



**TOURO COLLEGE**  
JACOB D. FUCHSBERG LAW CENTER  
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**Touro Law Review**

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Volume 32  
Number 1 *Symposium: Billy Joel & the Law*

Article 7

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April 2016

## Scenes from the Copyright Office

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### Recommended Citation

Frye, Brian L. (2016) "Scenes from the Copyright Office," *Touro Law Review*. Vol. 32 : No. 1 , Article 7.  
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## SCENES FROM THE COPYRIGHT OFFICE

*Brian L. Frye\**

In his iconic song, “Scenes from an Italian Restaurant,” Billy Joel uses a series of vignettes to describe an encounter between two former classmates, meeting again after many years.<sup>1</sup> The song begins as a ballad as they exchange pleasantries, segues into jazz as they reminisce about high school, shifts to rock as they gossip about the decline and fall of the former king and queen of the prom, then returns to a ballad as they part.<sup>2</sup> The genius of the song is that the banality of the vignettes perfectly captures the subjective experience of its protagonists.

This essay uses a series of vignettes drawn from Joel’s career to describe his encounters with copyright law. It begins by examining the ownership of the copyright in Joel’s songs. It continues by considering the authorship of Joel’s songs, and it concludes by evaluating certain infringement actions filed against Joel. This Essay observes that Joel’s encounters with copyright law were confusing and frustrating, but also quite typical. The banality of his experiences captures the uncertainty and incoherence of copyright doctrine.

### I. OWNERSHIP

The Copyright Act (the “Act”) provides, “Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression,” and “vests initially in the author or

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<sup>1</sup> BILLY JOEL, *Scenes from an Italian Restaurant*, on THE STRANGER (Columbia Records 1977).

<sup>2</sup> *Id.*

authors of the work.”<sup>3</sup> In other words, the copyright in an original work of authorship initially belongs to the authors of the work and protects the original elements of the work.<sup>4</sup> Copyright protects, *inter alia*, musical works and sound recordings.<sup>5</sup> As a result, the authors of a song may own copyrights in both the song and in particular recordings of performances of the song.<sup>6</sup>

William Martin “Billy” Joel was born in the Bronx on May 9, 1949, and grew up in Hicksville, Long Island.<sup>7</sup> He learned to play piano as a child, and on February 21, 1964, he joined the Echoes, a high-school cover band.<sup>8</sup> As the popularity of the Echoes grew, Joel met the record producer George “Shadow” Morgan, who recorded him playing piano on “Remember (Walking in the Sand)” and “Leader of the Pack” for the Shangri-Las.<sup>9</sup>

The Echoes soon learned that another band was using the same name, so they became Billy Joel and the Hydros, then the Emerald Lords, and finally the Lost Souls.<sup>10</sup> They also started performing original songs written by Joel.<sup>11</sup> In late 1965, the Lost Souls signed a recording contract with Mercury Records as the Commandos, because another band was using the name the Lost Souls.<sup>12</sup> While they recorded a few songs written by Joel, they never finished the album, and Mercury eventually shelved the project.<sup>13</sup>

In April 1967, Joel learned that he could not graduate from high school without attending summer school, because he had too many absences, so he quit.<sup>14</sup> According to Joel, he responded, “The hell with it. If I’m not going to Columbia University, I’m going to Columbia Records, and you don’t need a high school diploma over

<sup>3</sup> 17 U.S.C. § 102(a) (2015); *id.* § 201(a) (2015).

<sup>4</sup> See *Feist v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 348 (1991) (holding that “copyright protection may extend only to those components of a work that are original to the author”).

<sup>5</sup> 17 U.S.C. § 102(a)(2), (7).

<sup>6</sup> *Id.*

<sup>7</sup> Larry Getlen, *How Billy Joel Became ‘The Piano Man,’* NEW YORK POST (Jan. 26, 2014), <http://nypost.com/2014/01/26/how-billy-joel-became-the-piano-man/>.

<sup>8</sup> Stephen Thomas Erlewine, *Billy Joel Biography*, BILLBOARD, <http://www.billboard.com/artist/284376/billy-joel/biography> (last visited Jan. 27, 2016).

<sup>9</sup> BILL SMITH, *I GO TO EXTREMES: THE BILLY JOEL STORY* 53-57 (2007); HANK BORDOWITZ, *BILLY JOEL: THE LIFE & TIMES OF AN ANGRY YOUNG MAN* 17-20 (2006).

<sup>10</sup> BORDOWITZ, *supra* note 9, at 20; MARK BEGO, *BILLY JOEL: THE BIOGRAPHY* 33 (2007).

<sup>11</sup> BORDOWITZ, *supra* note 9, at 20.

<sup>12</sup> BORDOWITZ, *supra* note 9, at 20; BEGO, *supra* note 10.

<sup>13</sup> SMITH, *supra* note 9, at 53-57; BORDOWITZ, *supra* note 9, at 17-21.

<sup>14</sup> FRED SCHRUERS, *BILLY JOEL: THE DEFINITIVE BIOGRAPHY* 45-46 (2014).

there.”<sup>15</sup>

The Commandos soon disbanded, and Joel joined the Hassles, another popular Long Island band.<sup>16</sup> The Hassles signed a contract with United Artists and recorded two albums, *The Hassles* (1967) and *Hour of the Wolf* (1969), both of which featured songs written by Joel.<sup>17</sup> In 1970, the Hassles disbanded, and Joel formed Attila, a “heavy metal” duo, with drummer Jon Small.<sup>18</sup> Attila signed a contract with Epic Records and recorded *Attila* (1970), an album of songs written by Joel and Small, but the album was unsuccessful and Attila soon disbanded.<sup>19</sup>

As an author of the original songs performed by the Lost Souls, the Hassles, and Attila, Joel may have owned some or all of the copyrights in both the underlying musical works and the sound recordings in which they were fixed.<sup>20</sup> However, he probably transferred certain copyrights to Mercury, United Artists, and Epic in the recording contracts. In any case, the current owner or owners of the copyright in those works are difficult to determine with any certainty.<sup>21</sup>

## II. TRANSFER

Copyright consists of a set of exclusive rights to use a copyrighted work, which “may be transferred in whole or in part by any means of conveyance or by operation of law.”<sup>22</sup> In other words, the author of an original work of authorship initially owns the exclusive rights to use that work and can transfer those rights to others via contract.<sup>23</sup> Recording contracts typically provide that the artist transfers some or all of the copyrights in the musical works and sound recordings to the record company in exchange for a fixed sum

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<sup>15</sup> BORDOWITZ, *supra* note 9, at 22.

<sup>16</sup> BORDOWITZ, *supra* note 9, at 26; BEGO, *supra* note 10, at 42-43.

<sup>17</sup> BORDOWITZ, *supra* note 9, at 27-30; BEGO, *supra* note 10, at 44.

<sup>18</sup> BORDOWITZ, *supra* note 9, at 31; BEGO, *supra* note 10, at 46-47.

<sup>19</sup> BORDOWITZ, *supra* note 9, at 31-32; BEGO, *supra* note 10, at 47.

<sup>20</sup> BORDOWITZ, *supra* note 9, at 20-21, 26-32.

<sup>21</sup> For example, the copyright claimant listed for the Hassles, *The Hour of the Wolf* (1969), is Unart Music Corporation, which appears to be a defunct subsidiary of United Artists Records, Inc., which is also defunct. Moreover, even if the corporate claimant of the copyright could be traced, there is no guarantee that it is the current owner of the copyright or that the initial claim was valid.

<sup>22</sup> 17 U.S.C. §§ 106, 201(d)(1) (2012).

<sup>23</sup> *See* Erickson v. Trinity Theatre, Inc., 13 F.3d 1061, 1068 (7th Cir. 1994).

of money, a percentage of the profits, or both.<sup>24</sup>

In 1971, Joel recorded a voice and piano demo extended play recording (“EP”) of five original songs.<sup>25</sup> His manager Irwin Mazur gave a copy of the EP to Michael Lang, who passed it on to Artie Ripp, the owner of Family Productions, an independent label under contract with Paramount Records.<sup>26</sup> Ripp immediately called Mazur and signed Joel to a ten-record contract with Family Productions, which transferred most of Joel’s copyrights to Ripp and Lang, in exchange for a monthly payment.<sup>27</sup> As Joel recalled:

The guy who managed Attila [Irwin Mazur] got me a deal somehow to make a record. I now know that to get that record deal, I signed away all my publishing, all my copyrights, most of my royalties. It was a real screw job. I didn’t know what I was signing. But I probably would have signed anything to get a deal. I got an advance so I could buy a piano and pay the rent. I prepared a record thinking that the best way to get people to record my songs is to get them to hear them. And if you want to get people to hear your record, you go out on the road and tour. So it ended up being the same thing again, but I at least felt I had more control over it.<sup>28</sup>

On another occasion, Joel recalled:

“A.G.: Your first record deal as a solo performer, in 1970, was with the producer Artie Ripp and was notoriously bad.

B.J.: Yeah, I pretty much gave up my publishing, my copyrights, my royalties. He had to get his pound of flesh.”<sup>29</sup>

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<sup>24</sup> See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 519 (1994).

<sup>25</sup> BORDOWITZ, *supra* note 9, at 41-42.

<sup>26</sup> BORDOWITZ, *supra* note 9, at 43. According to Mark Bego, the demo was actually financed by Peter Schekeryk of Neighborhood Records. BEGO, *supra* note 10, at 54-55.

<sup>27</sup> KEN BIELEN, *THE WORDS AND MUSIC OF BILLY JOEL* 21 (2011); BEGO, *supra* note 10, at 56-57.

<sup>28</sup> David Sheff & Victoria Sheff, *Playboy Interview: Billy Joel*, PLAYBOY 90 (May, 1982).

<sup>29</sup> Andrew Goldman, *Billy Joel on Not Working and Noting Giving Up Drinking*, N.Y. TIMES (May 24, 2013), <http://www.nytimes.com/2013/05/26/magazine/billy-joel-on-not->

In fact, Joel's contract with Ripp was so notorious in the record industry that it inspired a slang term for a one-sided contract: a Ripp-Off.<sup>30</sup> As Joel observed:

I ended up on Artie Ripp's record label and production company which is based in L.A. and did not have an attorney representing me at the time. I was 21, I was old enough to sign, I signed away my publishing, my record rights, my copyrights, my record mechanical, my touring monies. I just signed away everything, I was like 'Hey, I got a record deal!' It's an old story in the music business, no one is clean.<sup>31</sup>

For years, Joel was bitter about his relationship with Ripp and Lang:

I notice that Family Productions, the company run by Artie Ripp that signed you to Paramount Records, still has Ripp's logo, Romulus and Remus being suckled by that she-wolf, on the label of every one of your albums. Do you think that someday you'll ever be free of Ripp?

[*Shaking his head in disgust*] I don't know. I get a dollar from each album I sell. Ripp gets twenty-eight cents out of that for "discovering me." Once in a while I get pissed off about it, but until the situation changes, it's not really healthy to dwell on it. I deserve that money a lot more than Ripp does, but I signed the papers, so what can I do? It was the only way I could get free of his Family Productions, although he wouldn't let me go entirely. And he seems willing to continue to take the money.

*Do you own your publishing?*

I have a deal with CBS' April-Blackwood Publishing;  
I do not own my publishing, but I do own my

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working-and-not-giving-up-drinking.html.

<sup>30</sup> SMITH, *supra* note 9, at 89.

<sup>31</sup> SMITH, *supra* note 9, at 89.

copyrights now - meaning that I own, like, fifty percent. [*Sighs*] Live and learn, eh?<sup>32</sup>

But Joel ultimately recognized that Ripp had taken a chance on him, when no one else would:

After all the people who passed on me, Artie Ripp was the guy who wanted me to be his artist. Nobody else heard it, nobody else wanted to sign me, nobody else was making me a deal. Artie made me a deal. He heard something. Was what he heard what I wanted to be as an artist? No. Was it my vision of what the record should be? No. Was it a good deal? No, it was a horrible deal. But he's the guy who got me on the radar screen.<sup>33</sup>

Ripp produced Joel's first solo album, *Cold Spring Harbor*,<sup>34</sup> and allegedly spent about \$450,000 developing Joel's career.<sup>35</sup> Unfortunately, the album flopped, at least in part because it was recorded at the wrong speed, so Joel sounded like one of the Chipmunks, but also because Paramount failed to promote or properly distribute it.<sup>36</sup> Nevertheless, Joel was popular on tour, even though he received little of the proceeds.<sup>37</sup> Then, on April 15, 1972, Joel appeared on WMMR 93.3 FM Philadelphia and performed his unreleased song "Captain Jack," which soon became an underground hit.<sup>38</sup>

When the tour ended, Joel moved to Los Angeles.<sup>39</sup> In the meantime, Paramount was falling apart. It stopped paying Ripp, who eventually bought out his contracts with Paramount, including the rights to Joel's copyrights, and started looking for a new recording

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<sup>32</sup> Interview by Timothy White with Billy Joel, in Detroit, MI (Sept. 4, 1980), <http://www.rollingstone.com/music/features/billy-joel-is-angry-19800904>.

<sup>33</sup> SCHRUEERS, *supra* note 14, at 79.

<sup>34</sup> BILLY JOEL, *COLD SPRING HARBOR* (Columbia Records 1971); Nick Paumgarten, *Thirty-Three-Hit Wonder*, *THE NEW YORKER* (Oct. 27, 2014), <http://www.newyorker.com/magazine/2014/10/27/thirty-three-hit-wonder>.

<sup>35</sup> BIELEN, *supra* note 27, at 21.

<sup>36</sup> SMITH, *supra* note 9, at 89; Paumgarten, *supra* note 34; Fred Goodman, *An Innocent Man*, *SPY MAGAZINE* at 73 (March 1991).

<sup>37</sup> SMITH, *supra* note 9, at 89; Paumgarten, *supra* note 34.

<sup>38</sup> SMITH, *supra* note 9, at 101.

<sup>39</sup> *Billy Joel Biography*, *BIOGRAPHY.COM*, <http://www.biography.com/people/billy-joel-9354859> (last visited Jan. 27, 2016).

contract.<sup>40</sup> Joel was frustrated and tried to disappear, performing in piano bars as “Bill Martin,” an experience that became the basis for his signature song, “Piano Man.”<sup>41</sup> He later recalled:

During this time, I got a lawyer to begin renegotiating my contract. The record company I had signed to finally figured if they didn’t renegotiate, they were never going to get anything from me. I got *some* of the rights back. It hasn’t been until recently that I’ve owned everything I do.<sup>42</sup>

In any case, Ripp kept looking for a new recording contract for Joel.<sup>43</sup> In 1973, he rejected an offer from A&M Records, then got a better offer from Atlantic Records.<sup>44</sup> But at the same time, Mazur got an offer from Clive Davis of Columbia Records, and Joel insisted on signing a seven-year contract with Columbia.<sup>45</sup> Columbia advised Joel that he could not break his contract with Ripp and Lang.<sup>46</sup> As Ripp rather saltily explained:

“You wanna say Artie Ripp had a very strong contract?,” Ripp asks today. “There was nothing wrong with it, man. If there was something legally wrong with my position, Columbia Records and Billy Joel would have had me the f--k out of there in a day. You think Clive Davis wanted me there? Or that Columbia wanted to pay me what they had to pay me?” Their recommendation, Ripp says, would have been to “shoot the c-----r.”<sup>47</sup>

As a result, Joel’s contract with Columbia provided that the Family Productions logo, Romulus and Remus being suckled by a she-wolf, would appear on Joel’s records, and Joel would pay Ripp and Lang each about 25 cents per record sold.<sup>48</sup> According to Ripp:

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<sup>40</sup> SMITH, *supra* note 9, at 110-11.

<sup>41</sup> SMITH, *supra* note 9, at 110-11; BEGO, *supra* note 10, at 63.

<sup>42</sup> Sheff & Sheff, *supra* note 28.

<sup>43</sup> BORDOWITZ, *supra* note 9, at 69.

<sup>44</sup> BORDOWITZ, *supra* note 9, at 67-68.

<sup>45</sup> BORDOWITZ, *supra* note 9, at 67-69.

<sup>46</sup> Goodman, *supra* note 36, at 73.

<sup>47</sup> Goodman, *supra* note 36, at 73.

<sup>48</sup> Goodman, *supra* note 36, at 73. Another biographer states that Ripp received four percent, or about 28 cents per record, and Lang received two percent, or about 14 cents per record. See SCHRUEERS, *supra* note 14, at 98.



My deal with Columbia was ten original Billy Joel albums, plus the ‘best-of.’ Anything that came from those albums was part of my deal, and my deal wasn’t based on years. My deal was based on ten studio albums. You’re not going to give me back the half million dollars I have in, you’ll pay me this royalty, you’ll pay Billy his royalty, you’ll pay him, his producers, and Michael Lang his override from my company. I’m the bad guy who has the contract that couldn’t be broken. I get 25 cents a record, okay, Billy didn’t have to pay it to me. The record company pays it to me. And that only happened if Billy sold records.<sup>49</sup>

Joel’s first three albums for Columbia were modestly successful.<sup>50</sup> In 1973, he recorded *Piano Man*.<sup>51</sup> The title track, which eventually became Joel’s signature song, peaked at #25 in 1974 on *Billboard*’s Top 100 chart.<sup>52</sup> Toward the end of 1974, he recorded *Streetlife Serenade*, which reached #35 on *Billboard*’s Top Album chart, and included “The Entertainer,” which reached #34 on *Billboard*’s Top 100 chart in 1975.<sup>53</sup> In 1976, he recorded *Turnstiles*, which did not chart, although it included several songs that later became hits, including “New York State of Mind” and “Prelude/Angry Young Man.”<sup>54</sup>

Joel’s career finally took off in 1977, when his fourth album, *The Stranger*, spent six weeks at #2 on *Billboard*’s Top Albums chart.<sup>55</sup> The album included four Top-25 hits, “Just the Way You Are” (#3), “Movin’ Out (Anthony’s Song)” (#17), “Only the Good Die Young” (#24), and “She’s Always a Woman” (#17), as well as “Scenes from an Italian Restaurant,” which became one of Joel’s best-known songs.<sup>56</sup> In 1978, Joel recorded *52nd Street*, which

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<sup>49</sup> Goodman, *supra* note 36, at 71-72.

<sup>50</sup> Goodman, *supra* note 36, at 79.

<sup>51</sup> 1973 *Rock Music Timeline*, ROCK MUSIC TIMELINE, <http://www.rockmusicimeline.com/1973.html> (last visited Jan. 27, 2016); Erlewine, *supra* note 8.

<sup>52</sup> Erlewine, *supra* note 8.

<sup>53</sup> Erlewine, *supra* note 8; *Streetlife Serenade*, ALL MUSIC, <http://www.allmusic.com/album/streetlife-serenade-mw0000190511/awards> (last visited Oct. 15, 2015).

<sup>54</sup> Stephen Thomas Erlewine, *Turnstiles Review*, ALL MUSIC, <http://www.allmusic.com/album/turnstiles-mw0000650318> (last visited Jan. 27, 2016).

<sup>55</sup> BORDOWITZ, *supra* note 9, at 99.

<sup>56</sup> *Billy Joel*, JEW WATCH, <http://www.jewwatch.com/jew-entertainment-joel-billy.html>

became his first #1 album.<sup>57</sup>

According to one biographer, when Joel's original contract with Columbia Records ended in 1981, his manager negotiated a new contract, which obligated Columbia to pay Ripp's percentage: "The only way Billy signed again to Columbia was they said, 'We'll pay the quarter to them. It doesn't come from your money anymore.'" <sup>58</sup> Walter Yetnikoff, the President of Columbia at the time, remembered the events differently:

I said, "I want Billy Joel's publishing back" - because it included "Piano Man" and stuff. And [Ripp] said, "It's worth a fortune." I said, "I'm going to pay you, I'll give you four hundred grand." He said, "No, no, it's far more. I'm not selling the publishing." And I grabbed him, and I said, "I'll f——n' kill you. I'm a guy from Brooklyn. You can't start with me." I said, "Let me explain something to you. Even if I can't put your head through the wall, you think you're going to succeed in this business when I'm the greatest exec and I'm going to be pissed at you? Anyone that talks to you can't talk to me. I represent CBS." I said, "Anyone who talks to you can't talk to Columbia, Epic, or anything else. You think you're going to live with that very long? As I recall, we bought it back, and I gave his copyrights to Billy as a birthday present."<sup>59</sup>

Another biographer corroborates this version of events, stating that Yetnikoff gave Joel the copyrights for his twenty-ninth birthday.<sup>60</sup> In any event, Joel's relationship with Columbia continues to this day:

B.J.: Do you know how many compilations there are that people think I put out? People think I'm doing it, and it kind of dilutes what I did in terms of the album forms. To be fair to Columbia records, I haven't given

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(last visited Jan. 27, 2016).

<sup>57</sup> *Billy Joel Earns His First #1 Album When 52<sup>nd</sup> Street Tops the Billboard Pop Chart*, HISTORY, <http://www.history.com/this-day-in-history/billy-joel-earns-his-first-1-album-w-hen-52nd-street-tops-the-billboard-pop-chart> (last visited Jan. 27, 2016).

<sup>58</sup> BORDOWITZ, *supra* note 9, at 134.

<sup>59</sup> SCHRUEERS, *supra* note 14, at 124.

<sup>60</sup> Paumgarten, *supra* note 34.

them anything since 1993, that's 20 years ago.

A.G.: What do you owe them?

B.J.: At this point, probably four or five regular albums. It's indentured servitude when you sign with a record company. I don't even own my own masters. They own the masters.

A.G.: Do you get a regular call from Columbia saying: "Billy, you're short four albums we paid for. What do you have?"

B.J.: No, they just say, "We'd like to put out this." What am I going to do, sue them? I can't stop them.<sup>61</sup>

According to Richie Cannata, Joel recorded - or at least threatened to record - throwaway songs, in order to evade his contractual obligations:

I remember at one point - and I don't know if Liberty talked about that - but he owed songs to somebody. So, we all made up songs to give him, and recorded them at "sound check." They were really crazy songs, but we made them up just to get out of this deal. "Hey we wrote ten more songs. Now, we've fulfilled that. Can we move on? Now am I out of the publishing deal?" We all kind of participated in that.<sup>62</sup>

To date, Joel has recorded twelve studio albums, all of which were eventually commercially successful, as well as an album of "classical

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<sup>61</sup> Goldman, *supra* note 29. Some artists are less sanguine than Joel about undesirable recording contracts. For example, in 1967, Van Morrison signed a contract with Bang Records, which obligated him to deliver 36 original songs. The relationship soon soured, and Van Morrison signed a new contract with Warner Music, but he still owed Bang 31 songs. So in 1968, he went to a recording studio and improvised them all on the spot, with titles like *Ring Worm*, *Want a Danish?*, *The Big Royalty Check*, and *Freaky If You Got This Far*. Bang never released the recordings, which eventually became known as the "Contractual Obligation Session."

<sup>62</sup> BEGO, *supra* note 10, at 166.

compositions” in 2001.<sup>63</sup> He has written and recorded thirty-three Billboard Top 40 hits and has sold more than 150 million records worldwide, making him one of the best-selling recording artists of all time.<sup>64</sup> But the ownership of the copyrights in his musical works and sound recordings is unclear, certainly from the outside, and probably also from the inside, as discussed below.

### III. TERMINATION OF TRANSFER

The Copyright Act provides, *inter alia*, that the author of an original work of authorship can terminate a transfer or license of the copyright in that work after a specified period of time.<sup>65</sup> The termination right is non-transferable and non-waivable, and can be exercised “notwithstanding any agreement to the contrary.”<sup>66</sup> Specifically, Section 304 of the Copyright Act provides that the author of a work copyrighted before January 1, 1978 can terminate a transfer or license of the copyright in that work executed before January 1, 1978, “at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.”<sup>67</sup> And Section 203 of the Copyright Act provides that the author of a work can terminate a transfer or license of the copyright in that work executed on or after January 1, 1978, “at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant.”<sup>68</sup>

The termination right was intended to benefit authors by enabling them to reclaim the copyright in their works of authorship, in two different ways.<sup>69</sup> The Copyright Act of 1976 changed the

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<sup>63</sup> Jeff Giles, *22 Years Ago: Billy Joel Releases his Final Rock Album*, ULTIMATE CLASSIC ROCK (Aug. 10, 2015, 6:25 AM), <http://ultimateclassicrock.com/billy-joel-river-of-dreams/>.

<sup>64</sup> *Billy Joel Biography*, BILLY JOEL, <http://www.billyjoel.com/biography> (last visited Feb. 23, 2016).

<sup>65</sup> See 17 U.S.C. § 203; *id.* § 304. See also Guy A. Rub, *Stronger Than Kryptonite?: Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J.L. & TECH. 49 (2013).

<sup>66</sup> 17 U.S.C. §§ 203(a)(5); 304(c)(5) (The termination right may also be asserted by the statutory successors of an author). *Id.* § 203(a)(2); *id.* § 304(c)(2).

<sup>67</sup> *Id.* § 304(c)(3). The Copyright Term Extension Act of 1998 further provided that authors whose termination rights under Section 304 had expired could terminate transfers and licenses executed before 1978, “at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured.” *Id.* § (d)(2).

<sup>68</sup> *Id.* § 203(a)(3).

<sup>69</sup> Edward E. Weiman, Andrew W. DeFrancis & Kenneth D. Kronstadt, COPYRIGHT

duration of copyright from an initial term of 28 years and a renewal term of 28 years to a fixed term of the life of the author plus 50 years.<sup>70</sup> Section 304 was intended to enable the authors of works created before the change in the copyright term to reclaim any extension of the copyright term.<sup>71</sup> By contrast, Section 203 was intended to enable the authors of works created after the change in the copyright terms to reclaim the copyright in works that proved more valuable than originally anticipated.<sup>72</sup>

Notably, a literal reading of Sections 203 and 304 appears to create a potential gap in the coverage of the termination right.<sup>73</sup> Section 304 only applies to works created and transferred before January 1, 1978, and Section 203 only applies to works transferred on or after January 1, 1978.<sup>74</sup> But what about works created after but transferred before January 1, 1978? For example, recording contracts typically provide for the transfer of copyright in works to be created in the future.<sup>75</sup> If a recording artist signed such a contract before January 1, 1978 that covers works created after that date, the termination right arguably does not apply, although the better reading is probably that those works were constructively transferred when they were created.<sup>76</sup>

In any case, the termination right lay largely dormant for 35 years, but the day of reckoning has finally arrived. Under Section 203, authors who transferred or licensed a copyright on January 1, 1978 could file a termination notice on January 1, 2011 and reclaim the copyright on January 1, 2013.<sup>77</sup>

While the termination right applies to all works of authorship, it is especially salient in relation to sound recordings, for both

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TERMINATION FOR NONCOPYRIGHT MAJORS: AN OVERVIEW OF TERMINATION RIGHTS AND PROCEDURES, 24 No. 8 INTELL. PROP. & TECH. L.J. 3, 4 (2012).

<sup>70</sup> Design Protection Act of 1976, S.22, 94<sup>th</sup> Cong. (1976). Subsequently, the term was extended to the life of the author plus 70 years.

<sup>71</sup> Weiman et al., *supra* note 69, at 4.

<sup>72</sup> Weiman et al., *supra* note 69, at 4.

<sup>73</sup> See generally Joshua Beldner, *Charlie Daniels & "The Devil" in the Details: What the Copyright Office's Response to the Termination Gap Foreshadows About the Upcoming Statutory Termination Period*, 18 B.U. J. SCI. & TECH. L. 199, 199 (2012).

<sup>74</sup> Weiman et al., *supra* note 69, at 3.

<sup>75</sup> *Copyright Ownership: Who Owns What?*, STANFORD UNIVERSITY LIBRARIES, <http://fairuse.stanford.edu/overview/faqs/copyright-ownership/> (last visited Oct. 15, 2015).

<sup>76</sup> Beldner, *supra* note 73, at 225-28.

<sup>77</sup> 17 U.S.C. § 203 (2002).

historical and practical reasons.<sup>78</sup> From a historical standpoint, federal copyright law only protects sound recordings created on or after February 15, 1972, and sound recordings created before that date are protected only by state law.<sup>79</sup> As a result, the termination right only applies to sound recordings created on or after February 15, 1972.<sup>80</sup> And from a practical standpoint, the authors of sound recordings typically transfer the copyright in their works to their publisher.<sup>81</sup> As a consequence, the termination right may enable the authors of many sound recordings created after January 1, 1978 to reclaim the copyright in the works they created.<sup>82</sup>

Indeed, many notable artists have already filed termination notices, including Bob Dylan, Tom Petty, Bryan Adams, Loretta Lynn, Kris Kristofferson, Tom Waits, and Charlie Daniels.<sup>83</sup> It appears that Joel may have filed a termination notice for his 1978 album, *52nd Street*, as well as other albums.<sup>84</sup>

However, there are several statutory limitations on the termination right. It must be timely asserted and the termination notice must comply with all statutory and regulatory formalities.<sup>85</sup> It does not apply to derivative works created prior to termination.<sup>86</sup> And most importantly, it does not apply to works made for hire.<sup>87</sup>

The Copyright Act provides that the “author” of a “work made for hire” is the employer,<sup>88</sup> and it defines a “work made for hire” as:

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<sup>78</sup> Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375 (January 2002).

<sup>79</sup> *See, e.g.*, 17 U.S.C. § 301 (1998).

<sup>80</sup> *Id.* § 301(c).

<sup>81</sup> Adam Rich, Note, *Finding The Groove: A Path Forward on Terminations of Sound Recording Transfers*, 57 N.Y.L. SCH. L. REV. 363, 365 (2012/2013).

<sup>82</sup> Matthew C. Holohan & Samantha K. Picans, *Copyright Transfer Terminations, Trademark, and Trade Dress: Forewarned is Forearmed*, 43 COLO. LAW. 51, 52 (2014).

<sup>83</sup> Larry Rohter, *Record Industry Braces for Artists' Battles Over Song Rights*, NY TIMES (Aug. 15, 2011), <http://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html>.

<sup>84</sup> *Id.* at 4-5 (noting that it is unclear which artists have filed termination notices because the Copyright Office database is incomplete).

<sup>85</sup> 17 U.S.C. §§ 304, 203(a)(4) (2002); *see also*, 37 C.F.R. § 201.10 (2013).

<sup>86</sup> 17 U.S.C. § 203(b)(1).

<sup>87</sup> *Id.* § 203(a).

<sup>88</sup> *Id.* § 201(b) (2015) (“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”).

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.<sup>89</sup>

Recording contracts typically provide that sound recordings are works made for hire.<sup>90</sup> For example, the copyright registration for Joel's 1978 album, *52nd Street*, states that the copyright claimant is CBS, Inc., "employer for hire."<sup>91</sup> However, the Supreme Court has held that the common law of agency determines whether a person is an "employee" for the purpose of the Copyright Act, and that the parties to a contract can effectively agree that a work is a "work made for hire" under the Copyright Act only if it falls into one of the statutory categories.<sup>92</sup> As a consequence, it is a question of fact whether a particular sound recording is a work made for hire under the Copyright Act, and the facts tend to favor producers and artists.<sup>93</sup>

The recording industry realized that the termination right might enable many artists to reclaim the copyright in their sound recordings and decided to intervene.<sup>94</sup> In 1999, representatives of the recording industry successfully lobbied Congress to amend Section 101 of the Copyright Act and list sound recordings as one of the statutory categories of works that can be deemed works made for hire based on an express agreement.<sup>95</sup> Recording artists were outraged, and Congress repealed the amendment in 2000.<sup>96</sup> So, as it stands, sound recordings can be works made for hire under the Copyright Act only if the artists and producers who created them are

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<sup>89</sup> *Id.* § 101 (2010).

<sup>90</sup> Ryan Vacca, *Work Made for Hire – Analyzing the Multifactor Balancing Test*, 42 FLA. ST. U. L. REV. 197 (2014).

<sup>91</sup> UNITED STATES COPYRIGHT OFFICE (Aug. 8, 2015), <http://cocatalog.loc.gov>.

<sup>92</sup> *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989).

<sup>93</sup> Vacca, *supra* note 90, at 241-42.

<sup>94</sup> LaFrance, *supra* note 78, at 375-76.

<sup>95</sup> CONSOLIDATED APPROPRIATIONS ACT OF 2000, H.R. 3194, 106<sup>th</sup> Cong. (1999) (amending 17 U.S.C.A. § 1301) (repealed 2000); *see* LaFrance, *supra* note 78, at 418.

<sup>96</sup> H.R. REP. NO. 5107, at 2 (2000).

“employees” under the common law of agency.<sup>97</sup>

As yet, no court has determined whether a typical sound recording is a work made for hire for the purpose of the termination right under Section 203.<sup>98</sup> It appears that many recording artists may be using the threat of filing a termination notice to renegotiate their contracts. Indeed, it appears that the recording industry is split on the wisdom of litigating terminating notices. But we should expect to see litigation in the near future, as the number of termination notices filed grows.

Are the musical works and sound recordings created by Billy Joel works made for hire? It is hard to say without examining the factual circumstances surrounding the creation of each work. And if some or all of those musical works and sound recordings are not works made for hire, who can claim authorship?

#### IV. AUTHORSHIP

Under the Copyright Act, “The authors of a joint work are co-owners of copyright in the work.”<sup>99</sup> The Act defines a “joint work” as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”<sup>100</sup>

Courts uniformly agree that a work is a joint work only if all of the authors who contribute to the work intend to create a joint work when the work is created.<sup>101</sup> But courts disagree about whether a joint author must contribute an original element to the joint work.<sup>102</sup> Most courts have held that a person can be a joint author only if that

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<sup>97</sup> *Reid*, 490 U.S. at 742.

<sup>98</sup> *Fifty-Six Hope Rd. Music Ltd. v. UMG Recordings, Inc.*, No. 08 CIV 6143 DLC, 2010 WL 3564258, at \*7 (S.D. N.Y. Sept. 10, 2010) (holding that certain sound recordings created by Bob Marley were works made for hire); *see also* *Scorpio Music S.A. v. Willis*, No. 11CV1557 BTM RBB, 2012 WL 1598043, at \*5 (S.D. Cal. May 7, 2012) (allowing a former member of the Village People to exercise the termination right under Section 203 of the Copyright Act and noting that plaintiff record company had withdrawn its claim that he was a “writer for hire”).

<sup>99</sup> 17 U.S.C. § 201 (2015).

<sup>100</sup> *Id.* § 101 (2010).

<sup>101</sup> *See* *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068-69 (7th Cir. 1994) (“[W]e believe that the statutory language clearly requires that each author intend that their respective contributions be merged into a unitary whole.”) (citing *Childress v. Taylor*, 945 F.2d 500, 505 (2d Cir. 1991)).

<sup>102</sup> *Gaiman v. McFarlane*, 360 F.3d 644, 658-59 (7th Cir. 2004).



person contributed an original element to the joint work.<sup>103</sup> But some courts have held that a person can be a joint author even if that person did not contribute an original element to the joint work, if the other authors agree to become joint authors.<sup>104</sup>

Obviously, when more than one person participates in the creation of an original work of authorship, the ownership of that work may be unclear.<sup>105</sup> For example, many people may participate in the creation of a musical work or sound recording.<sup>106</sup> While conventional understandings of authorship and ownership have arisen to address many of these circumstances, it is unclear whether they are consistent with copyright doctrine.

For example, when songwriters agree to collaborate on the creation of a song, they typically agree to consider each other joint authors.<sup>107</sup> But what if a songwriter contributes the lyrics and melody of the song, and others contribute additional elements, like the accompaniment and rhythm? What if an entire band participates in the creation of a song? Who are the authors of the underlying musical work? And who are the authors of the sound recording? In some cases, band members may be employees, and their contributions may be works made for hire. But what if they are not?

On May 19, 2009, Joel's former drummer Liberty DeVitto filed an action against Joel in the Supreme Court of New York, New York County, alleging eleven breach of contract claims for failure to pay royalties on eleven albums recorded between 1975 and 1990.<sup>108</sup> Joel and DeVitto first met as teenagers in the late 60s when their respective bands, The Hassles and The New Rock Workshop, performed at a rock club located in Plainview, Long Island named "My House."<sup>109</sup> In 1975, DeVitto joined what became the Billy Joel

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<sup>103</sup> See *Erickson*, 13 F.3d at 1069-70.

<sup>104</sup> *Gaiman*, 360 F.3d at 659.

<sup>105</sup> *Id.*

<sup>106</sup> *Childress*, 945 F.2d at 505.

<sup>107</sup> Ezra D. Landes, Comment, *I Am the Walrus. - No. I Am!: Can Paul McCartney Transpose the Ubiquitous "Lennon/McCartney" Songwriting Credit to Read "McCartney/Lennon?" an Exploration of the Surviving Beatle's Attempt to Re-Write Music Lore, As It Pertains to the Bundle of Intellectual Property Rights*, 34 PEPP. L. REV. 185, 186-87 (2006).

<sup>108</sup> *Liberty DeVitto v. William Joel and Sony Music Entertainment, Inc.*, No. 09107122, 2009 WL 6303526 (N.Y. Sup. Ct. 2009).

<sup>109</sup> *30 Days Out Exclusive Interview: Liberty DeVitto, former drummer for Billy Joel*, 30 DAYS OUT (July 24, 2008), <https://30daysout.wordpress.com/2008/07/24/30-days-out-interview-liberty-devitto-former-drummer-for-billy-joel/>.

Band.<sup>110</sup>

DeVitto was a member of the Billy Joel Band from 1975 to 2005, and he performed on the Billy Joel albums, *Turnstiles*, *The Stranger*, *52nd Street*, *Glass Houses*, *The Nylon Curtain*, *Innocent Man*, *The Bridge*, *Billy Joel Kohuept (Live In Leningrad)*, *Storm Front*, *Greatest Hits Volumes 1 & 2* and *Songs In The Attic*, which collectively sold more than 100 million copies worldwide.<sup>111</sup> In 2005, Joel fired DeVitto, possibly because DeVitto accused Joel of being an alcoholic.<sup>112</sup>

While DeVitto was not credited as an author of any Joel's songs, DeVitto claimed that the members of the Billy Joel Band composed their own parts to each song, and that the recordings of the songs were the product of collaboration between Joel and the members of the band.<sup>113</sup> As DeVitto remarked, "If Billy sang 'Only the Good Die Young' like he wanted to, it would have been a reggae song."<sup>114</sup>

The relationship between Joel and the members of the Billy Joel Band was unclear. As Mark Bego, a Joel biographer observed:

There were no formal printed contracts, and everything was still handled on a handshake kind of agreement. When it came time to record an album, the musicians in Billy's band were paid an hourly salary of "double scale," which is twice what the Musician's Union mandated as the minimum wage at the time. Billy's way of working in the recording studio was to bring in scraps of songs or melodies. He would ask for musical contributions from the members of his troupe, and they would create their parts. At the end

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<sup>110</sup> DeVitto, 2009 WL 6303526, at \*5; see *Billy Joel Sued by Drummer Over 'Unpaid Royalties'*, THE TELEGRAPH (May 26, 2009), <http://www.telegraph.co.uk/news/celebritynews/5382974/Billy-Joel-sued-by-drummer-over-unpaid-royalties.html>; see also *30 Days Out Exclusive Interview*, *supra* note 109.

<sup>111</sup> *Liberty DeVitto Discography*, DISCOGS.COM, [http://www.discogs.com/artist/254958-Liberty-DeVitto?query=billy joel](http://www.discogs.com/artist/254958-Liberty-DeVitto?query=billy%20joel) (last visited Oct. 15, 2015); see also *Billy Joel Biography*, ROCKHALL.COM <https://rockhall.com/inductees/billy-joel/bio/> (last visited Feb. 23, 2016).

<sup>112</sup> Kathianne Boniello, 'Drummed Out' by the Piano Man, NEW YORK POST (May 24, 2009), <http://nypost.com/2009/05/24/drummed-out-by-the-piano-man/>.

<sup>113</sup> *30 Days Out Exclusive Interview*, *supra* note 109. ("Phil Ramone, our producer through *The Bridge LP*, really taught us how to play in the studio. All of us came up with our own parts.").

<sup>114</sup> Boniello, *supra* note 112.

of the day, they had all technically contributed to the musical creating and recording of the songs, yet only one person was getting full songwriting credits. And, it was Billy Joel who also reaped all of the monetary rewards when other singers performed these songs.<sup>115</sup>

In an interview with David Sheff, which appeared in *Playboy Magazine*, Joel's description of his relationship with his band was broadly consistent with DeVitto's, reflecting a collaborative songwriting practice:

Playboy: Your songs are often contradictions within themselves: A fairly tough, raw statement comes packaged in a sweet melody.

Joel: That's true. Probably because my music and lyrics aren't written at the same time. I always write the music first. A lot of times I write bail-out lyrics, just to carry along the melody while I work on the real lyrics. *My Life* was originally [*singing*] "Welcome back, welcome back, welcome back to the real life." Those were the bail-out lyrics. *Honesty* was originally *Sodomy*. My drummer, Liberty DeVitto, will sometimes make up some dirty lyrics and we use those until it gets to the point where I say, "Uh-oh, I better write real lyrics for this or I'll have to get up onstage and sing Lib's words." I can just see getting up on stage and going [*singing*] "Sodomy, it's such a lonely word."<sup>116</sup>

In April 2010, DeVitto settled his action against Joel for an undisclosed sum.<sup>117</sup> Interestingly, it is unclear whether DeVitto was entitled to a settlement. Under the Copyright Act, he and the other

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<sup>115</sup> BEGO, *supra* note 10, at 145-46.

<sup>116</sup> Sheff & Sheff, *supra* note 28, at 79.

<sup>117</sup> Daniel Kreps, *Billy Joel Settles Royalty Lawsuit With Former Drummer*, ROLLING STONE (Apr. 23, 2010), <http://www.rollingstone.com/music/news/billy-joel-settles-royalty-lawsuit-with-former-drummer-20100423>; *Billy Joel settles lawsuit with former drummer*, THE TELEGRAPH (Apr. 21, 2010), <http://www.telegraph.co.uk/culture/music/music-news/7616368/Billy-Joel-settles-lawsuit-with-former-drummer.html>; Kamika Dunlap, *Legal Settlement Reached over Billy Joel Music Royalties*, FIND LAW (Apr. 27, 2010), [http://blogs.findlaw.com/celebrity\\_justice/2010/04/legal-settlement-reached-over-billy-joel-music-royalties.html](http://blogs.findlaw.com/celebrity_justice/2010/04/legal-settlement-reached-over-billy-joel-music-royalties.html).

members of the Billy Joel Band probably contributed original elements to at least some of Joel's songs. It seems undisputed that Joel intended to collaborate with his band members on the creation of the songs.<sup>118</sup> But Joel probably did not intend to create a joint work with the members of his band.<sup>119</sup> Ultimately, the issue probably comes down to whether the members of the Billy Joel Band were Joel's employees for the purpose of the work made for hire doctrine.<sup>120</sup> Because they received a union salary and other benefits, they probably were Joel's employees for the purpose of the Copyright Act, and therefore are probably not joint authors of Joel's songs.<sup>121</sup> But it is hard to say with certainty.

## V. INFRINGEMENT

The Copyright Act grants authors, *inter alia*, the exclusive right to reproduce the original elements of their works of authorship and to create derivative works based on the original elements of their works of authorship, subject to certain exceptions.<sup>122</sup> As a result, the use of an original element of a copyrighted work without the permission of the author is an infringing use, unless it is permitted by one of the exceptions.<sup>123</sup> So, in order to make out a *prima facie* infringement claim, a copyright owner must show that the alleged infringer actually copied an original element of the work, and that the works are substantially similar because of the copying.<sup>124</sup>

The plaintiff in an infringement action can prove copying either directly or circumstantially.<sup>125</sup> Direct evidence of copying is unusual, because most works are created in private and defendants

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<sup>118</sup> BEGO, *supra* note 10, at 145-46.

<sup>119</sup> BEGO, *supra* note 10, at 145-46.

<sup>120</sup> See 17 U.S.C. § 101 (2010) ("A work made for hire is a work prepared by an employee within the scope of his or her employment.").

<sup>121</sup> See *id.* ("A 'joint work' is a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.").

<sup>122</sup> See *id.* § 106 (2002) ("Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work . . .").

<sup>123</sup> *Id.* § 501(a) (2002).

<sup>124</sup> Ty Inc. v. GMA Accessories, Inc., 132 F.3d 1167 (7th Cir. 1997).

<sup>125</sup> Armour v. Knowles, 512 F.3d 147, 152 (5th Cir. 2007).

rarely admit to copying.<sup>126</sup> Accordingly, most plaintiffs prove copying circumstantially, by showing access and probative similarity.<sup>127</sup>

A plaintiff can prove access either by showing a connection between the defendant and the copyrighted work or by showing that the copyrighted work is ubiquitous.<sup>128</sup> Courts have generally found access when plaintiffs show a nexus between the defendant and the allegedly infringed work, but have not found access when the relationship is tenuous or speculative.<sup>129</sup> And a plaintiff can prove probative similarity by showing that the two works share one or more elements, whether or not those elements are independently protected by copyright.<sup>130</sup> In other words, shared ideas or public domain elements can show probative similarity, even though copying ideas and public domain elements cannot be an infringing use.<sup>131</sup>

The plaintiff in an infringement action must also show that the allegedly infringing work copied original elements of the copyrighted work, and that the works are substantially similar because of that copying.<sup>132</sup> Substantial similarity is a mixed question of fact and law, determined from the perspective of the “ordinary observer.”<sup>133</sup> In

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<sup>126</sup> *Peel & Co. v. The Rug Mkt.*, 238 F.3d 391, 394 (5th Cir. 2001).

<sup>127</sup> *Id.* at 394-95.

<sup>128</sup> *Id.* at 395.

<sup>129</sup> *See Taylor Corp. v. Four Seasons Greetings, LLC*, 315 F.3d 1039 (8th Cir. 2003) (noting that access existed where plaintiff designed the defendant’s product). *But see Jones v. Blige*, 558 F.3d 485 (6th Cir. 2009) (finding that the plaintiffs did not set forth any reasonable possibility that defendants had access to their work).

<sup>130</sup> *Batiste v. Najm*, 28 F. Supp. 3d 595, 599 (E.D. La. 2014).

<sup>131</sup> *Ty Inc.*, 132 F.3d at 1169.

<sup>132</sup> *Jones*, 558 F.3d at 490-91.

<sup>133</sup> *Arnstein v. Porter*, 154 F.2d 464, 472-73 (2d Cir. 1946). The court clarified the analysis used to determine whether one individual wrongfully appropriated something belonging to another by way of the following:

Whether (if he copied) defendant unlawfully appropriated presents, too, an issue of fact. The proper criterion on that issue is not an analytic or other comparison of the respective musical compositions as they appear on paper or in the judgment of trained musicians. The plaintiff’s legally protected interest is not, as such, his reputation as a musician but his interest in the potential financial returns from his compositions which derive from the lay public’s approbation of his efforts. The question, therefore, is whether defendant took from plaintiff’s works so much of what is pleasing to the ears of lay listeners, who comprise the audience for whom such popular music is composed, that defendant wrongfully appropriated something which belongs to the plaintiff.

*Id.*

practice, many courts and juries seem to apply a relaxed standard for substantial similarity, finding infringement if a work copies any elements of the old work and the two works are broadly similar.<sup>134</sup>

Throughout his career, Joel has been dogged with accusations of liberal borrowing from other songwriters. For example, when Joel first played “Piano Man” for Atlantic Records executives Ahmet Ertegun, Jerry Wexler, and Jerry Greenberg in 1973, Wexler observed, “You know, it’s kinda like ‘Bojangles.’ If ‘Bojangles’ wasn’t written, you probably wouldn’t have written that, right?” To which Joel protested, “I didn’t steal it. ‘Mr. Bojangles’ is one thing, ‘Piano Man’ is another thing. It’s a similar structure, same chord progression. That’s it.”<sup>135</sup>

While Joel has admitted to emulating the style of songwriters he admires, he has always denied copying them:

Joel: I like Elvis Costello, but I have never tried to duplicate anyone. If I consciously try to emulate anybody, it’s the Beatles. I’ve tried to compose in a certain style - for instance, I was thinking of Ray Charles when I sat down to write *New York State of Mind* - but that’s different. I am inspired by performers, but I don’t try to copy people. We didn’t set out to make *Glass Houses* New Wave. We looked at it as a rock-’n’-roll album. But we knew they would throw rocks at it.<sup>136</sup>

And yet, in 1983, Joel confessed his fear of being derivative to his publicist Howard Bloom:

You have no idea how hard it is for me to write songs. It’s a terrible experience. I have to lock myself in a room with a piano, and I pace back and forth, and I’m tortured. And the songs come out of me with such difficulty. And I’ll tell you something about my songs, every one of them disappoints me. They’re all derivative.<sup>137</sup>

Bloom rejected Joel’s concerns, responding, “Billy, you have no idea

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<sup>134</sup> Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp., 562 F.2d 1157 (9th Cir. 1977).

<sup>135</sup> BORDOWITZ, *supra* note 9, at 43.

<sup>136</sup> Sheff & Sheff, *supra* note 28, at 77.

<sup>137</sup> BORDOWITZ, *supra* note 9, at 150.

what you're doing. Of course it's derivative. Everything is derivative. Everything has roots, but your stuff is brilliantly original."<sup>138</sup>

Others disagreed. In 1979, John Powers, an unknown songwriter from Reno, Nevada, filed a copyright infringement action against Joel, alleging that Joel's song "My Life" (1978) copied elements of Power's unpublished song "We Got to Get It Together" (1974).<sup>139</sup> Powers claimed that Joel had access to his song because he sent a copy to Columbia Records, which was rejected.<sup>140</sup> Initially, Joel wanted to litigate, but in 1980, he settled for \$42,500 on the advice of counsel, because litigation would be risky and more costly.<sup>141</sup>

Among other things, the settlement required Powers to provide a letter stating that Joel had not copied his song, but Powers did not comply.<sup>142</sup> Instead, he ran advertisements alleging that Joel copied his song and made media appearances brandishing Joel's check.<sup>143</sup> Joel was livid, and in a 1980 interview with *Rolling Stone*, he expressed his indignation at the infringement action and fulminated against Powers:

Incidentally, I read recently in Random Notes about this guy [John Powers of Reno] who said that I stole his song, that he wrote "My Life." Now, my initial instinct is to just go beat the hell out of the guy, but my lawyers say I can't do that. I've had more leeches and sharks preying on me over the years, and it hasn't been dramatized in the press much because, until recently, Billy Joel wasn't very interesting to people.

But I never stole anybody's song. People send me tapes through Columbia all the time, and I *do not* and *will not* listen to them. As it is, I'm getting sued; I've got lawsuits up the gazool, which is something that disillusiones me a lot about writing. I don't want to

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<sup>138</sup> BORDOWITZ, *supra* note 9, at 150-51.

<sup>139</sup> BORDOWITZ, *supra* note 9, at 105.

<sup>140</sup> BORDOWITZ, *supra* note 9, at 105.

<sup>141</sup> BORDOWITZ, *supra* note 9, at 105.

<sup>142</sup> Sheff & Sheff, *supra* note 28, at 77.

<sup>143</sup> Sheff & Sheff, *supra* note 28, at 77.

steal from anyone, because I know the feeling - my stuff's been getting ripped off all my life.

*How have things with "My Life" ended up?*

Lawyers [*whistles whimsically*] . . . . It was a settlement. I said, "How much am I going to pay you if we go to court?" And the lawyers said X. "How much?! The guy is wrong. I never heard his song. He wants to go to court, I'll go to court. I'll kill him. I want to kill him. I'll kill anybody who says I stole his material."

Maybe he did have a melody that was copyrighted. But don't tell people I'm a thief. When they question my intentions, that bugs me. Enough about that. I never stole nobody's song.<sup>144</sup>

And in a 1982 interview with *Playboy*, he expanded on those sentiments:

*Playboy*: You were taken to court over *My Life*, weren't you?

Joel: Yeah. [*His eyes narrow and he smiles sinisterly*] Hey, you want to go to Reno and beat somebody up? That's where he lives - the creep who says I stole his song!

*Playboy*: What happened?

Joel: This is it: *I* wrote that song. I remember writing that song. I gave birth to that song. It's *my* song. But I got a call one day saying I was being sued by a guy who had a song with the same kind of notes that he

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<sup>144</sup> Timothy White, *Billy Joel is Angry*, ROLLING STONE (Sept. 4, 1980), <http://www.rollingstone.com/music/features/billy-joel-is-angry-19800904>.



copyrighted and sent to Columbia Records or somebody, and they sent it back, saying, “Thanks, but no, thanks.” Based on the fact that I wrote the same kind of song and the fact that Columbia had his tape, he said I heard his tape and stole the song. When I heard about it, I said, “Let’s go to court. Let’s kill him. I want to *kill* him.” But the lawyers said, “Look at it this way. You’re going to go to Reno, Nevada. You’re a big, successful rock star. Here’s this poor little schlump. The jury’s going to be from Reno. We’ll have our musicologist, he’ll have his musicologist. Who’s to say? You can lose.”

I said, “How can I lose? I *wrote* the song! I know I wrote the song! My wife is a witness!” “Your wife can’t testify.” “But she was there! I went through all hell writing this damn thing!” Anyway, they told me I should settle out of court. I said, “What! Why should I settle? I *wrote* the goddamn song!” But they advised me to settle, because life is not fair. So they settled for the minimum amount of money. After everything, the guy probably got \$5000. It was a nuisance suit. But by the agreement, we were supposed to get a letter saying that I did *not* steal his song. I was totally against it, but I went along with the lawyers for once. So I’m supposed to have this letter. I’ve never seen this letter. And I hear that the guy does an act now and says, “This is a song I wrote that Billy Joel stole.” [*He downs a glass of Scotch*] I want to break his legs with my own hands.

Somebody else was going to sue me for another song: he claimed I was in a movie theater and heard a tape of his that I stole. When I heard about it, I said, “Listen, no more of this settling s--t. If somebody sues, you have to countersue. Tell the guy, ‘I’m going to countersue you for every penny you ever make, and I’ll give it all to charity. I don’t want your stinking money. You go after me, I’ll kill you!’” I never stole

nobody's song! I'm still mad at the lawyers for letting me settle. It sucks. Lawyers kind of run the country. So anyway, I don't care how much it will cost me. If it ever happens again, I am going to go for the jugular. After my lawyers went back to tell the second guy we wouldn't settle, we never heard from him again.

Playboy: Do you –

Joel: Man, the thing that bugged me about it was that it was like they were taking away my kid! I give birth to these songs. I go through labor pains with these songs. It's not the money. It's the birthright. Writing is the worst thing. It's the scariest thing in the world. I hate to write. I absolutely hate writing. You tear your guts out of yourself.

You're in the middle of a hot, dry desert. There's nothing but this blank piece of paper in front of you and this piano that has 88 white teeth staring at you, waiting to bite your hands off. That's what it's like. It's horrible - until you finish. Then it's, "Don't talk to me. I just did something really cool. Look at my child."

For somebody to come up and say, "That's not your child . . ." No way. *F--k you!* So if I ever meet that guy, I'm going to break his legs, I'm going to break his face. That may sound real *macho* and stupid and brutal, but I don't care: Don't take my child away. That's it.<sup>145</sup>

Based on those statements, Powers filed a defamation action against Joel in Nevada state court, which was eventually dismissed in 1988.<sup>146</sup> The court held that Joel's statements were not defamatory as

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<sup>145</sup> Sheff & Sheff, *supra* note 28, at 79.

<sup>146</sup> Powers v. Joel, 809 P.2d 616 (Nev. 1988); *see also* Richard Harrington, *Singing all the Way to the Court*, WASHINGTON POST (Sept. 28, 1980), <https://www.washingtonpost.com/archive/lifestyle/1980/09/28/singing-all-the-way-to-court/8a31570f-a265-47d3-bd89bc8b0dd9868b/>; BORDOWITZ, *supra* note 9, at 105.

a matter of law, because “a reasonable reading of the verbiage and style of the statements makes clear that they are issued as opinion rather than assertions of fact.”<sup>147</sup>

In 1993, a second infringement action was filed against Joel, but true to his word, he refused to settle. Gary Zimmerman, a “struggling Long Island songwriter,” alleged that Joel’s songs “We Didn’t Start the Fire” (1989) and “River of Dreams” (1993) copied elements of his unpublished song “Nowhere Man” (1986), and requested \$10 million in damages.<sup>148</sup> Zimmerman claimed that Joel had access to “Nowhere Man” via an anonymous mutual friend.<sup>149</sup> He alleged that “We Didn’t Start the Fire” copied “a substantial part of the melody [of ‘Nowhere Land’] used as a bridge, and the phrasing and the form of the bridge . . . More than 50 percent of the defendant’s song consisted of plaintiff’s work.”<sup>150</sup> He also alleged that “The River of Dreams” copied the melody and the first two lines of “Nowhere Man.” Specifically, Joel’s song begins, “In the middle of the night I go walking in my sleep,” while Zimmerman’s begins, “It’s the middle of the night, and I just can’t get to sleep.”<sup>151</sup>

Joel denied any knowledge of Zimmerman or his song and noted that the risk of infringement litigation forced him and his peers to ignore new songwriters.<sup>152</sup> “I regard my songs as my children, and I will do what any parent would do—guard them with my life. This is another example of why true, struggling songwriters can’t get anybody—including me—to listen to their songs. As far as Gary Zimmerman is concerned, I have never met him, and I have never heard his music.” About a year later, Zimmerman dropped his suit.<sup>153</sup>

It is hard to say whether either Powers or Zimmerman had a

<sup>147</sup> Powers, 809 P.2d 616.

<sup>148</sup> New York Times News Service, *Song Writer Drops Fruitless Suit Against Billy Joel*, DESERET NEWS (Aug. 27, 1994, 12:00 A.M.), <http://www.deseretnews.com/article/372294/SONGWRITER-DROPS-FRUITLESS-SUIT-AGAINST-BILLY-JOEL.html>.

<sup>149</sup> BORDOWITZ, *supra* note 9, at 105; *Songwriter Accuses Billy Joel of Some Pop Music Plagiarism*, ORLANDO SENTINEL (Aug. 13, 1993), [http://articles.orlandosentinel.com/1993-08-13/news/9308130611\\_1\\_billy-joel-gary-zimmerman-plagiarism](http://articles.orlandosentinel.com/1993-08-13/news/9308130611_1_billy-joel-gary-zimmerman-plagiarism); New York Times News Service, *supra* note 148; “We Didn’t Start the Fire” Starts a Lawsuit, ASSOCIATED PRESS (Aug. 12, 1993 1:29 P.M.), <http://www.apnewsarchive.com/1993/-We-Didn-t-Start-the-Fire-Starts-a-Lawsuit/id-e5e0cde995b8a5238a79a02b2493be50>.

<sup>150</sup> ORLANDO SENTINEL, *supra* note 149.

<sup>151</sup> ORLANDO SENTINEL, *supra* note 149.

<sup>152</sup> ASSOCIATED PRESS, *supra* note 149.

<sup>153</sup> See New York Times News Service, *supra* note 148; BORDOWITZ, *supra* note 9, at 150-51; ORLANDO SENTINEL, *supra* note 149.

legitimate infringement claim, because their songs are out of print - if they were ever published - and unavailable to compare with Joel's songs. But it seems unlikely that Joel ever heard either song. His lawyer's advice to settle with Powers explicitly reflected the uncertainties of copyright litigation, rather than an assessment of the merits of Powers's action. And Zimmerman's decision not to pursue his action likely reflects his or his lawyer's assessment of its merits. Nevertheless, in the absence of a concrete and objective definition of infringement, it is impossible to know with certainty whether a particular use - or even a particular similarity - will be deemed infringing.

## **VI. CONCLUSION**

This essay has discussed copyright ownership, authorship, and infringement in relation to songs written and recorded by Billy Joel. It has shown that the status of each is unclear, at best. And it has suggested that Joel's experience of the vagaries of copyright law is the rule, not the exception.