of the work for hire concept," he told the Subcommittee and attendees, "is to consolidate ownership in a single entity that will in the marketplace pay for the privilege of being the owner of the work-for-hire, rewarding the creative authors accordingly, enabling consumers to receive entertainment and information goods at the lowest possible cost, and advancing the purpose of the copyright system overall" (Hearing: 137). First, there is no payment required for the privilege of being the owner of a work for hire separate from whatever payments might be made according to the salary or contract – the appeal of work for hire is precisely that through it, further employer or commissioner obligation is obliterated.⁷ Neither is there any legal mechanism to ensure the "according" reward of creative authors.⁸ Work for hire is a complete denial of direct producers' ownership claims. Goldstein does not show how consumers will benefit under conditions of corporate monopoly; as Rosen's earlier testimony implied, non-exclusive licenses under US copyright law's codification of the rights of joint authors would be

⁷ Perhaps a tax on intellectual property equivalent to those on real estate would be a place to start.

⁸ Moreover, there is no disincentive for record companies to withhold royalties against the terms of contracts. When recording artists who can afford the tens of thousands of dollars it costs to pursue an audit of their contracting label find the label has shorted them on royalties (as they almost invariably do, according to one accountant who has conducted dozens of such audits), the most they can claim is what they are owed, no penalties; they can't even demand the costs of the audit be covered (c.f. Record Label Accounting Practices: Hearing of the California State Senate Committee on the Judiciary and State Senate Select Committee on the Entertainment Industry, 2001-2002 Leg. 1 [July 23, 2002]; Clover 2003).

much more likely to result in lower costs to consumers. Joint authorship, as she implied, is governed by something akin to a “one-drop” rule: joint authors, by virtue of that legal standing, have what can often amount to veto power.⁹ Finally, the purpose of the copyright system in the U.S. is “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” (U.S. Constitution, Article 1, Section 8). In her spoken testimony, Marci Hamilton argued that

the commissioned work made for hire provision is constitutionally suspect. ... [T]he Constitution's Framers chose...the term ‘authors’. The word is ‘authors’. They could have chosen publishers. They could have chosen guilds, like the Stationer's Company in England. They could have chosen the people. They had all those choices and they chose ‘authors’ (Hearing: 149).

6. Responses of the Artist Community to the RIAA’s “Chaos Theory”

The appearance in Congress of the artists and the testimony of members of the “artist community” signals the beginning of a new era of activism and representation of (rich) musicians in the halls of Congress. With the parenthetical “(rich)” I don’t mean to make light; those rich artists – Sheryl Crow, Don Henley, and the other charter members of the Recording Artists Coalition – despite the success of their contractors in marketing their work, occupy positions structurally homologous to those of much more vulnerable artists. Unlike so many under-resourced, underprepared, unprotected, mostly African-American artists, Crow, Henley and their peers had the resources and allies necessary to protect themselves from extreme exploitation. Nevertheless, these powerful artists had also come

⁹ Nimmer (1978/2005), however, points out that case law with respect to motion pictures suggests that “[i]f [minor contributors] never contributed copyrightable expression, then they failed to qualify as ‘authors’ later entitled to terminate” (5-50, n. 121.85).

face to face with the appropriative power of the record companies in their contract negotiations and in their regular audits of their label's books, which almost invariably turned up significant unpaid royalties and produced, at minimum, "hard feelings" (Sheryl Crow, Hearing: 194).¹⁰ In any case, they could not but be familiar with the tragic stories of fallen stars such as Mary Wells, the "First Lady of Motown" who was "discovered" broke and homeless due to unpaid royalties in a Los Angeles hospital charity ward in the early 90s after making Berry Gordy and Motown Records millions of dollars.¹¹

This hearing was a self-conscious artist community's *arrival* in Washington. This was not the first time artists had represented their interests before legislators: they had, for example, participated in the long-running (and as yet unresolved) arguments over the implementation of the digital performance right.¹² But in that case, the interests of artists and industry coincided to such a degree that controversy over relations of production and working conditions did not arise. Their presentation at the work for hire hearing would be their official public debut as an independent political interest group; the hearing's unfolding and outcome could set the tone and scope for musicians' participation in upcoming debates over online music delivery, "piracy," and other sensitive issues concerning their livelihoods.

¹⁰ Artists, their representatives and CPAs who work for firms that audit record labels on behalf of artists describe at length the multifarious, Byzantine means by which record labels withhold royalties and other payments to artists. See the testimony of CPAs Linda Becker and Charles Sussman, *Record Label Accounting Practices* (second hearing). According to litigator Don Engel's testimony before California state senators, "[t]he intentional underpayment of royalties to all recording artists is a pervasive, consistent policy and practice of each of the five record conglomerates that, together, control the worldwide record industry. These are not accounting errors. They are systematic, outright thievery." *Record Label Accounting Practices*, 91 (first hearing).

¹¹ See, e.g., Hoekstra (1992), as well as the written testimony of Sam Moore (of Sam and Dave), *Record Label Accounting Practices*, written testimony 1-12 (first hearing).

¹² These arguments took place in what Anne Chaitovitz of AFTRA called the "CARP [copyright arbitration and royalty panel] from hell" (personal communication 2004). See Delibero (2005).

The first shot in the battle between the RIAA and the recording artists had been fired by the RIAA in the form of the change to copyright law. At the May 25 hearing, the testimony of the RIAA's Rosen and their expert witness Goldstein too came first. Most of the witnesses' written testimony was deposited with the Subcommittee prior to the hearing; verbal testimony was ad-libbed, though generally based on written testimony. In the question and answer session following the opening statements and testimony, witnesses spoke off the cuff. The artist community's testimony can be read primarily as a carefully considered rebuttal to the bill, its logic, and to the process of its passage. Their rebuttal was initiated by Sheryl Crow, whose homespun self-presentation, and representations of her career trajectory and what she does as a recording artist, also contained some rather extreme claims about authorship and ownership.

Crow introduced herself, and before beginning her own testimony, asked that a stack of letters of support from recording artists such as REM, Bruce Springsteen and the Dixie Chicks (not yet under fire for their remarks about President Bush) be entered into the record. "This amendment," Crow said,

...truly undermines what the architects of the copyright law intended. I was raised to believe America was based on the importance of ideas and the freedom to see dreams through. It was founded on hard work and the encouragement and nurturing of creativity. To let the looming presence of large organized special interest groups, working on behalf of film and recording companies, control the fate of the artist community is alarming. In the most eloquent words of Timothy White, who is a writer for Billboard magazine and my good friend, "It is a small change in terms of the number of words in the statute, but it is a very big change by potential implications when the heirs of recording artists discovery they don't have a legacy they might have enjoyed (Hearing: 160).

A thread of Jeffersonian republicanism runs throughout her testimony. Her role, she said, was "to talk about what it means to be the author of a sound recording" (Hearing:

160). Don Henley later told Bill Holland of Billboard that “Neither Sheryl Crow nor I nor any member of the coalition wish to undermine the issue nor sell out. Our official position is what Sheryl Crow enunciated in her written testimony in Washington.” (Holland 2000C). Because Crow articulated the official position of the Coalition in her testimony (prepared, no doubt, in consultation with Henley, Cooper and others of the Coalition), I will quote her extensively.

Following as it did the RIAA’s strident testimony, Crow’s verbal testimony departed from her written testimony in ways that seem to reflect a sense of urgency in response to certain of the RIAA’s points. In the first part of her testimony, Crow declares that “[i]f anyone in this room sat in a recording studio, you would see that the artist featured on a sound recording functions as the author of the work. Without the creative vision of that featured artist, there would be no sound recording” (Hearing: 161).

In her written testimony, it is not the featured artist’s “vision” that is the basis of a sound recording, but her “contribution.” “Vision” is much more mystifying and irreducible than “contribution,” which not only places the work of the featured artist on a level more consonant with her employed side musicians, but also smacks of “contribution to collective work” – something to avoid reinforcing at this stage. In her written testimony, she adds that “[t]o legislate that the record label should be recognized and credited as the “author” of the sound recording undermines the framers’ intent of the Constitution and goes against my good Midwestern common sense. I am the author and creator of my work” (Hearing: 164). Continuing in this style, Crow then goes on to “describe the process by which [she] and other music artists author [their] sound recordings, for the journey begins long before the recording contract is signed” (Hearing:

164). The authorship process, she suggests, begins with the first glimmerings of the musician identity.

My mother, who still teaches piano and my father, a lawyer and trumpet player, raised me to appreciate all kinds of music and to never fear the challenge of pursuing my dreams of becoming a musician. I went on to study music at the University of Missouri, where I received my degree in piano performance and music education. While teaching music in the St. Louis school system, I began playing in local bands. I also began working in a local studio as a jingle singer for commercials. Before I obtained my recording contract, I worked as a background singer, side musician, and wrote songs that were recorded by other artists. After many years of writing my own songs and playing any place that would have me, I finally was offered a recording contract. As you can see, the creative work that goes into making a first album begins long before the record contract is ever obtained (Hearing: 164).

Crow's testimony is devoted to the construction of a concept of authorship that will naturalize a proprietary relation between the featured artist and the sound recording, by locating the source of property in the personality of the author (See Rose 1993, particularly Chapter 7; Woodmansee 1984). Authorship of a sound recording, however, is not the same as authorship of songs, and while Crow invokes her authorship of her own songs, she is careful not to dwell on this form of authorship too much. To achieve her rhetorical goal, she must distinguish her creative work from that of her creative collaborators in such a way as to assert and naturalize the former's proprietary essence and the latter's non-proprietary essence. Too great a focus on the personality might tend to beg the question "why exactly is your creativity proprietary and that of others isn't?" While establishing her own credibility as an all-round author, ultimately, for the purposes of statute, it is more important that she locate *sound recording* authorship much less ambiguously in the person of featured artist as *coordinator and sponsor of the recording session* in which the sound recording actually comes into existence. "Personality"

arguments can take her and the Coalition just so far; what she can really stand on, however, is her status as the “hiring party” in the recording process. As she moves from talking about authorship as conventionally understood – the embodiment of personality in symbolic forms – to authorship with respect to the proprietary creation of sound recordings, her emphasis shifts from the apparently solitary processes of creation and selection to the social processes associated with the hiring and management of capital, technological systems, and personnel. In this shift, we begin to see the connections between author and entrepreneur, employer, capitalist.

“Because I produce my own records,” Crow states,

I am basically the captain of the ship and ultimately, the decision-maker, I must also decide what musicians I want to perform on each song, given the desired sound I want to attain, what engineering staff to implement my sonic vision, what studio will be appropriate (in my situation, I own my recording equipment which is set up in my home studio), and how much money I want to spend. The cost is very important because I pay for the recording of my own albums and a portion of the marketing out of my royalties (Hearing: 165).

The artist is issued an advance by the record label in the form of a loan that is to be repaid (“recouped”) out of artist royalties (*before* the artist receives any royalty payment). Rather than being *hired* by capital, then, we can understand Crow as *hiring* capital (Ellerman 1992: 93-94) – she *borrow*s money to produce the album in exchange for a sizeable share of the profits from its sale and lease. The less an artist spends on production, the less the artist will owe the label, or the more can be spent on promotion and publicity, touring, and videos. She goes on to describe what happens once she’s hired all the human and technological resources necessary to begin recording.

This part of the process is perhaps the most difficult but also the most exciting. This is where I translate my vision for my music into a quality recording. To accomplish this, I communicate with and direct the engineer

and the musicians. (In the case of an artist who does not produce himself, he will have hired a producer to facilitate the process of capturing his vision, as the artists [sic], on the recording. The producer would have been chosen with the artist's vision in mind and follows the creative lead of the artists.) [...] Once the songs are recorded and mixed, I choose what songs will be included on the album and what the album will be titled. I then deliver the master tapes, completed, fully edited, and ready for manufacturing (Hearing: 166).

Crow is at pains to show the degree to which she is in charge of a process of production involving multiple actors: every facet of production is polished to perfection in its purpose to reflect her individual vision. Her description of the recording process climaxes with a rhetorical coup de grâce.

It has been argued that the work for hire amendment was necessary to clarify who is the author of the sound recording. There is no confusion in the record industry as to who creates the sound recording. It is the featured artists. A sound recording is the final result of the creative vision, expression and execution of one person – the featured artist. And, although the artist may respect the fine folks' opinion at the record label and may even solicit advice from them, they are, by no means, involved in the process of defining the music. Furthermore, any claims to the authorship [sic] by producers, hired musicians, background singers, engineers would be false (Hearing: 166).

Toynbee (2000) has characterized popular music making as “social authorship.” For Crow and the Recording Artists Coalition to reverse the movement of appropriation, however, they must deny the social dimensions of music composition and production. This pattern, however, is ingrained at the very root of liberal society with its predicate of individual self-ownership, freedom of contract, and the privacy of the private sphere. Discussing John Locke’s justification of the natural right to unequal property and unlimited individual appropriation, C.B. MacPherson argued that the natural right to property in Lockean theory – “Labour being the unquestionable property of the Labourer, no Man but he can have a right to what that is once joyned to” (quoted in MacPherson

1962: 214) – is transformed once the common stock of productive resources, with which “original appropriators” who were industrious enough to have gotten there “first” have mixed their labor, is used up. At that point, labor transforms from an instrument of the personality through which humans appropriate nature to a commodity for sale. In Locke, writes MacPherson, “the more emphatically labor is asserted to be a property, the more it is to be understood to be alienable. For property in the bourgeois sense is not only a right to enjoy or use it; it is a right to dispose of, to exchange, to alienate” (214).¹³ Thus is promised and justified – on the basis of universal self-ownership and freedom of contract – a political economy in which some own productive property and the rest have only their labor power to sell. Copyright, however, emerging more or less in parallel with the enclosures of primitive accumulation’s concentrated capitalist/legislative push in the 18th and early 19th centuries (Perelman 2000), provides a new, inexhaustible common stock out of which new productive property can be generated and a new class of capitalists established. But its usefulness in accumulation depends on state-enforced boundaries around authorship and monopolies on intellectual properties that deny principles of social authorship and heteroglossia. For he or she who can make legally defensible claims of authorship, the assertion that “labor, and its productivity, is something for which he owes no debt to civil society” (MacPherson 1962: 221) provides the foundation for accumulation; for all those employees who cannot make such claims, it is the basis of appropriation and alienation.

Rhetorically, authorship begins in the personality, but socially it culminates and is thus finally fully certified in the hiring, organization, and management of capital,

¹³ The historical basis of copyright in “literary property” was the need by 17th and 18th century booksellers for an originary source of manuscript that could decisively, exclusively be alienated – see Rose 1993.

technological resources and labor services, the control of the labor processes and the legal structures that condition the relations between hiring and hired parties.

7. Employer Authors

Recall that there are two prongs for determining work for hire status: 1) the fact of the employment relation, and 2) the category of work at issue in combination with a contract specifying work for hire. Since record labels no longer employ artists, all the RIAA arguments dealt with prong two, either with respect to the creation of a new commissioned works category (such was their change to law), or the interpretation of an existing category such that sound recordings could be understood to fall within it. On the other hand, artists almost always employ session personnel, and thus the work of session personnel is almost always (in the “majors,” or the world of the big multinational labels and their subsidiaries) unambiguously work-for-hire under prong one.

Several members of the artist community offered testimony along these lines.

Michael Greene, president of the National Academy of Recording Arts and Sciences (NARAS) addressed the threat of unmarketability head on in his brief verbal testimony:

I have headed up over 10 recording studios and produced armies of musicians over my career and I will tell you that this so-called chaos theory the recording companies are advancing is merely confetti being tossed into the air to hide the reality. All non-featured performers, such as side musicians, backup singers, and engineers are hired to work on a song with a contractual understanding through industry standard agreements that their contributions are made without claims of authorship. This has been the standard practice forever, and anyone who has contracted, recorded, or produced a record certainly knows this (Hearing: 181).

NARAS, however, was ambivalent in their support of repeal. Greene pointed out in his written testimony that

despite our strong position on the subject, we are somewhat conflicted about our appearance here today. Our organization is comprised of several strata of the creative and technical community within the music industry. The Academy's constituency is recording artists, songwriters, musicians, producers, engineers and other professionals in the industry. As a result, it would be disingenuous for us to propose that in every instance the performer or producer can enjoy the benefit of termination rights under the Copyright Act (Hearing: 173).

The ultimate disposition of ownership of sound recordings has yet to be determined (c.f. Kuda 2004). NARAS represents a constituency that will be at odds over the resolution of this situation, nevertheless, including sound recordings in the categories of commissioned work eligible for work for hire status would preclude all other claims that might be at variance with those of the featured artists.

Sheryl Crow's attorney, Jay Cooper, also argued vigorously that it is precisely work for hire that makes it possible to stop the buck of authorship of sound recordings at the persons of featured artists. To determine where work for hire actually comes into the relations in production, and in whose favor it actually operates in the production and marketing of copyright-eligible sound recordings, he argued,

[w]e have to go to the contract that Ms. Crow and most artists sign. And in that contract, it says to Ms. Crow, "You will deliver this album. We are going to pay you in advance. You pay for all the recording costs. If you exceed the advance, it comes out of your pocket. You will hire the producer. You will hire the musicians. You will hire the studio. You will hire the engineer. You will hire the mixer. You will hire all these people." So Ms. Crow or other artists of that nature—that is what they do. They go ahead and retain all these services and they deliver then a final product to the company. It is not the company that is hiring all these people. It is not the company that goes out and contracts with the producer. [...] She goes out and engages all these people to work. So if there is a work for hire at all, it would be by the artist because the artist is engaging everybody that is concerned with the recording and not the record company (Hearing: 190-191).¹⁴

¹⁴ Castel (2003, 117) writes of the period of the transition to capitalism, "in the country at least, the recourse to wage labor always indicates a grave precariousness of conditions, and the more one is a wage laborer, the more one is impoverished." There is evidence from the early industrial era that weavers,

A little later in the hearing, Cooper was questioned by Congressman Robert Wexler (D-Fla.), who was interested precisely in how the line between proprietary and non-proprietary authorship was drawn, and whether sauce for the goose, in this case, would also be sauce for the gander. He asked about the status of Clarence Clemons, saxophonist for Bruce Springsteen.

Wexler: Ms. Crow indicated which extraordinary artists apparently share her frustration in this process, and one of them was Bruce Springsteen. And it just occurred to me while you were reading what you perceived to be the law – I am worried about Clarence, the saxophone player, because I love Bruce Springsteen. When I buy Bruce Springsteen's albums, I buy them just as much for Clarence the saxophone player as I do for Bruce Springsteen. Where does he come out in this deal? If we adopted your point of view and at the end of the game – if I understand it, then, at that point, Bruce Springsteen then says, “I am the artist, I negotiate, I make my deal.” Where does Clarence come out in this? Does he have to follow Bruce? Where does he come out in this?

Cooper: I was a saxophone player, so I know this from experience. Clarence is a hired hand, a hired gun. He gets paid a salary, he gets paid fees. Bruce may decide to reward him with a royalty. But he is generally employed by Bruce Springsteen. He is not employed by the record company. He doesn't sign with the record company unless Clarence Clemens goes out and makes his own deal somewhere. But he is one of Bruce's side men, just like the piano player, the bass player, the drummer, and everyone else like that.

Wexler: He is not a work for hire in any respect?

Cooper: He may be in the context, but he may be under work for hire for the artist.

Wexler: Okay. That is my point. If he is in fact a work for hire for the artist, and we then change the rules as you suggest we do as between the artist and the recording company, are we then obliged to change the rule between the artist and the "Clarences" of the world?

Cooper: Well, I didn't quite finish what I was going to say. It may be a work for hire.

Wexler: What if it is? Let's assume he is.

Cooper: There is one other intervening factor, which is that he is a member of the Musician's Union. When you contract with musicians, you contract with a certain employment form. The union sanctifies this

potters, and other artisans defended their threatened status as independent artisans rather than employees on the basis of their control over assistants (sometimes their own children) who *they* classified as employees (Rick Biernacki, personal communication 2005; see also Biernacki 1995, 82-83).

relationship and he is paid as an employee just like any other hired hand on that particular record date. So it is not clear——

Wexler: So you are not advocating that we do for Clarence necessarily what you would advocate we do for the primary artist?

Cooper: No, not whatsoever.

Wexler: Thanks (Hearing: 222-224).

The boundary around authorship, legitimated by the intervention of the employment bargain, can be breached if Springsteen deigns to offer Clemons an emolument through exceptional inclusion on a copyright as joint author. Otherwise, the employment relation as determinant of authorship is legally, if not logically, unassailable. The tenuous logic of the featured artists' assertions with respect to the creative work of their collaborators is evidenced by the ways in which, despite the absolute nature of work for hire, backup musicians are entitled to quasi-royalty payments. Musicians who record under union contracts, whether for recording artists or producers of television shows or commercials, have for decades been entitled to direct or "pocket" residuals, paid directly to individual workers based on the re-use of their work, typically understood as a translation between formats. Examples include the syndication of a TV show in which their musical performance is incorporated, the release of a film in a new medium such as DVD, the renewal of TV commercial beyond its initial 13-week run, and the re-use in a TV commercial of a song recorded for other purposes. While these payments were originally negotiated by musicians and then television writers in the early fifties "in the belief that if a program was rerun, then there was less employment for new product," they also reflect and reinforce basic notions of authorship (*Residuals Survival Guide*). According to a veteran officer of the American Federation of Musicians, "the creativity level with musicians is high enough that even the playing of somebody else's material, the interpretation of it, is considered an intellectual property," that is, a work of authorship.

Pocket residual agreements between the union and producers are “based on the fact that nobody, really, can totally *buy* someone else’s intellectual property, [that] there’s always a thread leading back to that original person. All residual agreements are based on that principle” (Stahl 2005: 98). In addition, the royalty split of the new digital performance right presumes a quantum of proprietary authorship in all backup performers: the copyright holder gets 50%, the featured artist 45%, and backup musicians 5% (see SoundExchange 2006).

8. Liberalism and the Employment Relation

It is now a commonplace, perhaps first suggested by Marx in his famous essay “On The Jewish Question,” that the “political emancipation” associated with liberal society’s promised “inalienable rights” is not necessarily linked to social, or what Marx called “true human” emancipation, which would encompass all areas of life. In other words, particularly in Anglo-American society, the private sphere of work is one in which for centuries unfreedom, inequality, and the naked exercise of power have been the rule rather than the exception. The “privacy” of the “private sector” is guaranteed precisely by the lack of penetration into that sector of the rights characteristic of the much vaunted “political emancipation” attributed to liberalism. Thanks to the increasing contemporary exclusion of the “private sector” from the kinds of broad debate and reform (e.g. voting rights, civil rights) that continue to shape the democratic political sphere,¹⁵ the conception – fostered in what Marx called “classical political economy” – of the abstemious, industrious capitalist as altruist providing opportunities to obtain sustenance to those

¹⁵ See Lichtenstein (2002) for a discussion of the “individualization” of rights in the private sphere.

insufficiently abstemious and industrious to become capitalists themselves now returns, undergirding and justifying the ideological and material derogation of individuals in their capacity as economic actors with zero productive property outside their own minds and bodies (c.f. Head 2003; Henwood 2003).

As Orren (1992) and Steinfeld (1991, 2001) argue, the “free labor” which lies at the heart of the conception of liberal society as based on voluntary relationships is not only a relatively recent development, but it also seems upon earnest probing to be somewhat vaporous. According to Orren, though American liberal legislation had “demolished” many feudal structures with respect to politics and religion, labor disputes, particularly late in the 19th century, were the province of common law rather than legislation, and American courts preserved feudal dimensions of labor law – under the category of and referring to centuries-old precedents of “master and servant” law – inherited from British common law. (The language of “master and servant,” though it sounds archaic, describes the relation of employer and employee and is still found in some parts of American employment law.) The “same provisions” of master and servant law, writes Orren, “were taken for granted and relied upon by the textile magnates and railroad barons in the nineteenth century, just as they had been relied upon by the landlords, master bricklayers, and wool merchants of the fifteenth century and by the ironmongers and cloth and tobacco and salt manufacturers of the seventeenth century” (70). These provisions, for example, conferred the status of criminal vagrant “upon those persons with the characteristics of being able-bodied and without other means of support” (74), protected the master’s property interest in the labor of the servant over other claims (this entitled the master to recover damages from a party responsible for any injury of the former’s

employee, “much as if the injury had been to his chattel or machines or buildings” [81]), and confirmed the principle that employment contracts were for labor “entire” – that is, “a worker hired for a stated job or period of time was not legally entitled to be paid for any labor performed until the job or term was completed” (84). In effect, such provisions, as they were applied in the late 19th century, radically constrained workers supposedly working in a regime of “free contract” and “free labor.” As Fisk (2003A: 21) argues, over the course of the 19th century, courts “effaced the distinctions of status and independence that previously had accorded different rights to different kinds of persons and replaced them with a uniform body of law that translated rights and obligations previously determined as a matter of status into implied contractual terms.”

“By the late nineteenth century” Fisk (2003B) writes “...contract became the organizing principle of the free market.” Contracts never being between equals, the late 19th century applications through contract of provisions of master and servant law both confirmed and extended employers’ power over employees, aggressively limiting the alternatives available to workers. Orren’s reading of labor cases from the 19th and early 20th centuries leads her to conclude that “the opinions in the labor decisions indicate that the judges believed that what was at stake [in labor disputes] was no less than the moral order of things, not merely the formal division of powers or the privileges of favorite social groups” (114). Orren’s research suggests that, because of the ascription of status *through* contract, liberal principals did not enter into the workplace in any systematic or significant way until the sea changes that took place around the endorsement of collective bargaining and other labor legislation during the New Deal.

But the degree to which liberal principles entered in the employment relation even at this time is arguable: another perspective suggests that even though “specific performance,” that is, the ability of an employer to compel a worker to work on pain of imprisonment, was done away with by the Thirteenth Amendment to the Constitution, even though freedom of choice and contract and the impersonal indirect compulsion of the market are widely thought to have thoroughly liberalized the economic sector, *legal* compulsion was in the nineteenth century and is still today operational and effective. Robert Steinfeld (1991, 2001) advances an account of the general unfreedom of labor for most of U.S. history, arguing on a different tack than Orren’s that indentured and other forms of formally unfree labor – backed up by pro-employer common law of the kind reviewed by Orren – were the rule rather than the exception through the late 19th century. Steinfeld is concerned to show how “direct” or “personal” compulsion to work – through vagrancy laws, “specific performance” clauses and other forms of employee liability that have their roots in pre- and early modern British common law – was gradually transformed into, naturalized and legitimized as routine and morally neutral “economic necessity.” “In effect,” Steinfeld (1991) writes, “the direct legal control that employers had previously enjoyed over employees gave way to another form of legal regulation that offered workers greater formal autonomy but continued indirectly to place them at the disposal of those who owned productive assets” (9).

Steinfeld develops the notion of a changing mix of freedom and unfreedom that has characterized the employment relation in Anglo-American society for the last several centuries. He notes that over the course of the last century, the formal autonomy of workers that is now the norm has come to be through the gradual substitution of

economic (or indirect, “pecuniary”) for legal (or direct, “nonpecuniary”) compulsion. Whereas legal compulsion is understood to have its source in law “that authorizes or permits individuals and state officials to use physical violence or confinement to extract labor,” it is “impersonal” market forces that are the source of economic compulsion; “they are supposed to exert pressure in the way nature exerts pressure: If you do not work, you starve. No one [according to this logic] controls market forces” and thus no one compels anyone to do anything they wouldn’t otherwise (2001: 19). But both the indirectness of economic compulsion and its supposed comparative gentleness are questionable; this form of compulsion “always has as its source in a set of legal rights, privileges and powers that place one person in a position to force another person to choose between labor and some more disagreeable alternative to the labor, just as so-called legal compulsion does” (19). The conditions in which such choices can be imposed are governed by law, that is, people and institutions, not “nature,” not “the economy.” As with the “line” between proprietary and nonproprietary creative work in Hollywood entertainment industries, the line between “free” and “coerced” labor is also a “matter of convention” (26). “We may rightly say,” argues Steinfeld, “that the degree of compulsion operating in these different choices is greater or lesser, but there are no logical grounds for saying that the performance of labor in one case is coerced and in the other it is voluntary” (26). Thus the much vaunted liberalism of the economic sector – in which all action is undertaken consensually through voluntary entry into contracts – can be understood, without posing any serious intellectual challenges, to be a matter of argument rather than fact, and Steinfeld and Orren’s historical researches suggest the argument against is rather powerful.

9. Democracy and the Employment Relation

If the liberal nature of the employment relation is dubious, the penetration of democratic principles into the workplace is even more so. Ellerman (1992, 2005) puts forward an argument for workplace democracy based on a rehabilitated “labor theory of property.” He argues the employment relation is non-democratic at its core, that “[t]he inalienable human rights at the foundation of our political democracy do not reach the ‘private sphere’” of employment (1992: 17). Steinfeld and others (e.g. Dahl 1985) argue that imbalances of power in the employment relation derive from the unequal distribution of ownership of “the firm” or of “productive assets.” Ellerman, however, shows that legally defensible claims to appropriate the whole product – to alienate and dominate direct producers, when such claims are made by capital – are determined not by ownership but by the “direction of the hiring contract” (32). “Capitalism is capitalist,” he writes, “not because it is private enterprise or free enterprise, but because capital hires labor rather than vice-versa. Thus the quintessential aspect of our economy is neither private property nor free markets but is that legal relationship wherein capital hires labor, namely the employer-employee relationship” (93-94). When the “hiring party” hires labor, the former is empowered by law – fraudulently, Ellerman argues – to deny employees their inalienable rights as democratic citizens. It is well known that labor cannot be transferred – this is the basis of the Marxian concept of labor power: the capitalist buys not a worker’s labor but a worker’s *capacity* to labor. Ellerman, among other, more mainstream economists, understands the resolution of this dilemma through the notion of *rental*. “[W]hen one rents a person for eight hours, one buys the labor services of eight man-hours (or person-hours), i.e., the right to employ or use the person

within the limits of the contract for an eight-hour period. The labor market is the market for the renting of human beings” (94-95). The problem here, of course, is that “renting people treats them as if they were things” (137). In the employment relation, the employee becomes the rented instrument of the employer, and surrenders responsibility for the positive or negative results of his or her intentional actions. But, Ellerman argues,

[a] person cannot in fact by consent transform himself or herself into a thing, so any contract to that effect is juridically invalid – even though it might be ‘validated’ by a system of positive law (e.g., the antebellum South). A right is *inalienable* (even with consent) if the contract to alienate the right is inherently invalid. The self-enslavement or self-sale contract is an old example of such a contract, while the self-rental or employment contract is a current example” (1992: 127).

This is demonstrated, he suggests, by what happens when an employer directs an employee to participate in the commission of a crime. If the employee participates with the employer in the commission of a crime, the former’s de facto responsibility – fraudulently ignored during the normal course of work – cannot be avoided. Ellerman argues that at this point, “the tortious servant emerges from the cocoon of non-responsibility metamorphosed into a responsible human agent” (1992: 128). “That is to say,” in the words of Justice Holmes, “although it is contrary to [employment] theory to allow a servant to be sued for conduct in his capacity as such, he cannot rid himself of his responsibility as a freeman, and may be sued as a free wrong-doer. This, of course, is the law to-day” (quoted in Ellerman 1992: 128). The corollary to the judicial principle of imputation – “people should be responsible for the positive and negative results of their intentional action” – is the labor theory of property, where

people should legally appropriate the positive and negative fruits of their labor.[...] The question of de facto responsibility, whether posed in a courtroom or outside, presupposes the understanding that persons act and things don’t. Yet it is precisely the presupposition that is ‘overlooked’ in

economic theory which treats both the services of human beings and the services of capital and land symmetrically as ‘input services’” (41).

One thing that copyright guarantees is precisely the kind of positive “responsibility” Ellerman highlights: those who satisfy the legal criteria of authorship have inalienable rights to monopoly rents (Harvey 2002) based on their rights of first appropriation of the produce of their labor. By law, authors are owners.

Popular music, as is made clear through a host of fiction, nonfiction, and promotional media products, and as, according to Zanes, is constantly reiterated more generally in what he calls “popular music culture,” promises “a cultural rise to power.” But this phrase of Zanes’ extends farther than he takes it. We can understand this phrase to refer to the promise of a rise to *social* power through *cultural* practices, where “cultural practices” are understood as social and political-economic practices whose “cultural” dimension happens to be foregrounded.

A range of music scholars argue that popular music unambiguously provides resources to be used in the construction of identity and that process is unambiguously positive. According to Hesmondhalgh (forthcoming), the dominant sociological view of popular music is overwhelmingly positive; in this view popular music is understood “as a resource, and one at the disposal of humans conceived in a particular way: creative, active, imbued with agency, diverse, and performative” (3). “[M]usic is found” by this dominant strand of scholarship, “to be enriching [users’] experience, adding to agency, enhancing dimensions of people’s uses of musical material” (3). To this, he shows, is added “the idea that music has a particular and special ability to offer a route towards self-creation through fantasy” (4).

The critical thread I am pursuing here, however, emerges occasionally. Angela McRobbie (2002) has described how the affective relations developed through “clubbing” can develop into exclusionary business socialities that foreclose opportunities for (mostly racialized) “outsiders.” Ed Kealy (1974, 1979) has argued in great detail that the “real rock revolution” was part and parcel with a 1960s reorganization of the record industry – largely driven by self-actualizing, authenticity-conscious artists – that resulted in the radical occupational destabilization of an entire stratum of technical workers.¹⁶ But by and large, however, popular music, like many other widely distributed “grassroots” cultural practices, is held to be essentially a pro-social, positive force, its participants often understood as “exemplary agents” (e.g. Toynbee 2003: 52). For Charles Taylor (1991: 62) the artist in contemporary society “becomes in some way the paradigm case of the human being, as agent of original self-definition.” The relations that sustain the artist *as* artist, however, participate to a great degree in the regimes of coercion, alienation, and appropriation outlined above.

Struggles around work for hire show that creative work is not, as Ryan (1992: 44) argues, “ultimately irreducible to abstract value.” The development of work for hire doctrine in the late 19th century can be understood to recapitulate landmark moments of the development of the capitalist labor process that entailed the destruction of alternative possibilities for “self-provisioning” and produced “abstract labor” – the capacity to work at “whatever” job is made available by the employer. Work for hire is a mode of appropriation, or more to the point, “primitive accumulation” in a field in which workers’

¹⁶ Kealy’s fascinating study has been too long overlooked in research on popular music. His examination of “new individualism”-driven (Honneth 2004) reorganization of the recording industry, which entailed, among other things, new impetus to outsourcing, the “flexibilization” of workers and “affectivization” of formerly bureaucratic/technical labor, suggests that the entertainment industry led the way towards, or at least foreshadowed, the later reshaping of American industry in the 80s and 90s.

connection to the produce of their labor is harder to dislodge, in which it is not as hegemonic as it is in other arenas that the hiring party or owner of capital has the legitimate right of appropriation, where struggle still takes place over the process and produce of labor. According to Catherine Fisk, “prior to the Civil War, no court recognized that an employer was entitled to copyright the works of its employees simply by virtue of the employment; indeed courts assumed just the opposite” (2003A: 32). However, over the course of the six decades preceding the 1909 Copyright Act, there took place a “massive transfer of autonomy from creative workers to their employers” (2003B, 4), as courts managed a 180 degree shift in the default rule of authorship through an accumulation of incremental pro-employer decisions, no one of which was decisive. “It is enormously important” Fisk argues, “that the work-for-hire principle slipped into the cases without the usual adversary process ... for these seminal cases did not actually force a court to choose between the rights of the employee and those of the employer” (2003A: 44). The situation might put one in mind of the story of the frog in the saucepan full of water – the water heats to boiling so gradually that the frog never notices the change. Over the course of these decades’ worth of decisions, courts “reallocated copyright ownership simply by rewriting the implied contract between employer and employee to include a principle of employer ownership as a matter of ‘tacit assent’ – rather than as a virtually inalienable right...” (45).

A variation of what Ellerman calls the “identity fiction” – whereby employer and employee are one person in law, and that person is the employer – “is given by the phrase: *Qui facit per alium facit per se* (that which is done through another is done oneself). This captures the instrumental role of the employee. The employer ‘acts

through' the employees" (1991: 131). The employment relation – codified through the judicial assumption of tacit assent to conditions of master and servant – by placing the employee in “the legal role of a non-adult, indeed a non-person or thing” (2005: 462), not surprisingly dissolves the basis for employee claims of copyright for intellectual property created in the workplace. Today, nearly a century after its codification in American law, work for hire, like the employment relation itself, is “accepted as part of the furniture of the social world” (Ellerman 1992: 106).

For most workers in capitalism, an even partial claim on the produce of labor is so far removed from possibility that it never even presents itself as something to imagine, much less struggle for. For creative workers in the cultural industries, however, positioned at the point of the wedge of primitive accumulation, the viability of that kind of claim means the difference between the possibility of security and the promise of insecurity, between the status of freeholder and that of “bird-free” waged worker (Stewart 1984).

The apparent irreducibility of x, y, or z cultural practice depends on historically, socially, politically constructed structures of power. The “lines” between “creative” and “technical” labor, between “employee” and “author,” between “consent” and “coercion,” and so on, are the products of history. They may have much to do with our conceptions of what in culture is sacrosanct and what is not, but the relationships between each pole in each binary is more likely one of mutual constitution than reflection. The recording artists Sheryl Crow represented in her testimony to the Congressional committee, rather than challenge the validity of work for hire as a general practice – which would have opened a Pandora’s box – relied on the “furniture” of the employment relation to preserve

themselves from dispossession. That is, they chose to take advantage of the historical power of the “hiring party” to consolidate their claims, harnessing the legally constituted power of the wedge of primitive accumulation to certify their legally defensible ownership of sound recordings by way of the appropriation of the produce of their collaborators’ labor. This story of musicians and power suggests that a well-rounded understanding of the place of cultural practices such as popular music making must include an appreciation for the dimensions and dynamics to which Rousseau (1973 [1755]: 90) directs our attention in his location of the origin of inequality at the moment when “singing and dancing...became the amusement, or rather the occupation, of men and women thus assembled together with nothing else to do.”

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