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Cover Page Footnote

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EXPOSING THE "FOLKLORE" OF RE-RECORDING CLAUSES (TAYLOR'S VERSION)

*Justin Tilghman**

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TABLE OF CONTENTS

I. INTRODUCTION

Many artists believe that their significance, power, or notoriety comes from how many GRAMMY awards they have won or how well their album sales do the first week. However, very few artists recognize that the true power comes in the form of owning the rights to their master recordings. Given how difficult it is to achieve commercial success as an independent artist, many artists will turn to major record companies to help with their music production and distribution. This help, however, is not unconditional. The artist will sign over the master recording rights to the song or album to the record company to support the artist's album. Whoever owns the rights to a master recording is free to appropriate and license the recording to third parties for large sums of money and exclude others from using the recording without authorization.

Unfortunately, many artists only get a fraction of the profits, despite it being their creation. Singer Taylor Swift has taken significant issue with this "trade" between artists and record companies. Most notably, Swift was involved in a highly publicized fight to get the master recording rights for her entire catalog from music executive Scooter Braun. After fruitless attempts to buy back her masters, Swift decided to re-record her entire catalog. Swift attempted to create a new master's recording separate from that of the original master recordings owned by Braun. She can only do this once her re-recording clause expires. This clause prohibits an artist from re-recording their own songs for a designated period of time. This Note explores when re-recording clauses go too far and, in effect, violate the public policy the Framers had in mind when drafting the 'Useful Art Clauses'.

II. BACKGROUND

A. NOW WE GOT BAD BLOOD

In today's music industry, how artists are measured in success is rudimentary, that is, rudimentary in the sense that an artist is viewed as "successful" based, for the most part, on their tangible accomplishments. For instance, when some artists win an award at the GRAMMYs, they reached the "pinnacle" of success. Indeed, those artists make a five-pound grammium alloy statue[1] their "end goal".[2] On the other hand, an artist may base their success on how big their house is, how many cars they have, or how many expensive pieces of jewelry

[1] Chris Baker, *All About that Brass: What Exactly is a Grammy Trophy Made of?*, SYRACUSE NY LOC. NEWS, https://www.syracuse.com/entertainment/2015/02/what_is_a_grammy_trophy_made_of.html (last updated Mar. 22, 2019, 6:24 AM).

[2] *How Important are the Grammy Awards?*, NPR (Feb. 9, 2007), https://www.npr.org/templates/story/story.php?storyId=7304613.

they own.[3] In a song titled *Success*, by record executive Shawn Carter, also known as "Jay-Z", Carter questions what it means to be successful in the music industry.[4] Carter doubts that the number of cars he has or his purchase of expensive champagne will ever truly make him successful; yet, a majority of the artists in today's music industry find solace knowing that once they have obtained those tangible accomplishments, they have "made it".[5]

A minority of artists like Carter, however, focus less on tangible items to measure their success or impact in the music industry. Most notably in that compact group is GRAMMY Award-winning recording artist Taylor Swift. Known for hits like *Shake it Off*[6] and *Bad Blood*[7], Swift is making a public display of a struggle that many artists throughout the years have dealt with.[8] In 2005, teenage Swift entered into a 13-year contract with Big Machine Records, a country music record label founded by Scott Borchetta.[9] The contract stipulated that in exchange for a cash advance and help with producing Swift's music, Big Machine Records would own the master recording rights[10] to Swift's first six albums.[11] At the time that the young Swift signed the contract, she likely had no idea what a master recording was or its significance because of her lack of experience in dealing with major recording labels.[12]

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[3] DRAKE, SUCCESSFUL (Young Money Records, Cash Money Records, & Motown 2009)("I want the money (Money), money and the cars. Cars and the clothes (Clothes)… I just wanna be successful.").

[4] JAY-Z, SUCCESS (Roc-a-Fella Records & Def Jam Records 2007)("I used to give a s***, now I don't give a s*** more. Truth be told I had more fun when I was piss-poor. I'm pissed off, and this what success is all about… [a]ll this stress, all I got is this big house.").

[5] *See* Spencer Kornhaber, *Jay-Z's Pitch for Generational Wealth*, ATLANTIC (June 30, 2017), https://www.theatlantic.com/entertainment/archive/2017/06/jay-zs-pitch-for-generational-wealth/532383/ ("[The album's] confessional thread is remarkable on its own, but it also serves as a headline-baiting advertisement that helps to spread *4:44*'s deeper message about commerce and racial progress…. But for *4:44*, [Jay-Z] consolidates his thinking on the link between material success and racial inequality with some big-picture, long-term prescriptions.").

[6] TAYLOR SWIFT, SHAKE IT OFF (Big Machine Records 2014).

[7] TAYLOR SWIFT, BAD BLOOD (Big Machine Records 2015).

[8] Brittany Spanos, *Taylor Swift vs. Scooter Braun and Scott Borchetta: What the Hell Happened?*, ROLLING STONE (July 1, 2019 1:22 PM), https://www.rollingstone.com/music/music-news/taylor-swift-scooter-braun-scott-borchetta-explainer-853424/ (noting Swift's frustration in her attempts to get the rights to her master recording when Swift stated that "[f]or years I asked, pleaded for a chance to own my work. Instead I was given an opportunity to 'earn' one album back at a time....").

[9] *Id.*

[10] *See also* United States v. Am. Soc'y of Composers, Authors, & Publishers, 559 F. Supp. 2d 332, 403 (S.D.N.Y. 2008) ("[T]he right in the sound recordings, which is the particular recording of the work by a particular artist or band, the copyright in which is typically owned by record companies.").

[11] Spanos, *supra* note 8.

[12] Leni, *infra* note 41.

In 2019, Swift became embroiled into a fight with record executive, Scooter Braun, to obtain the master recording rights to the first six albums she made while signed to Big Machine Records.[13] This fight began when Borchetta and Swift were unable to reach a deal to renew Swift's contract, causing Swift to leave the record label.[14] Swift leaving, however, did not mean that her master recording rights left with her. In 2019, Big Machine Records was purchased by Braun for reportedly $300 million.[15] Along with acquiring the record label, Braun also acquired Swift's master recording rights.[16] In 2020, Braun sold Big Machine and Swift's master recordings to Shamrock Holdings, an American private equity firm owned by the Disney estate, for reportedly $300 million.[17] Before the sale to Shamrock Swift attempted to buy her master recording rights from Braun directly.[18] Braun gave Swift the option to buy back her master recording rights, but she would be required to sign a non-disclosure agreement, preventing her from saying anything negative about Braun in public.[19] Swift refused and blasted Braun on social media.[20] She said that she had no idea that Braun, whom she described as an "incessant, manipulative bully[]" would be purchasing Big Machine.[21] She also stated "[e]ssentially, [her] musical legacy is about to lie in the hands of someone who tried to dismantle it."[22]

Faced with being unable to obtain her master recording rights, Swift has chartered a different path to obtain the benefits that come with owning the rights to a master recording. In 2019, Swift announced that she would be re-recording the previous six albums she recorded while under Big Machine Records with her new record label Universal Music Group.[23] Swift's contract with Universal Music Group provides that she will be able to own the master recording rights of the re-recorded versions of her previous albums.[24] Swift urges that her decision to re-record her albums is not for money, but instead to move the needle in the

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[13] Shirley Halperin, *Scooter Braun Sells Taylor Swift's Big Machine Masters for Big Payday,* VARIETY (Nov. 16, 2020, 12:01 PM), https://variety.com/2020/music/news/scooter-braun-sells-taylor-swift-big-machine-masters-1234832080/.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Taylor Swift (@taylorswift), TUMBLR (June 30, 2019), taylorswift.tumblr.com/post/185958366550/for-years-i-asked-pleaded-for-a-chance-to-own-my.

[21] *Id.*

[22] *Id.*

[23] Anthony Pericolo, *Bad Blood with Taylor Swift's Album Re-recording*, HARV. JOLT DIG. (Feb. 20, 2021), https://jolt.law.harvard.edu/digest/bad-blood-with-taylor-swifts-album-re-recording.

[24] *Id.*

direction of artists rather than the recording label in terms of ownership and ownership rights of the music.[25]

B. DIFFERENT DANCE, BUT IT IS REALLY THE SAME SONG

Swift is certainly not the first artist to make the decision to re-record her own songs. Other singers, like Prince and JoJo, have also re-recorded their catalogs to control the rights to their music.[26] The act of re-recording, however, begs the question of whether an artist re-recording their previous album violates the copyrights of the record label. Concededly, Swift is a professional and can sing notes or reach certain pitches that very few in the general public can. Despite this fact, Swift's ability to change the melody or the beat of a re-recorded version to avoid infringing on the record labels version is unlikely. The question is: does an artist re-recording their song, regardless of how similar it is to the original version, constitute copyright infringement? If there is no infringement, then what rights do record labels have in protecting their investments? The battle between artists and recording labels has been a back-and-forth one.[27] Swift's endeavor could put a huge win in the column for artists by giving artists the control in their own creations, even if it was not the first version of the creation.

This Note analyzes whether an artist can re-record their own catalogue without infringing on the original master recordings owned by a record label or some other entity. This Note argues that Congress' intention in passing the Copyright Act was to prevent master recording owners from extending their rights in their recordings beyond the sounds fixed in the actual recording.

This Note then argues that the contractual measures that recording labels have in place are not enforceable against artists and cannot prevent artists from re-recording their music for a set duration of time. Part II discusses the two separate copyrights within a musical work as well as what is considered infringement of a copyrighted musical work under the Copyright Act. Part III discusses the contractual method record labels use to protect their interest in an artists' original master recording by restricting an artists' ability to re-record their own music for a designated period. Part III also argues that the Copyright Act does not extend an owner's rights in a master recording to re-recordings of that master recording and proposes that re-recording clauses in contracts are void ab initio in the interest of the public. Finally, Part IV will discuss the practical implications and

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[25] Chloe Karis, *Why is Taylor Swift Re-recording Her Old Albums, and What Does it Mean for the Music Industry?*, MIXDOWN (Apr. 16, 2021), https://mixdownmag.com.au/features/why-is-taylor-swift-re-recording-her-old-albums-and-what-does-it-mean-for-the-music-industry/.

[26] Ryan Mikeala Nguyen, *What Taylor Swift's Re-recordings Symbolize For Music Ownership,* NEW U. (Apr. 12, 2021), https://www.newuniversity.org/2021/04/12/what-taylor-swifts-re-recordings-symbolize-for-music-ownership/.

[27] Brian Haack, *Why are so few Artists Fighting to Get Back Their Masters?*, RECORDING ACAD. (Sept. 30, 2017 12:19 AM), https://www.grammy.com/news/universal-language-why-humans-need-music.

difficulties that some artists will face when attempting to re-record their own music.

C. CREATOR'S RIGHTS

A copyright owner has certain exclusive rights within its work to do and authorize certain things.[28] These rights include (1) the ability to reproduce the copyrighted work in copies; (2) prepare derivative works of the copyrighted work; and (3) in the case of sound recordings, perform the copyrighted work in public through digital auto transmission.[29] For musical works, specifically, there are two copyrights implicated within each musical creation.[30] Each of those copyrights have distinct, yet key features that make them desirable for an artist or recording label.

The first copyright is the right within the musical work itself.[31] This includes "the melodies and/or lyrics that underlie all songs, and which are written by songwriters . . . ."[32] These copyrights are referred to in the music industry as the publishing rights to a song.[33] Artists, despite the prevalence of "ghost-writing"[34], which is the practice of one artist writing lyrics for another artist, generally write their own music, and thus will more than likely be the exclusive owner of the publishing rights to their songs.[35] Being the exclusive owner of a song's publishing rights permits an artist to license the use of their music to be used in any capacity, contingent on the payment of a license fee.[36] Licensing fees provide artists with a "great source of income," along with other royalties they may accrue from the use of their songs.[37] Copyright infringement of publishing rights occurs when "a substantial similarity exists between the defendant's work and the

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[28] 17 U.S.C. § 106.

[29] *Id.*

[30] United States v. Am. Soc'y of Composers, Authors, & Publishers, 559 F. Supp. 2d 332, 403 (S.D.N.Y. 2008).

[31] *Id.*

[32] *Id.*

[33] *Music Publishing Explained for Musicians*, DITTO MUSIC (May 4, 2021), https://dittomusic.com/en/blog/music-publishing-explained-for-musicians/.

[34] Natalie Robehmed, *Phantom Rappers: Inside the Business of Ghostwriting*, FORBES (Sept. 22, 2015, 9:45 AM), https://www.forbes.com/sites/natalierobehmed/2015/09/22/phantom-rappers-inside-the-business-of-ghostwriting/?sh=3b9a14f71ec1 (describing the practice of artists writing lyrics for other more successful artists).

[35] *See* Brandy Robidoux, *25 Artists who Actually Write Their Own Music*, ELITEDAILY (July 29, 2021), https://www.elitedaily.com/entertainment/artists-write-own-music ("And while sometimes musicians enlist writers to pen their music for them, it's even more impressive when an artist writes their own tunes. In a time where fans value authenticity from celebrities more than ever, a lot of artists *do* write their own music.").

[36] Henry Schoonmaker, *Benefits of Self-Publishing*, SONGTRUST BLOG, https://blog.songtrust.com/benefits-self-publishing (last updated Mar. 22, 2022).

[37] *Id.*

protectible elements of plaintiff's."[38] Ascertaining whether two works are "substantially similar" involves a court making a determination of whether "an average lay observer would recognize the alleged copyright as having been appropriated from the copyrighted work."[39]

The second copyright, and arguably the most coveted, is "the right in the sound recordings, which is the particular recording of the work by a particular artist or band, the copyright in which is typically owned by record companies."[40] These copyrights are more commonly known as the master recording rights to a song, for good reason. The "master" of the fixed sounds in the recording has the "legal rights to freely appropriate and maximize [] money-making opportunities."[41] The entity or person who owns the master recording has the authority to license the recordings for use in movies, TV shows, and commercials.[42] It cannot be overstated how much significance there is in owning the master recording rights to a song. As Diego Fraias, CEO and co-founder of Amuse, a music recording label, notes:

> 'A lot of artists, especially in the early days of their career, don't realize that signing away your masters means selling the rights to their own work - sometimes for all future . . . That doesn't always feel like a priority if you haven't had your breakthrough yet, but even Taylor Swift and Kanye were beginners at one point in their careers. For Taylor, not owning some of her masters meant losing power over where and how that music was used, as well as kept her from performing songs live.'[43]

Along with the affirmative rights of a master recording, owners of a song's master recording enjoy negative rights, which prevent others from making unauthorized uses of the fixed sounds.[44] Unauthorized use of a master recording amounts to copyright infringement.[45] Copyright infringement of a sound

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[38] Clayton v. UMG Recordings, Inc., No. 20-cv-5841, 2021 WL 3621784, at *5 (S.D.N.Y. Aug. 16, 2021) (quoting Peter F. Gaito Architecture, LLC v. Simone Dev. Corp., 602 F.3d 57, 63 (2d Cir. 2010)).

[39] Watt v. Butler, 744 F.Supp.2d 1315, 1322 (N.D. Ga. 2010) (quoting Original Appalachian Artworks, Inc. v. Toy Loft, 684 F.2d 821, 829 (11th Cir. 1982)).

[40] Am. Soc'y of Composers, Authors, & Publishers, 559 F.Supp.2d at 403.

[41] Leni, *What Does It Mean to Own Your Masters?*, AMUSE (Oct. 15, 2020), https://www.amuse.io/content/owning-your-masters?cn-reloaded=1&cn-reloaded=1.

[42] *Id.*

[43] *Id.*

[44] *See* 17 U.S.C. § 106 (stating the exclusive rights of a copyright holder).

[45] *See, e.g.,* Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800-01 (6th Cir. 2005) (holding that unauthorized use of a sound recording amounted to infringement).

recording occurs when the fixed sounds in the recording are reproduced, adapted, publicly performed, or distributed through digital audio transmission without the permission of the sound recording's owner.[46] A sound recording owner whose copyright has been infringed is entitled to actual damages, statutory damages, injunctive relief, and attorneys' fees.[47] There are limits, however, in an owner's rights to their sound recording. The rights in a sound recording "'do not extend to the making or duplication of another sound recording that consists *entirely* of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.'"[48] Therefore, in cases where there is infringement upon the sound recording, the inquiry is primarily focused on whether there is authorization to use the fixed recording, rather than whether there is a substantial similarity between the sound recording and the alleged infringing work.[49]

D. RE-RECORDING CLAUSES: "YOU BELONG WITH ME" . . . AT LEAST FOR A FEW YEARS

Rights in a sound recording, while lucrative, do not go beyond the fixed sounds in the sound recording[50], and thus, sound recording owners are very limited in the ways they can protect their copyrights.[51] Specifically, record labels, that typically own the sound recording rights in a song,[52] will employ contractual measures to prevent an artist from undercutting the label's profitability in its

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[46] U.S. COPYRIGHT OFF., CIRCULAR 57 PRE-1972 SOUND RECORDINGS 2 (Mar. 2021), https://www.copyright.gov/circs/circ57.pdf; *see also* U.S. COPYRIGHT OFF., CIRCULAR 56 COPYRIGHT REGISTRATION FOR SOUND RECORDINGS (Mar. 2021), https://www.copyright.gov/circs/circ56.pdf ("In 1971, Congress amended the copyright law to provide federal copyright protection for sound recordings fixed and first published with a statutory copyright notice on or after February 15, 1972. All sound recordings created after January 1, 1978, are automatically protected by copyright. A sound recording is considered created when it is "fixed" in a phonorecord for the first time.").

[47] *Id.*

[48] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792, 800 (6th Cir. 2005) (emphasis added) (quoting 17 U.S.C. § 114(b)).

[49] *See* Fharmacy Recs. v. Nassar, 248 F.R.D. 507, 527 (E.D. Mich. 2008), *aff'd*, 379 F. App'x 522 (6th Cir. 2010) ("The protection afforded sound recordings in a digital sampling case such as the one now before the Court, therefore, does not extend to the 'generic sound'; it only protects the recorded sound—the stored electronic data digitally preserved by the composer. The substantial similarity test thus has no place in determining whether infringement occurred.").

[50] 17 U.S.C. 114(b).

[51] *Id.*

[52] Madeleine Amos, *What Does Owning Your Masters Mean?*, ROUTENOTE (July 19, 2021), https://routenote.com/blog/what-does-owning-your-masters-mean/#:~:text=In%20a%20traditional%20record%20contract,having%20to%20ask%20your%20permission.

sound recording.[53] Re-recording clauses, or re-recording restrictions, stop an artist from re-recording music they made while under a record label so that the record label can exploit its exclusive rights in the sound recording.[54] Record labels will inhibit the artists' ability to re-record anywhere from a couple of months to a few years.[55]

A standard re-recording clause reads as follows: "[The artist] undertakes that [the artist] will not record for five (5) years from the end of the Term any composition released on Record by [the recording label] or our licensees under this Agreement during the Term or within one (1) year after the end of the Term."[56] Record labels are making significant increases to the duration of time artist will have to wait before re-recording their music.[57] Based on an interview with Dina LaPolt, an entertainment attorney, Vice reported that record labels will "try to bump up the term of that restriction to 20 or 30 years, if not extend it in perpetuity."[58] LaPolt says that "'[e]very time there is an amazing thing that an artist does to get out of their deal, or get their IP back, [record companies] come up with some dastardly, ugly thing to make sure that doesn't happen again.'"[59]

III. ANALYSIS

A. A HISTORY IN CREATOR'S RIGHTS

Courts should not enforce re-recording clauses against an artist when enforcement would be too extreme, in light of the circumstances in which the clause was agreed to and the public policy concerns regarding an artists' ability to expand on their creation.

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[53] Chris Castle, *Re-Recording Restrictions: A Glossary of Industry Terms*, HYPEBOT (Aug. 30, 2019), https://www.hypebot.com/hypebot/2019/08/re-recording-restrictions-a-glossary-of-industry-terms.html.

[54] *Id.*

[55] *Id.*

[56] *Re-Recording Restriction Sample Clauses*, LAW INSIDER, https://www.lawinsider.com/clause/re-recording-restriction (last visited Oct. 28, 2021).

[57] *See* Schwartz, *infra* note 58 (discussing steps record labels may take in response to Swift re-recording her catalogue).

[58] Drew Schwartz, *Why Taylor Swift's Plan to Re-Record Her Old Music Ss Actually Going to Work*, VICE (Dec. 7, 2020, 1:11 PM), https://www.vice.com/en/article/k7a7ka/why-taylor-swift-re-recording-her-old-music-scooter-braun-explained; *see also* Kyle Kim, *We Compared 'Taylor's Version' Songs with the Original Taylor Swift Albums*, WALL ST. J., https://www.wsj.com/articles/we-compared-taylors-version-songs-with-the-original-taylor-swift-albums-11636383601 (last updated Nov. 12, 2021, 10:49 AM) ("'[Swift] is bringing to attention the rerecording restriction agreement alone makes the whole controversy valuable.'").

[59] Schwartz, *supra* note 58.

John Locke, a proponent of the theory of labor in private property, asserts that property[60] belongs to whoever exerted the labor to create the property.[61] Locke argues that natural law reasons that "since one's labor is part of one's person, a man is exclusively proprietor of his acts of labor."[62] Locke's reasoning supports the idea that a person who labors should benefit from the fruits of their labor. That benefit further incentivizes the laborer to continue to labor so that they may reap more benefits for themselves as well as society. This reasoning reinforces the philosophy underlying the Copyright clause.[63]

The Supreme Court reasoned that the economic philosophy behind the Copyright Clause is to advance the public welfare by incentivizing "individual effort" for "personal gain."[64] History proffers that society not only benefitted if creators were allowed to create, but also maintained control of their creations. Anything that prevented a creator from owning their creation, therefore, was not in the best interest of the public.[65] In protecting the "promot[ion] [of] the Progress of Science and useful Arts," courts appear to keep in mind that protecting a person's labor has implications beyond that just of the individual but impact the greater public entirely.[66] There is a public policy interest in ensuring that a person's ability to create is not interfered with by society nor the government.[67] On the other hand, courts should not ignore that recording labels entering into deals with artist have their own incentive. At bottom, the record labels are making an investment into the creation of a work, and thus should be able to benefit from that investment for some period of time. This investment should not outweigh the circumstances surrounding the agreements between million-dollar corporations and young, inexperienced artist.

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[60] Henry Moulds, *Private Property in John Locke's State of Nature*, 23 AM. J. ECON. AND SOC. 179, 179 (Apr. 1964), https://www.jstor.org/stable/3484403?seq=1#metadata_info_tab_contents.

[61] *Id.*

[62] *Id.*

[63] U.S. CONST. art I, § 8, cl. 8 (providing that Congress has the power "[t]o 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.").

[64] Mazer v. Stein, 347 U.S. 201, 219 (1954); *see also* Washingtonian Pub. Co. v. Pearson, 306 U.S. 30, 36 (1939) (reasoning that the Copyright Clause is for the purpose of "afford[ing] greater encouragement to the production of literary works of lasting benefit to the world." (internal citations omitted)).

[65] *See* Comput. Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 711 (2d Cir. 1992) (reasoning that the grant of a monopoly in the copyright of a computer program would stifle the public welfare because it would inhibit the benefits of creativity); *see also* Gund, Inc. v. Smile Int'l, Inc., 691 F. Supp. 642, 644 (E.D.N.Y. 1988) ("Any monopoly tends to burden competitors and therefore the public.").

[66] Comput. Assocs. Int'l, Inc., 982 F.2d at 711.

[67] Richard Oxenberg, *Locke and the Right to (Acquire) Property: A Lockean Argument for the Rawlsian Difference Principle*, 26 SOC. PHIL. TODAY 55, 61 (2010), https://philarchive.org/archive/OXELAT.

B. RE-RECORDING CLAUSES DISINVENTIVIZES CREATION

Courts have generally voided entire contracts or particular contract provisions if they are deemed to be void ab initio as against public policy.[68] Courts differ on what exactly violates public policy, thus it is clear that "'[t]here is no magic formula for determining when a contract ... is void as against public policy.'"[69] Although, to determine if a contract violates public policy, courts will often engage in a balancing-test which weighs the policy of enforcing the contract against the interest in honoring the contract.[70] Other courts will only find a contract unenforceable if it clearly violates enacted legislation.[71] The highest court in Idaho reasoned that "'[t]he usual test applied by the courts in determining whether a contract offends public policy and is antagonistic to the public interest is whether the contract has a tendency toward such an evil.'"[72]

The balancing approach provides the strongest support for finding re-recording clauses void against public policy. The much narrower approach of only finding that a contract is void ab initio when it violates enacted statute fails to consider the fluidity and ever-evolving nature of public policy. This approach does not consider contract provisions that may clearly shock the conscience yet do not violate a black-letter law. Rather, the balancing approach is broader in that it considers important public interest that may not be encapsulated into statute, but nevertheless concern the safety, well-being, and efficiency of the public.[73] The balancing approach ensures that contracts which "violate any

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[68] *See, e.g.*, Saint-Jean v. Emigrant Mortg. Co., 337 F. Supp. 3d 186, 203 (E.D.N.Y. 2018); *see, e.g.,* In re Village Homes of Colo., Inc., 405 B.R. 479 (Bkrtcy. D. Colo. 2009); *see, e.g.,* Rullan v. Goden, 134 F. Supp. 3d 926, 945 (D. Md. 2015) (reasoning that contracts could be void as against public policy).

[69] Saint-Jean, 337 F.Supp.3d at 203 (quoting Anders v. Verizon Comms. Inc., 16-CV-5654 (VSB), 2018 WL 2727883, at *9 (S.D.N.Y. June 5, 2018)).

[70] *See* Sylver v. Regents Bank, Nat'l Ass'n, 300 P.3d 718, 723 (Nev. 2013) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 178(3)(c)-(d) (AM. LAW INST. 1981)) (accounting for "'the seriousness of any misconduct involved and the extent to which it was deliberate, and ... the directness of the connection between that misconduct and the term.'").

[71] CSA 13-101 Loop, LLC v. Loop 101, LLC, 341 P.3d 452, 453 411 (Ariz. 2014).

[72] Neustadt v. Colafranceschi, 469 P.3d 1, 8 (Idaho 2020) (emphasis omitted) (quoting Stearns v. Williams, 240 P.2d 883, 837 (Idaho 1952)).

[73] *See, e.g.*, Rogers v. Webb, 558 N.W.2d 155, 157 (Iowa 1997) (quoting Norris v. Norris, 174 N.W. 2d 368, 370 (Iowa 1970)) (noting Iowa's interest in preserving the marriage relationship made agreement which provided compensation for a male friend of a woman going through a divorce from the proceeds of the divorce void under the general rule that "'any provision [in a contract] which provides for, facilitates or tends to induce a separation or divorce of the parties after marriage'" is contrary to public policy and void); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981)(stating that "[o]nly infrequently does legislation, on grounds of public policy, provide that a term is unenforceable. When a court reaches that conclusion, it usually does so on the basis of a public policy derived either from its own perception of the need to protect some aspect of the public welfare or from legislation that is relevant to that policy although it says nothing explicitly about unenforceability.").

established interest of society" are invalidated.[74] Therefore, under the balancing approach, re-recording clauses are void against public policy because they violate the established interest that society has in ensuring that creators are able to create and the interest the public has in benefiting from such creations.

As noted previously, re-recording clauses prohibit the artist from re-recording music they have already made for a designated period.[75] The artist is not forced to enter these contracts. Artist like Swift, desperate for fame and resources, will enter into agreements with re-recording clauses without considering how much the contract provision can stifle their creation in the future. The record labels' freedom to contract should not be inhibited because of an artist's failure to do their own due diligence before entering into an agreement. The freedom to contract, however, "is not absolute."[76] "[F]or the government cannot exist if the citizen may at will . . . exercise his freedom to contract to work . . . harm [to his fellow citizens]. Equally fundamental with the private right is [the right] of the public to regulate it in the common interest."[77]

The common interest here is society being able to appreciate the value of the different approach an artist can take when artists have the opportunity to re-create. For instance, when analyzing the differences between Swift's re-recorded and original versions Dr. Paula Clare Harper, Assistant Professor of Musicology at the University of Nebraska-Lincoln's Glenn Korff School of Music, noted that "[Swift] is bringing in the breathy, more chest-driven singing evident in her later albums."[78] Swift's vocal evolution in her re-recorded music has allowed her listeners to enjoy music they otherwise would have never heard had Swift's re-recording clause not expired. Listeners have enjoyed her re-recorded versions so much so that "Fearless (Taylor's Version)" is one of the highest selling albums of 2021, according to Billboard.[79]

Record labels may argue that the restrictions are only for a designated period of time, so artist are not completely prohibited from re-creating music. This assumption, however, depends on the premise that an artist will always have a healthy voice to sing with,[80] a committed fan base, or, frankly, the personality to remain in the "spotlight". While in form there is an eventual opportunity for an artist to recreate, in reality most artists have very small windows to capitalize off of their fame and stardom.

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[74] Walker v. Am. Fam. Mut. Ins. Co., 340 N.W.2d 599, 601 (Iowa 1983)(citations omitted).

[75] Castle, *supra* note 53

[76] Waithaka v. Amazon.com, Inc., 404 F. Supp. 3d 335, 346 (D. Mass. 2019) (quoting Commonwealth v. Henry's Drywall Co., 320 N.E.2d 911, 915 (Mass. 1974)).

[77] *Id.*

[78] Kim, *supra* note 58.

[79] *Id.*

[80] Abby Jones, *SZA Says Her Voice is 'Permanently Injured' After Swollen Vocal Cord Diagnosis*, BILLBOARD (May 30, 2018), https://www.billboard.com/music/pop/sza-voice-permanently-injured-swollen-vocal-cords-8458440/.

C. PRACTICAL IMPLICATIONS OF RE-RECORDING

Assuming that an artist is not bound by a re-recording clause, there are still several hurdles they must jump to fully monetize the value of their music. Not every artist is as lucky as Swift, who is with a new label that is willing finance her album while allowing her to own her masters.[81] Many artists do not have the luxury to rely on another label to finance their music, and thus must come out of pocket to re-create their music.[82] Depending on several factors, an artist could end up paying up to $100,000 to produce an entire album.[83]

Despite what the internet estimates some artists' worth is[84], very few musicians have $100,000 to spend on creating music.[85] This financial obstacle makes creating music very difficult without record label support. Even with label support, very few artists can obtain a label deal like that of Swift.[86] Unlike Swift, an artist leaving one label for another could be stuck in the same predicament of being subject to a re-recording clause, which would stifle any immediate creativity an artist may have.

Swift's situation, moreover, is unique in that she has an extremely loyal fan base. Also known as the "Swifties,"[87] Swift's fans have rallied behind her to ensure that all of her re-recordings have substantial commercial success.[88] Hugh McIntyre, a contributor for Forbes, notes that "[i]t's clear by *Fearless (Taylor's Version)*'s first week numbers that Swifties aren't afraid to stand by their favorite,

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[81] Melinda Newman, *Taylor Swift Leaves Big Machine, Signs New Deal with Universal Music Group*, BILLBOARD (Nov. 19, 2018), https://www.billboard.com/music/music-news/taylor-swift-leaves-big-machine-signs-new-label-deal-universal-music-8485629/.

[82] *See* Graham Corrigan, *What They Don't Tell You About Being Independent in 2019*, COMPLEX (June 17, 2019), https://www.complex.com/pigeons-and-planes/2019/06/independent-artists-labels-indie-week/ (discussing the reality of many artists having some financial backing, whether it is by a major label or investors).

[83] Max Monahan, *How Much Does It Really Cost to Make an Album? A Breakdown of the Costs Involved*, SONICBIDS (June 28, 2016, 8:00 AM), https://blog.sonicbids.com/how-much-does-it-really-cost-to-make-an-album (estimating that "[t]he creation of an album is a delicate and costly process. The final numbers: you can make an album for as little as $1,700 (if you choose to not hire anyone for engineering, mixing, or mastering) plus a *ton* of work, or spend well north of $100,000.") (emphasis in original).

[84] Brandon Caldwell, *Lil Durk Calls Cap on Net Worth Reports: 'I Got That in Richards'*, HIPHOPDX (Jan. 9, 2022, 10:32 AM), https://hiphopdx.com/news/id.67088/title.lil-durk-calls-cap-on-net-worth-reports-i-got-that-in-richards#.

[85] Monahan, *supra* note 83.

[86] Pericolo, *supra* note 23 ("Although Swift has been advocating for artist control over their own master recordings, up-and-coming artists lack the negotiation power to get such a favorable contract like that between Swift and UMG.").

[87] Amber van As, *Taylor Swift and the Story of the Swifties Fandom*, DIGGIT MAG. (Jan. 11, 2018), https://www.diggitmagazine.com/articles/taylor-swift-and-story-swifties-fandom.

[88] *Id.*

as the set sold incredibly well and was a massive streaming win as well."[89] Few artists have such a dedicated fan base like Swift. If an artist cannot depend on their fanbase to purchase or stream the re-recorded versions, then the artist gains no financial benefit by re-recording their music. When an artist re-records their previous songs, the artist essentially creates a separate masters from the original master recording.[90] Assuming the artist can maintain control over those separate masters, they can exploit that ownership through licensing the recording to streaming services, advertisers, TV shows, and movies.[91] If the artist's fan base is stagnant or the quality of the re-recorded versions is not as good as the originals, then very few people will want to stream or license the re-recorded versions. In other words, artists may end up losing more money than they make because a song's re-recorded version is not as desirable as the original one.

Swift also has the advantage of having such a large catalogue.[92] That large catalogue, in combination with her dedicated fan base, gives her the opportunity to make a significant profit from her re-recorded versions. As compared to an artist like Swift, with such an extensive catalogue of songs, artists with less than an outstanding track record are limited in the amounts of revenue they can gain from re-recording their music. Furthermore, given the continuous evolution of music, a song that was popular at one point may no longer receive the same reception it once did. This risk has not stopped some one-hit wonder artists from attempting to re-record their old "hit."[93]

The risk that comes with re-recording an artists' old music, however, is not without its benefits. It is important to note that the record label's original recording does not disappear.[94] This is significant because the record label could, to undercut the artist who decides to re-record, engage in a "race to the bottom" by licensing the original recording for as cheap as possible. In response, the artist would likely reduce their asking price for the recordings so they can compete with the record label. The real winner in this race, however, is the licensee of either the original or re-recorded version because the licensee would likely,

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[89] Hugh McIntyre, *Taylor Swift's Fans Have Always Loved Her, but Their Support of Her New No. 1 Album Feels Special*, FORBES (Apr. 29, 2021, 9:10 AM), https://www.forbes.com/sites/hughmcintyre/2021/04/29/taylor-swifts-fans-have-always-loved-her-but-their-support-of-her-new-no-1-album-feels-special/?sh=1c2394ab6818.

[90] Pericolo, *supra* note 23.

[91] Leni, *supra* note 41.

[92] Danielle Pascual*, Here's Every Song Taylor Swift Wrote on Her Own*, BILLBOARD (Jan. 25, 2022), https://www.billboard.com/music/pop/taylor-swift-solo-songwriter-list-1235022983/.

[93] Anatasia Tsioulcas, *Look What They Made Her Do: Taylor Swift to Re-Record Her Catalog*, NPR (Aug. 22, 2019, 11:14 AM), https://www.npr.org/2019/08/22/753393630/look-what-they-made-her-do-taylor-swift-to-re-record-her-catalog ("Some artists have jumped at the opportunity to re-record their work . . . One example is the one-hit wonder Wang Chung, who in 2007 re-recorded 'Everybody Have Fun Tonight' in order to rejigger its licensing profits.").

[94] Pericolo, *supra* note 22 ("Swift's old master records won't disappear as she releases new ones. If Swift refuses to license her re-recording to someone, they can always turn to Braun.").

assuming the original and re-recorded versions are of equal quality, spend far less money than the licensee would have paid had there only been one version of the song.

For the artist, the benefits of re-recording their own songs look far less appealing, especially when considering how much less profit they stand to make when considering the cheap licensing fee and the large investment that is needed to produce the re-recorded versions. Thus, it is very important for an artist to consider all the contingencies and uncertainties that come along with deciding to re-record their catalogue. The artist, nevertheless, should always have that option to decide whether to re-record their own music at any time, notwithstanding a contract provision that merely inhibits society from experiencing the "public good emanat[ing] from" an artist and their evolving artistry.[95]

IV. CONCLUSION

An artist should not be prevented from re-recording their own catalogue because doing so would be contrary to the promotion of the useful arts. The Founders intended for creators to have all reasonable avenues to create inventions or art. The initial creation has not intended to be the last creation. The Framers knew that further innovation would take the form of imitation of established creations because imitation creates competition, which has always propelled our society forward.[96]

Re-recording clauses have, in essence, inhibited further innovation of music and artist because it puts the kibosh on an artists' ability to make music that revolutionizes the sound of music or inspire younger artists to create a new sound. Even simpler, re-recording clauses inhibit competition because such clauses give the record labels a monopoly over the use of song that the recording labels did not technically create. It emphasizes the need for courts to consider all the relevant factors when deciding whether to find a re-recording clause unenforceable because of its threat to innovation in the music industry.

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[95] Chandra N. Saha & Sanjib Bhattacharya, *Intellectual Property Rights: An Overview and Implications in Pharmaceutical Industry*, 2 J. of ADVANCED PHARM. TECH. & RSCH. 88, 88 (2011) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3217699/ ("Intellectual property rights (IPR) have been defined as ideas, inventions, and creative expressions based on which there is a public willingness to bestow the status of property.").

[96] LYDIA P. LOREN & JOSEPH S. MILLER, INTELLECTUAL PROPERTY LAW: CASES & MATERIALS 2 (Semaphore Press 7th ed. 2021).