

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

JOHN WAITE, an individual; JOE ELY, an individual, and on behalf of all others similarly situated,

Plaintiffs,

v.

UMG RECORDINGS, INC., a Delaware corporation, and DOES 1 through 10,

Defendants.

Case No.

**CLASS ACTION COMPLAINT  
FOR:**

**(1) COPYRIGHT  
INFRINGEMENT; AND**

**(2) DECLARATORY RELIEF**

**DEMAND FOR TRIAL BY JURY**

Plaintiffs JOHN WAITE, an individual (“Waite”), and JOE ELY (“Ely”), an individual, (collectively, “Plaintiffs”) on behalf of themselves and all other similarly situated authors of sound recordings (“sound recordings”) who have served Notices of Termination pursuant to §302 of the Copyright Act of 1976 upon Defendant UMG RECORDINGS, INC. (also known as “Universal Music Group and “UMG”) (hereinafter “UMG” or “Defendant”) and DOES 1-10 (collectively “Defendants”), allege as follows.

**NATURE OF THE ACTION**

1. Since the first Copyright Act was enacted in 1790, that Act, and the several successive copyright statutes have always had a feature which allows a second chance for authors (or their heirs) to reclaim copyrights from unwise grants made by authors early on in their careers, close to the creation of the works. While the particular features of those laws, and the length of the terms and statutory scheme of the terminations involved, have changed and evolved, the strong “second chance” concept has remained. In fact, the very first act, the Copyright Act of 1790, borrowed that concept from the English Statute of Anne, enacted in 1709, the first copyright law. The theme continued in the Copyright Acts of 1831, 1870, and 1909.

2. Likewise, §203 of the Copyright Act of 1976 modified the Act of 1909 substantially, but continued the policy with full force. According to the Congressional Record, the purpose of the statute was to protect authors and their heirs from “the unequal bargaining position of authors” in dealing with unpublished works, because of “the impossibility of [an author] determining [his or her] work’s prior value until it has been exploited.” H.R.Rep. No. 94-1476, at 124 (1976). Section 203 provides that authors (a term that includes both songwriters and recording artists) may terminate grants of copyright ownership thirty-five (35) years after the initial grant, generally computed from the date of the publication of those works subject to the grant.

3. But while the Copyright Act confers upon authors the valuable “second chance” that they so often need, the authors of sound recordings, in particular, who have attempted to avail themselves of this important protection have encountered not only resistance from many record labels, they have been subjected to the stubborn and unfounded disregard of their rights under the law and, in many instances, willful copyright infringement.

4. Waite, Ely, and hundreds of other recording artists, have served Notices of Termination upon UMG pursuant to the provisions set forth in 17 U.S.C. §203, but UMG has routinely and systematically refused to honor them. These refusals are made, in every instance, on similar legal grounds, the first and foremost of which is UMG’s position that the sound recordings created by recording artists under contract with UMG (or its affiliated or predecessor companies) are “works made for hire,” and, therefore, not part of the subject matter of §203. UMG claims that the recordings are works made for hire because of contractual language that is found in every UMG recording agreement. As a result of UMG’s policy, UMG has refused to acknowledge that any recording artist has the right to take over control of the sound recordings, or enter into an agreement with a different label for the exploitation of recordings, after the effective date of

termination. In many instances, UMG has continued to exploit the recordings after the effective date, thereby engaging in willful copyright infringement of the United States copyright in those recordings. As a result of UMG's actions, UMG has effectively stymied any chance that the class plaintiffs have of entering into a new agreement with a third party, or even exploiting the recordings themselves, as is their right. As a result, these actions by UMG have effectively destroyed the very salability of the post-termination rights in the recordings that the Copyright Act expressly guarantees.

5. On account of UMG's repeated, methodical, and willful copyright infringement, actual and statutory damages are the remedy. For those recordings for which the associated Notice of Termination has not reached its effective date of termination, the proper remedy is declaratory relief. With regard to both copyright infringement and all recordings for which a Notice of Termination has been sent to UMG, injunctive relief, addressing and preventing UMG's lawless behavior, is warranted. Therefore, Plaintiffs bring this class action for copyright infringement, declaratory relief, and injunctive relief, on behalf of themselves and all similarly situated recording artists who have sent Notices of Termination to UMG with an effective date of termination on or after January 1, 2013, as more precisely described in ¶15, below.

### **THE PARTIES**

6. Plaintiff JOHN WAITE ("Waite") is a resident of Santa Monica, California. Waite is a British singer and songwriter, who began his career in the early 1970s as a member of the musical group The Babys. In 1983, he began a solo career and released several successful albums.

7. Plaintiff JOE ELY ("Ely") is a resident of Austin, Texas. Ely has had a long career in music as a singer, songwriter, and guitarist. Since releasing his first solo album in 1977, he has recorded a total of eighteen studio albums on several

labels, including MCA, which is a predecessor to UMG. Ely has also been a performer on numerous albums by other recording artists, including The Clash and Rosie Flores.

8. Defendant UMG RECORDINGS, INC. is a Delaware corporation with its principal place of business and global corporate headquarters located in Santa Monica, California. UMG also maintains U.S. headquarters at 1755 Broadway, New York City, New York offices, where Island Records, Def Jam Recordings, Republic Records, Decca Label Group, Spinefarm Records, Geffen Records, and other of UMG's labels are headquartered. Also known as Universal Music Group, UMG is an American global music corporation that is a subsidiary of the French media conglomerate Vivendi Universal S.A. UMG is considered one of the "Big Three" record labels, along with Sony Music and Warner Music Group. UMG is one of the world's largest recorded music and music publishing companies, and includes record labels such as Motown, Def Jam and Geffen. UMG is successor to, and was formerly named, PolyGram Records, Inc. UMG is a record label, as well as a global music conglomerate, and has released music under the Universal and Mercury imprints, and is the successor-in-interest to many record labels, including EMI, Capitol, Geffen, A & M, and Chrysalis imprints, among many others.

9. The true names and capacities (whether individual, corporate, associate or otherwise) of the defendants named herein as Does 1 through 10, inclusive, are unknown to Plaintiffs, who therefore sue said defendants by such fictitious names. Plaintiffs will amend this Complaint to allege their true names and capacities when such have been ascertained. Upon information and belief, each of the Doe defendants herein is responsible in some manner for the occurrences herein alleged, and Plaintiffs' and class members' injuries as herein alleged were proximately caused by such defendants' acts or omissions.



10. Plaintiffs are informed and believe, and on that basis allege, that at all times mentioned in this Complaint, UMG and each of the Doe defendants were the agent of each other and, in doing the things alleged in this Complaint, were acting within the course and scope of such agency.

### **JURISDICTION AND VENUE**

11. This is a civil action seeking damages and injunctive relief for copyright infringement under the Copyright Act, 17 U.S.C. §101 *et seq.*, and also seeks declaratory relief with regard to several legal issues that arise from the language and interpretation of the Copyright Act.

12. This Court has original subject matter jurisdiction of this action pursuant to 28 U.S.C. §§1331 and 1338(a).

13. This Court is empowered to issue a declaratory judgment and further necessary or proper relief pursuant to 28 U.S.C. §§2201 and 2202.

14. Venue is proper in this District pursuant to 28 U.S.C. §§1391(b) and (c) and 1400(a) because UMG is subject to personal jurisdiction in this District and because a substantial part of the events or omissions by UMG giving rise to the claims occurred in this District.

### **CLASS ALLEGATIONS**

15. Plaintiffs bring this action as a class action pursuant to Fed. R. Civ. Proc. 23 on behalf of themselves and on behalf of a class of similarly situated recording artists, defined as:

All recording artists (and statutory heirs and personal representatives of those recording artists, if applicable) who have served Notices of Termination on UMG pursuant to §203 of the Copyright Act (or who may serve such Notice in the pendency of this action), with an effective date of termination of January 1, 2013

or later, and who have not entered into a further agreement with UMG (pursuant to §203(b)(4)) wherein UMG has been granted further rights therein.

16. This action has been brought and may be properly maintained as a class action because there is a well-defined community of interest in the litigation and the members of the proposed class are readily and easily ascertainable and identifiable.

17. The members of the class are so numerous that joinder of all members is impracticable. Plaintiffs are informed and believe, and on that basis allege, that there are hundreds of members in the class who can be readily located, identified from various records and databases (including those maintained by UMG and the United States Copyright Office), and notified of this action.

18. Plaintiffs' claims for copyright infringement and declaratory relief are typical of the claims of the members of the class, and Plaintiffs' interests are consistent with and not antagonistic to those of the other members of the class they seek to represent. Plaintiffs and all members of the class have sustained damages and face irreparable harm arising out of Defendants' continued infringement and disregard of the Notices of Termination as alleged herein and, thus, are entitled to recover actual damages and/or statutory damages and obtain injunctive relief to prevent further wrongful conduct by Defendants. In other instances, class members have had the salability of their sound recordings damaged and/or destroyed by UMG's behavior, and seek declaratory relief for the legal issues discussed below.

19. Plaintiffs have no interests that are adverse to, or which conflict with, the interests of the absent members of the class and they are able to fairly and adequately represent and protect the interests of such a class. Plaintiffs

believe strongly in the protection of the rights of recording artists and are committed to protecting such rights. Plaintiffs have raised a viable claim for copyright infringement of the type reasonably expected to be raised by members of the class and will diligently and vigorously pursue that claim. If necessary, Plaintiffs may seek leave of the Court to amend this Complaint to include additional class representatives to represent the class or additional claims as may be appropriate. Plaintiffs are represented by experienced, qualified, and competent counsel who are committed to prosecuting this action.

20. Questions of fact and law (to the extent that any may exist) are common to all members of the class and would plainly predominate over any questions affecting only individual members of the class under Fed. R. Civ. Proc. 23(b)(3). These common legal and factual questions, to the extent that any may exist, do not vary from class member to class member, and can be determined without reference to the individual circumstances of any class member, including (without limitation) the following:

(A) Whether sound recordings can ever be considered “works made for hire,” as that term is defined in the Copyright Act, because the definition set forth in §101 of the Copyright Act does not include sound recordings as being one of the types of works that can be a work made for hire;

(B) Whether the release of sound recordings that were created by a particular recording artist in “album” form, as is typical in the music industry, constitutes a “contribution of a collective work,” or creates a “compilation,” as those terms are used in §101 of the Copyright Act, thereby transforming the sound recordings into “works made for hire”;

(C) Whether a foreign choice of law provision in a recording agreement has any effect upon the application of United States copyright law to issues relating to the application of the Copyright Act (and §203

specifically) to the United States copyrights at issue, or whether such a clause raises viable claims of “breach of contract” against the recording artists for the act of exercising their rights under United States copyright law;

(D) Whether UMG’s position regarding “work made for hire” clauses violates §203(a)(5) of the Copyright Act;

(E) Whether sound recordings created and delivered pursuant to a recording agreement are “commissioned works,” as that term is used in §101 of the Copyright Act, thereby transforming the sound recordings into “works made for hire”;

(F) Whether recording artists are barred from exercising their rights under §203 of the Copyright Act if a “loan-out company,” or, in the appellation utilized by UMG, a “Furnishing Company” was involved in the contractual transaction relating to the original grant;

(G) Whether the exercise by recording artists of their rights under §203 of the Copyright Act to terminate the original grant, and to thereafter exploit the sound recordings after the effective date of termination, is a breach of contract by the recording artists of a clause in the recording agreement that, according to UMG, provides that recording artists may never exploit the sound recordings themselves;

(H) Whether the assertion of rights by the recording artists under §203 of the Copyright Act is “time-barred” because, according to UMG, “claims regarding the initial ownership status of a work must be brought within three years of creation,” and the act of serving a Notice of Termination is a claim “challenging that issue”; and

(I) The basis and method for determining and computing damages, including statutory damages.

21. Class certification is appropriate pursuant to Fed. R. Civ. Proc. 23(b)(2) because UMG has acted and/or refused to act on grounds that are generally applicable to the Class, which makes declaratory and injunctive relief with respect to Plaintiffs and the Class, as a whole, appropriate.

22. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because individual litigation of the claims of all class members is impracticable. The claims of the individual members of the class may range from smaller sums to larger sums. Thus, for those class members with smaller claims, the expense and burden of individual litigation may not justify pursuing the claims individually. And even if every member of the class could afford to pursue individual litigation, the court system could not be so encumbered. It would be unduly burdensome to those courts in which individual litigation of numerous cases would otherwise proceed. Individualized litigation would also present the potential for varying, inconsistent, or contradictory judgments and would magnify the delay and expense to all parties and to the court system resulting from multiple trials of the same factual issues. By contrast, the maintenance of this action as a class action presents few management difficulties, conserves the resources of the parties and court system, and protects the rights of each member of the class. Plaintiffs anticipate no difficulty in the management of this action as a class action.

**FIRST CLAIM FOR RELIEF**  
**(Copyright Infringement – Against All Defendants)**

23. Plaintiffs hereby incorporate the allegations set forth in paragraphs 1 through 22 above, as though fully set forth herein.

24. Pursuant to §203 of the Copyright Act, recording artists have the right to serve a Notice of Termination to terminate the grant of rights made to a

record label, generally thirty-five (35) years after the publication of those recordings. The Notice is served upon the current grantee, and, with regard to Waite, Ely, and the members of the class, that current grantee is UMG.

The Waite Albums

25. Waite, through a loan-out company, entered into a recording agreement with Chrysalis Records, Inc., a predecessor to UMG, in or about November 1981, and thereafter Chrysalis released the album *Ignition*. In September 1983, Waite, through another loan-out company, entered into another agreement with Capitol, and, thereafter, Capitol released the album *No Brakes*. In July 1985, Waite, through another loan-out company, entered into another agreement with Capitol, and, thereafter, Capitol released the album *Mask of Smiles* (collectively, the “Waite Albums”).

26. On April 15, 2015, Waite served a Notice of Termination (the “Waite Notice”) upon UMG, and Waite caused the Notice to be recorded in the United States Copyright Office, on August 30, 2016, as document V9924 D957 P1 through P3. A true and correct copy of the Waite Notice is attached hereto as Exhibit A.

27. The effective date of termination for the *Ignition* Album was May 22, 2017. Initially, UMG made an effort to cease the United States exploitation of the *Ignition* Album, and although UMG repeatedly informed Waite that UMG did not agree that Waite had presented a valid Notice of Termination, sought to negotiate a further grant from Waite, pursuant to §203(a)(5).

28. On or about August 1, 2017, Waite rejected UMG’s proposal, and thereafter began to exploit the *Ignition* Album himself, via digital outlets, through a record label that he owns.

29. In May 2018, UMG, despite its previous decision to cease the United States exploitation of the *Ignition* Album, suddenly asserted that Waite’s

exploitation of the *Ignition* Album was improper. On May 31, 2018, counsel for UMG sent Waite a letter setting forth UMG's legal positions for its claims that the Waite Notice was invalid, and, in addition, demanded that Waite "cease and desist from any and all unauthorized exploitation of the sound recordings, including the 'Ignition' Album." A true and correct copy of that letter is attached hereto as Exhibit B.

30. In or about early July 2018, UMG issued a take-down notice against Waite's digital release of that album.

31. After UMG had successfully caused Waite's release to be taken down from digital sites, UMG resumed the digital exploitation of the *Ignition* Album through UMG's normal digital outlets.

32. The effective date of termination has passed for the *Ignition* Album. Despite this fact, and UMG's knowledge of the effective date, UMG willfully infringed upon the United States copyright belonging to Waite by continuing to exploit the sound recordings, as if the Waite Notice had not been sent at all, in complete disregard of the law.

33. Under §106 of the Copyright Act, the copyright owner of a sound recording has the exclusive right to reproduce and distribute the sound recordings, including, but not limited to, in phonorecords, and to exploit or authorize the exploitation of interactive streams and digital downloads of the sound recordings through subscription or non-subscription online digital music services.

34. Pursuant to the Waite Notice, Waite is currently the owner of the United States copyright in and to the sound recordings comprising the *Ignition* Album.

35. By willfully continuing to exploit the sound recordings comprising the *Ignition* Album in the United States after the effective date, all of which



occurred within the past three years, UMG has infringed upon those recordings, and, furthermore, unlawful reproduction and distribution of the sound recordings owned by Plaintiff as alleged hereinabove constitutes copyright infringement under the Copyright Act.

#### The Ely Albums

36. Ely entered into a recording agreement with MCA Records, Inc., a predecessor of UMG, in 1976. In February 1978, Ely's second album, *Honky Tonk Masquerade*, was released on the MCA label.

37. On December 15, 2015, Ely served a Notice of Termination (the "Ely Notice") upon UMG, and Ely caused the Notice to be recorded in the United States Copyright Office, on August 30, 2016, as document V9921 D732 P1 through P3. A true and correct copy of the Ely Notice is attached hereto as Exhibit C.

38. The effective date of termination for four albums on the Ely Notice, namely, *Honky Tonk Masquerade*, *Down the Drag*, *Live Shots*, and *Musta Notta Gotta Lotta* (the "Ely Albums") was December 16, 2017.

39. On May 6, 2016, counsel for UMG sent Ely a letter setting forth UMG's legal positions for its claims that the Ely Notice was invalid, and, in addition, demanded that Ely "refrain from attempting to exploit the recordings yourself or taking any other actions interfering with UMG's continuing rights in the recordings that are the subject of your termination notice." A true and correct copy of that is attached hereto as Exhibit D.

40. UMG failed and refused to cease the sale, distribution, and exploitation of the Ely Albums on the effective date of termination, that is, December 16, 2017, and continued such exploitation after that date.

41. Despite UMG's knowledge of the effective date, UMG has willfully infringed upon the United States copyright belonging to Ely by continuing to

exploit the sound recordings, as if the Ely Notice had not been sent at all, in complete disregard of the law.

42. Under §106 of the Copyright Act, the copyright owner of a sound recording has the exclusive right to reproduce and distribute the sound recordings, including, but not limited to, in phonorecords, and to exploit or authorize the exploitation of interactive streams and digital downloads of the sound recordings through subscription or non-subscription online digital music services.

43. Pursuant to the Ely Notice, Ely is currently the owner of the United States copyright in and to the sound recordings comprising the Ely Albums.

44. By willfully continuing to exploit the sound recordings comprising the Ely Albums in the United States after the effective date, which occurred within the past three years, UMG has infringed upon those recordings, and, furthermore, UMG's unlawful reproduction and distribution of the sound recordings owned by Ely as alleged hereinabove constitutes copyright infringement under the Copyright Act.

45. Plaintiffs are further informed and believe, and on that basis allege, that the continued willful exploitation by UMG of sound recordings of members of the class in the United States after the effective dates of the Notices of Termination served on UMG pursuant to §203 by or on behalf of such class members, all of which effective dates occurred within the past three years, constitutes willful infringement by UMG.

46. UMG's acts of infringement have been willful, intentional, and purposeful, in disregard of and indifferent to the rights of Plaintiffs and the members of the class.

47. As a direct and proximate result of Defendants' infringements of Plaintiffs' copyrights and the copyrights of the members of the class, pursuant to

17 U.S.C. §504(c), Plaintiffs and the class members are entitled to recover up to \$150,000 in statutory damages for each sound recording infringed. Alternatively, at their election, pursuant to 17 U.S.C. §504(b), Plaintiffs and the class members are entitled to their actual damages, as well as all profits attributable to the infringement, including but not limited to UMG's profits from infringement, as will be proven at trial.

48. Plaintiffs and the class members are also entitled to recover attorney's fees and costs pursuant to 17 U.S.C. §505, and prejudgment interest according to law.

49. UMG is causing, and unless enjoined by the Court will continue to cause, Plaintiffs and the class members irreparable harm for which they have no adequate remedy at law. Plaintiffs and the class members are entitled to an injunction under 17 U.S.C. §502 prohibiting the continued infringement of their sound recordings.

**SECOND CLAIM FOR RELIEF**  
**(Declaratory Relief – Against All Defendants)**

50. Plaintiffs hereby incorporate the allegations set forth in paragraphs 1 through 49 above, as though fully set forth herein.

51. Pursuant to 28 U.S.C. §§2201 and 2202, a case of actual controversy within the jurisdiction of this court has arisen and now exists between Plaintiffs and the class members on the one hand, and Defendants on the other hand, concerning their respective rights and duties, in that Plaintiffs and the class members contend that:

(A) Sound recordings cannot be considered “works made for hire,” as that term is defined in the Copyright Act, because the definition set forth in §101 of the Copyright Act does not include sound recordings as being one

of the types of works that can be a work made for hire;

(B) The release of sound recordings that were created by a particular recording artist in “album” form, as is typical in the music industry, do not constitute a “contribution of a collective work,” or a “compilation,” as those terms are used in §101 of the Copyright Act, and do not transform the sound recordings into “works made for hire”;

(C) A foreign choice of law provision in a recording agreement has no effect upon the application of United States copyright law, exclusively, to issues relating to the application of the Copyright Act (and §203 specifically) to the United States copyright, and cannot support a claim of “breach of contract” by the recording artists for exercising their rights under United States law;

(D) UMG’s position regarding “work made for hire” clauses violates §203(a)(5) of the Copyright Act;

(E) Sound recordings created and delivered pursuant to a recording agreement are not “commissioned works,” as that term is used in §101 of the Copyright Act, thereby transforming the sound recordings into “works made for hire”;

(F) Recording artists are not barred from exercising their rights under §203 of the Copyright Act, even if a “loan-out company,” or, in the appellation utilized by UMG, a “Furnishing Company” was involved in the contractual transaction relating to the original grant;

(G) The exercise by recording artists of their rights under §203 of the Copyright Act to terminate the original grant, and to thereafter exploit the sound recordings after the effective date of termination, does not constitute a breach of contract of the recording agreements; and

(H) The assertion of rights by the recording artists under §203 of

the Copyright Act are not “time-barred, despite UMG’s position that “claims regarding the initial ownership status of a work must be brought within three years of creation.”

52. Defendants, on the other hand, contend that:

(A) The sound recordings at issue are “works made for hire,” because the recording agreements at issue contain clauses that purport to be an agreement between the parties to those agreements that the sound recordings should be so characterized;

(B) The sound recordings at issue are contributions to a “collective work” or “compilation,” *i.e.*, record albums, and so are works made for hire;

(C) If a recording agreement so provides, foreign law may be applied to the rights of recording artists in United States copyrights, and may be used to deny terminations that would be otherwise valid under the United States Copyright Act;

(D) UMG’s position regarding “work made for hire” clauses does not violate §203(a)(5) of the Copyright Act;

(E) Sound recordings created and delivered pursuant to a recording agreement are “commissioned works,” as that term is used in §101 of the Copyright Act, thereby transforming the sound recordings into “works made for hire”;

(F) Recording artists are barred from exercising their rights under §203 of the Copyright Act if a “loan-out company,” or, in the appellation utilized by UMG, a “Furnishing Company” was involved in the contractual transaction relating to the original grant;

(G) The exercise by recording artists of their rights under §203 of the Copyright Act to terminate the original grant, and to thereafter exploit the sound recordings after the effective date of termination, constitutes a

breach of contract of the recording agreements; and

(H) The assertion of rights by the recording artists under §203 of the Copyright Act are “time-barred” because “claims regarding the initial ownership status of a work must be brought within three years of creation.”

53. Plaintiffs and the class members desire a judicial determination of their rights and duties, and a declaration that UMG’s repeated disregard of the rights of Plaintiffs and the class members violates the Copyright Act.

54. Such a judicial determination of the rights and duties of the parties is necessary at this time, in that Defendants have repeatedly denied Plaintiffs’ rights, and the rights of hundreds of class members, and has denied all of them the right to own the United States copyright in and to the sound recordings for the post-termination period. By doing these acts in the past, and unless enjoined from engaging in like behavior in the future, UMG will be allowed to destroy the value and salability of the subject sound recordings, in direct contradiction of the second chance guaranteed by the Copyright Act.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, on behalf of themselves and on behalf of all other members of the class, pray for Judgment against UMG and the Doe Defendants, and each of them, as follows:

A. Determining that this is a proper class action maintainable pursuant to Rule 23 of the Federal Rules of Civil Procedure, certifying Plaintiffs as class representatives and Plaintiffs’ counsel as class counsel;

B. For actual damages according to proof, or, at Plaintiffs’ election, for statutory damages in an amount of \$150,000 per infringed work, or according to proof;

C. For declaratory relief, regarding the legal issues described in ¶¶ 51 through 54, above;

D. A temporary, preliminary, and permanent injunction enjoining and restraining Defendants, and their respective agents, servants, directors, officers, principals, employees, representatives, subsidiaries and affiliated companies, successors, assigns, and those acting in concert with them or at their direction, and each of them, from continued denial and disregard of the Notices of Termination served by Plaintiffs and the members of the class, and each of them, upon UMG, to the extent that UMG bases said grounds on the legal and factual issues that are adjudicated in this suit;

E. For pre- and post-judgment interest;

F. For such fees and costs (including reasonable attorney's fees) incurred herein as permitted by law; and

G. For such other and further relief as this Court deems just and proper.

**BLANK ROME LLP**

Dated: February 5, 2019

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*Attorneys for Plaintiffs*

**DEMAND FOR JURY TRIAL**

Plaintiffs demand a trial by jury of the claims alleged in this Complaint.

**BLANK ROME LLP**

Dated: February 5, 2019

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# **EXHIBIT A**

## Certificate of Recordation



This is to certify that the attached document was recorded on the date and in the place shown below.

This certificate is issued under the seal of the United States Copyright Office.

*Mauri A. Pallante*

United States Register of Copyrights and Director

August 30, 2016

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Date Of Recordation

9924

957

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Volume

Doc. No.

**VIA CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

April 20, 2015

Universal Music Group  
2220 Colorado Avenue  
Santa Monica, CA 90404

As successor-in-interest to Chrysalis Records, Inc., EMI America Records, and Capitol Records, Inc.

**RE: NOTICE OF TERMINATION UNDER 17 U.S.C. § 203 and 37 C.F.R. § 201.10**

Dear Sir or Madam:

The undersigned is the author of the works listed on Schedule A annexed hereto. Pursuant to 17 U.S.C. § 203 and 37 C.F.R. § 201.10 I am hereby serving notice of my intention to terminate the grant or transfer of copyright and the rights of copyright proprietor in the works listed below. To my best knowledge and belief, this notice has been signed by the only person(s) whose signature(s) is necessary to terminate the grant under 17 U.S.C. § 203.

Works: See Schedule A

Name of Author(s): John Waite

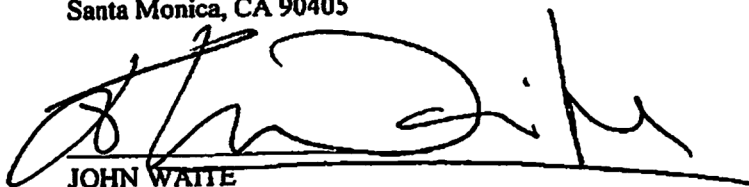
Copyright Date: See Schedule A

Copyright Registration No: See Schedule A

Effective Date of Termination: See Schedule A

Grant Hereby Terminated: All grants or transfers of copyright and all rights of copyright proprietor, including publication and recording rights, in and to the above sound recordings including, without limitation to the grant dated in or about 1981 between the members of the recording group called The Babys and Chrysalis Records.

Name(s)/Address(es) of  
Person(s) Executing Termination: John Waite  
c/o Bill Vulsteke  
Provident Financial Management  
2850 Ocean Park Blvd. Suite 300  
Santa Monica, CA 90405

  
JOHN WAITE

**Schedule A**

<u>Work</u>	<u>Author</u>	<u>Publication Date</u>	<u>Copyright Registration No</u>	<u>Termination Notice Date</u>	<u>Effective Date of Termination</u>
Ignition	John Waite	5/21/1982	SR0000036195	4/20/2015	5/22/17
No Brakes	John Waite	6/15/1984	SR0000055904	4/20/2015	6/16/2019
Mask of Smiles	John Waite	7/26/1985	SR0000093264	4/20/2015	7/27/2020

**PROOF OF SERVICE**

State of California

County of Los Angeles

}  
}  
}

I, EVAN S. COHEN, am employed in the aforesaid county, State of California; I am over the age of 18 years; my business address is: 1180 South Beverly Drive, Suite 510, Los Angeles, California 90035-1157.

On April 20, 2015, I served the foregoing **NOTICE OF TERMINATION UNDER 17 U.S.C. §203 and 37 C.F.R. §201.10** on all interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

**Business Affairs  
Universal Music Group  
c/o UMG Recordings, Inc.  
2220 Colorado Avenue, First Floor  
Santa Monica, CA 90404**

I am readily familiar with the business's practice for the collection and processing of correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business. On this date, the above referenced correspondence was placed for deposit at Los Angeles, California and placed for collection and mailing following ordinary business practices.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on April 20, 2015.



\_\_\_\_\_  
EVAN S. COHEN



# **EXHIBIT B**



Cowan, Liebowitz & Latman, P.C.  
114 West 47<sup>th</sup> Street  
New York, NY 10036

(212) 790-9200 Tel  
(212) 575-0671 Fax  
www.cll.com

**Thomas Kjellberg**  
(212) 790-9202  
txk@cll.com

May 31, 2018

**VIA CERTIFIED MAIL,**  
**RETURN RECEIPT REQUESTED**

Mr. John Waite  
c/o Bill Vulsteke  
Provident Financial Management  
2850 Ocean Park Blvd., Suite 300  
Santa Monica, CA 90405

Mr. John Waite  
Chief Executive Officer  
No Brakes Tour Inc.  
3130 Wilshire Blvd., Suite 600  
Santa Monica, CA 90403

Re: John Waite Copyright Termination Notice  
“Ignition,” “No Brakes” and “Mask of Smiles” Albums

Dear Mr. Waite:

We represent Capitol Records, LLC f/k/a Capitol Records, Inc. (“Capitol”), the successor to Chrysalis Records, Inc. (“Chrysalis”), and write with reference to your notice dated April 20, 2015 (which notice Capitol has no record of having received, and of which it had no knowledge until late 2017) purporting to terminate Capitol’s rights in John Waite sound recordings contained on the albums “Ignition,” “No Brakes” and “Mask of Smiles” (the “Albums”). As set forth in detail below, your attempt to terminate Capitol’s rights in and to these sound recordings under 17 U.S.C. § 203 is without legal or factual merit.

As a threshold matter, your notice fails to comply with the requirement of “[a] brief statement reasonably identifying the grant to which the notice of termination applies.” Your notice purports to identify a grant “dated in or about 1981 between the members of the recording group called The Babys and Chrysalis Records.” There is no such agreement covering the sound recordings identified in Schedule A to your notice. Rather, as addressed below, those recordings appear to be governed by a series of agreements from 1981, 1983 and 1985 entered into by various furnishing companies providing your services to either Chrysalis or Capitol. Accordingly, while your notice purports to terminate rights in the sound recordings on the

**Cowan, Liebowitz & Latman, P.C.**

Mr. John Waite

May 31, 2018

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Albums, you have failed to properly identify any grant covering such works. Certainly, a notice that references incorrect parties and dates cannot be considered a reasonable identification of the grants you purport to be terminating.

While your failure to provide a reasonable identification of the alleged grant is itself sufficient to render the purported notice ineffective, your termination attempt would fail even had you properly identified the controlling agreement. Accordingly, for purposes of efficiency, we proceed to address the absence of any right to terminate under the applicable agreements.

The relevant agreements that form the basis for the parties' relationship with respect to the Albums are: (1) with respect to "Ignition," a November 1, 1981 agreement (the "1981 Agreement") between Chrysalis and Heavy Waite, Inc. ("Heavy Waite"); (2) with respect to "No Brakes," a September 22, 1983 agreement (the "1983 Agreement") between Capitol and Moonwalk Music, Inc. ("Moonwalk"); and (3) with respect to "Mask of Smiles," a July 4, 1985 agreement (the "1985 Agreement") between Capitol and Diamond Stripe, Inc. ("Diamond"). Heavy Waite, Moonwalk and Diamond (referred to collectively herein as the "Furnishing Companies") were each engaged to furnish your recording services. Each of the agreements contains unambiguous language specifying that any recordings created during its term are works made for hire owned by the record company. The 1981 Agreement provides:

All master recordings embodying the performances of Artist recorded during the term hereof, from the inception of the recording thereof, and all phonograph records and other reproductions made therefrom, together with the performances embodied therein and all copyrights therein and thereto, and any and all renewals and extensions thereof shall be entirely [Chrysalis's] property, free of any claims whatsoever by [Heavy Waite], Artist, or any other person, firm or corporation. For the purposes hereof, [Heavy Waite], Artist, and all other persons rendering services in connection with such master recordings shall be our employees for hire and all such master recordings shall be works made for hire under the United States Copyright Law.

1981 Agreement ¶ 4. The 1983 and 1985 Agreements contain a provision establishing the recordings covered by such agreements as works made for hire:

With respect to any person whose services are furnished by [Moonwalk or Diamond] in connection with masters recorded hereunder, including, but not limited to, Artist and/or any person engaged to act as a Producer, [Moonwalk or Diamond] has or shall have a contract in which the person acknowledges that each master embodying the results and proceeds of his services is prepared within the scope of [Moonwalk's or Diamond's] engagement of his personal services and is a work made for hire, or as part of an lp-master constitutes a work specifically ordered by [Moonwalk or Diamond] for use as a contribution to a collective work and shall be considered a work made for hire.

**Cowan, Liebowitz & Latman, P.C.**

Mr. John Waite

May 31, 2018

Page 3

1983 and 1985 Agreements ¶ 5(a); *see also* ¶ 18 (acknowledging Capitol as the “sole, exclusive, and perpetual owner of all masters from inception”). Accordingly, there is no operative grant to terminate, but simply a work made for hire relationship, which is not subject to termination under the statute.

Moreover, even if Chrysalis and/or Capitol were deemed to have acquired copyright rights to the sound recordings by virtue of a grant made by the Furnishing Companies, the result would still not be a transfer terminable under the Copyright Act because any such grant was made by the company that was signatory to such agreements, not by you. A copyrighted work of which a corporate entity is the legal author is *ipso facto* a work made for hire, and transfers of rights in works made for hire are categorically not terminable under § 203. The Furnishing Companies all represented, warranted and agreed that they had the proper authority to enter into the relevant agreement and to perform all of its terms, including granting the rights covered by the agreement. 1981 Agreement ¶ 9(a); 1983 and 1985 Agreements ¶¶ 2(i), (j), (k). Moreover, you personally signed inducement letters and/or declarations in which you joined in the representations and warranties made by the Furnishing Companies, confirmed the Furnishing Companies’ right to perform their contracts with the record companies and/or acknowledged the work made for hire status of the recordings created under the relevant agreements. 1981 Agreement Exhibit A ¶¶ 1(a)-(c); 1983 Agreement Exhibit B ¶¶ 1-3, Declaration ¶ A; 1985 Agreement Exhibit A ¶¶ 1-3; Exhibit E ¶ A. Having permitted the Furnishing Companies to enter into these agreements and signed documentation confirming their authority to make such agreements, including most fundamentally the right to transfer the necessary rights, you cannot now turn around and claim that the rights all along belonged to you and not the entity that made the relevant agreements with Chrysalis and Capitol. The sound recordings were created by you within the scope of your employment by the Furnishing Companies, which presumably were formed for the purpose of permitting you to be treated as an employee of such companies. *See generally* *Caso v. Nimrod Productions, Inc.*, 77 Cal. Rptr. 3rd 313, 316-17 (2d Dist. 2008) (describing typical entertainment industry loan-out arrangement in which loan-out company furnishes services of its employee); *see also* 17 U.S.C. § 101(1) (defining a work made for hire as “a work prepared by an employee within the scope of his or her employment.”); 17 U.S.C. § 201(b) (under which “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”).

The sound recordings also constitute works made for hire under section 101(2) of the Copyright Act, which defines a “work made for hire” as

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.

**Cowan, Liebowitz & Latman, P.C.**

Mr. John Waite

May 31, 2018

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17 U.S.C. § 101(2). The sound recordings were specially commissioned for use in compilations, *i.e.*, long-playing record albums. The 1981 Agreement provided in paragraph 2 for delivery of “sufficient Masters to constitute one (1) 12-inch, 33-1/3 rpm long-playing record, of no less than thirty-three (33) minutes in duration (hereinafter such a record is sometimes referred to by the term ‘LP’) plus, at our election, sufficient additional Masters to constitute a second LP.” The 1983 and 1985 Agreements likewise provided for delivery of “lp-masters.” 1983 and 1985 Agreement ¶ 1. An “lp-master” is defined as “a set of masters sufficient to constitute a lp-disc,” and “lp-disc” is defined as “a 12 inch, 33-1/3 rpm, long playing disc-type record or its tape record equivalent, embodying thereon not less than eight (8) nor more than twelve (12) selections.” *Id.* ¶¶ 14(e), (h).

The Albums are compilations under the Copyright Act:

A “compilation” is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term “compilation” includes collective works.

17 U.S.C. § 101. “An album is a collection of preexisting materials—songs—that are selected and arranged by the author in a way that results in an original work of authorship—the album.” *Bryant v. Media Right Prods.*, 603 F.3d 135, 140-41 (2d Cir. 2010). Accordingly, “[a]n album falls within the Act’s expansive definition of compilation.” *Id.* at 140. The sound recordings selected and arranged to comprise the Albums were subject to signed, written agreements deeming such sound recordings to be works made for hire. 1981 Agreement ¶ 4; 1983 and 1985 Agreements ¶ 5(a). In addition, the copyright registration for the Albums specifically identify Chrysalis (in the case of “Ignition”) and Capitol (in the case of the other two Albums) as owning the copyright as “employer for hire.” Accordingly, no indication of a transfer of copyright from you to Chrysalis or Capitol appears on the registrations, which have also never been amended since their issuance to reflect any such purported transfer that could potentially be subject to termination. The registrations were timely made under 17 U.S.C. § 410(c), and are thus *prima facie* evidence that the sound recordings are works made for hire. You would bear the burden of proving otherwise and rebutting the presumption that Chrysalis and/or Capitol owned all right, title and interest in the copyright to the sound recordings in their own names as works made for hire under § 101(2) of the Copyright Act from inception.

In any case, even if the sound recordings were not works made for hire, you would be time-barred from challenging that issue. Under the three-year statute of limitations for copyright claims, 17 U.S.C. § 507(b), claims regarding the initial ownership status of a work must be brought within three years of creation. *See, e.g., Robles Vasquez v. Torres-Negron*, 2007 U.S. Dist. LEXIS 57872, \*21 (S.D.N.Y. July 11, 2007) (“Since plaintiffs’ claim ... relates to a claim of copyright ownership, the normal three-year limitations period applies.”). Accordingly, in *Aday v. Sony Music*, 44 U.S.P.Q.2d 1688 (S.D.N.Y. 1997), the recording artist Meat Loaf was held to be time-barred when in 1997 he sought to contest the work-for-hire provision in his 1977

**Cowan, Liebowitz & Latman, P.C.**

Mr. John Waite

May 31, 2018

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recording agreement with Sony after a royalty dispute. The artist sought a declaration that he was not an employee for hire, but the Southern District of New York rejected the claim, stating the singer “had reason to know in 1977 about any of the problems with the work-for-hire provision that [he] now contend[s] violates the Copyright Act.”

Finally, with respect to the “Ignition” Album, paragraph 11(b) of the 1981 Agreement prohibits you from making any use of the sound recordings, regardless of whether or not your purported termination notice is effective:

Neither [Heavy Waite] nor Artist shall at any time manufacture, distribute, or sell or authorize the manufacture, distribution or sale by any person, firm, or corporation other than [Chrysalis] of phonograph records embodying ... any performance rendered by Artist during the term of this contract....

This provision is not a “grant or transfer or license of copyright or any right under a copyright” as section 203(a) requires, and thus it is not terminable. Clearly, the statute does not contemplate that a terminated assignment or license agreement is rescinded *in toto*, only that the grant of U.S. rights is terminated. The remainder of the provisions of the agreement arise under state contract law and are not affected by termination; the Copyright Act explicitly states in section 203(b)(5) that termination shall not affect “rights arising under any other Federal, State or foreign laws,” such as state contract law. Courts have consistently recognized that parties are free to contract away rights they would otherwise enjoy under the Copyright Act. See *Bowers v. Baystate Technologies*, 320 F.3d 1317 (Fed. Cir. 2003) (contract waiving fair use rights); *Davidson Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005) (same). Accordingly, you would continue to be bound by your contractual obligation to refrain from exploiting the “Ignition” recordings, or permitting others to exploit the works, even if your termination of any “grant” to Chrysalis were given effect. This is not an “agreement to contrary” under section 203(a)(5), because it does not prevent you from exercising whatever termination rights you may have.

For all these reasons, Capitol continues to possess the exclusive right to exploit the sound recordings comprising the Albums pursuant to its rights as outlined above. Any exploitation of those sound recordings by you or on your behalf would be in violation of Capitol’s exclusive rights, and would render you, and any other individuals or entities involved in such exploitation, liable for a number of claims including copyright infringement, and subject to all of the remedies provided by the Copyright Act.

In fact, we are aware that at least one of the Albums (“Ignition”) has been added to Spotify, Apple and other digital services by an entity named “No Brake Records,” which we believe is controlled by or associated with you. Accordingly, we hereby demand that you cease and desist from any and all unauthorized exploitation of the sound recordings, including the “Ignition” Album, and take immediate steps to remove any such sound recordings from any digital services to which you, an entity with which you are associated, or an entity purporting to be acting upon authorization from you have added them without Capitol’s authorization.



**Cowan, Liebowitz & Latman, P.C.**

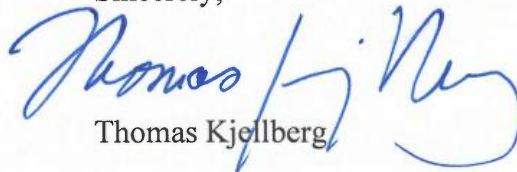
Mr. John Waite

May 31, 2018

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This letter is not intended to be a complete statement of the facts or the law, and is without prejudice to any of Capitol's rights, remedies, or defenses, all of which are expressly reserved.

Sincerely,

A handwritten signature in blue ink, appearing to read "Thomas Kjellberg", with a large, stylized flourish at the end.

Thomas Kjellberg

cc: Evan S. Cohen, Esq. (via email)



# **EXHIBIT C**

## Certificate of Recordation



This is to certify that the attached document was recorded on the date and in the place shown below.

This certificate is issued under the seal of the United States Copyright Office.

*Maria A. Pallante*

United States Register of Copyrights and Director

June 17, 2016

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Date Of Recordation

9921

732

---

Volume

Doc. No.

**VIA CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

December 15, 2015

Universal Music Group  
2220 Colorado Avenue  
Santa Monica, CA 90404

As successor-in-interest to MCA Records, Inc.

**RE: NOTICE OF TERMINATION UNDER 17 U.S.C. § 203 and 37 C.F.R. § 201.10**

Dear Sir or Madam:

The undersigned persons are the authors of the works listed on Schedule A annexed hereto. Pursuant to 17 U.S.C. § 203 and 37 C.F.R. § 201.10, we are hereby serving notice of our intention to terminate the grant or transfer of copyrights and the rights of the copyright proprietor in the works listed below. To the best of our knowledge and belief, this notice has been signed by the only persons whose signatures are necessary to terminate the grant under 17 U.S.C. § 203.

Works: See Schedule A

Name of Author(s): Joe Ely

Copyright Date: See Schedule A

Copyright Registration No: See Schedule A

Effective Date of Termination: See Schedule A

Grant Hereby Terminated: All grants or transfers of copyright and all rights of copyright proprietor, including publication and recording rights, in and to the above sound recordings including, without limitation to the grant dated in or about 1978 between the recording artist Joe Ely and MCA Records, Inc.

Name(s)/Address(es) of  
Person(s) Executing Termination:

Joe Ely  
P.O. Box 91479  
Austin, TX 78709



**Schedule A**

<b><u>Work</u></b>	<b><u>Author</u></b>	<b><u>Publication Date</u></b>	<b><u>Copyright Registration No</u></b>	<b><u>Termination Notice Date</u></b>	<b><u>Effective Date of Termination</u></b>
Honky Tonk Masquerade	Joe Ely	February 9, 1978	SR0000001085	December 15, 2015	December 16, 2017
Honky Tonk Masquerade	Joe Ely	February 9, 1978	SR0000080445	December 15, 2015	December 16, 2017
Fingernails/Because Of The Wind	Joe Ely	February 8, 1978	SR0000000183	December 15, 2015	December 16, 2017
Honky Tonk Masquerade/Johnny Blues	Joe Ely	April 26, 1978	SR0000000983	December 15, 2015	December 16, 2017
She Never Spoke Spanish To Me/ Combread Moon	Joe Ely	September 27, 1978	SR0000003875	December 15, 2015	December 16, 2017
Down The Drag	Joe Ely	February 14, 1979	SR0000008563	December 15, 2015	December 16, 2017
Live Shots	Joe Ely	April 11, 1981	SR0000033289	December 15, 2015	December 16, 2017
Musta Notta Gotta Lotta	Joe Ely	March 27, 1981	SR0000025796	December 15, 2015	December 16, 2017
Hi-Res	Joe Ely	April 2, 1984	SR0000053613	December 15, 2015	April 3, 2019

**PROOF OF SERVICE**

State of California            )  
  }  
County of Los Angeles        )

I, EVAN S. COHEN, am employed in the aforesaid county, State of California; I am over the age of 18 years; my business address is: 1180 South Beverly Drive, Suite 510, Los Angeles, California 90035-1157.

On December 15, 2015, I served the foregoing NOTICE OF TERMINATION UNDER 17 U.S.C. §203 and 37 C.F.R. §201.10 on all interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope, addressed as follows:

**Business Affairs  
Universal Music Group  
c/o UMG Recordings, Inc.  
2220 Colorado Avenue, First Floor  
Santa Monica, CA 90404**

I am readily familiar with the business's practice for the collection and processing of correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business. On this date, the above referenced correspondence was placed for deposit at Los Angeles, California and placed for collection and mailing following ordinary business practices, via certified mail, return receipt requested.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 15, 2015.



\_\_\_\_\_  
EVAN S. COHEN

# **EXHIBIT D**

**COWAN  
LIEBOWITZ  
LATMAN**

Cowan, Liebowitz & Latman, P.C.  
114 West 47<sup>th</sup> Street  
New York, NY 10036  
(212) 790-9200 Tel  
(212) 575-0671 Fax  
www.cll.com

**Richard S. Mandel**  
(212) 790-9291  
rsm@cll.com

May 6, 2016

**VIA CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED**

Mr. Joe Ely  
P.O. Box 91479  
Austin, Texas 78709

Re: Joe Ely Copyright Termination Notice

Dear Mr. Ely:

We represent UMG Recordings, Inc. (“UMG”), the successor to MCA Records, Inc. (“MCA”), and write with reference to your notice dated December 15, 2015 purporting to terminate UMG’s rights in certain specified recordings containing your performances. As set forth in detail below, your attempt to terminate UMG’s rights in and to these recordings under 17 U.S.C. § 203 is without legal or factual merit.

**The 1976 Agreement**

The first six works referenced in Schedule A of your termination notice were created pursuant to an August 26, 1976 agreement between you and MCA (the “1976 Agreement”). As a threshold matter, § 203 has no application to the 1976 Agreement because it was executed prior to January 1, 1978. By its clear terms, § 203 only permits termination of grants executed “on or after January 1, 1978.” To the extent you are attempting to treat either the date of publication of the works or the date of creation of such works as being the date of execution, rather than the date the relevant agreement was signed, there is no basis for such a strained statutory interpretation. Based on the unambiguous meaning of the term, “executed” plainly refers to when the agreement was signed and not when the recordings were created or published. Neither the courts nor Congress has ever endorsed a contrary interpretation of the term “executed” that would fix such date based on the creation or publication of the work rather than the signing of the relevant agreement. Even the Copyright Office has recognized in its final rulemaking on the issue, 76 Fed. Reg. 32316 (June 6, 2011), that the definition of “executed” in § 203 “should be settled in the courts (or in Congress, if Congress accepts the Office’s suggestion to enact legislation that will clarify the status of [such grants].)”



**Cowan, Liebowitz & Latman, P.C.**

Mr. Joe Ely  
 May 6, 2016  
 Page 2

Even assuming for the sake of argument only that § 203 could apply to pre-1978 agreements, termination would nevertheless be inapplicable. As the statute itself recognizes, termination is not available with respect to works made for hire. Because the relevant contractual relationship pre-dates the effective date of the 1976 Copyright Act, the work-made-for-hire-status of the recordings is determined under the 1909 Copyright Act. See Roth v. Pritikin, 710 F.2d 934 (2d Cir.), cert. den., 464 U.S. 961 (1983) (1909 Act governed post-1978 work created under pre-1978 contract); Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc., 312 F.3d 94, 98 (2d Cir. 2002) (work for hire determination “turns on whether the relevant contract was entered into prior to January 1, 1978”).

Under the 1909 Act, “in the absence of an express contractual reservation of the copyright in the artist, the presumption arises that the mutual intent of the parties is that the title to the copyright shall be in the person at whose instance and expense the work is done.” Twentieth Century Fox Film Corp. v. Entm’t Distrib., 429 F.3d 869, 877 (9th Cir. 2005) (quoting Lin-Brook Builders Hardware v. Gertler, 352 F.2d 298, 300 (9th Cir. 1965)). Indeed, under the 1909 Act, there arose “an almost irrebuttable presumption that any person who paid another to create a copyrightable work was the statutory ‘author’ under the ‘work for hire’ doctrine.” Estate of Burne Hogarth v. Edgar Rice Burroughs, Inc., 342 F.3d 149, 158 (2d Cir. 2003) (citation omitted); Easter Seal Society for Crippled Children & Adults v. Playboy Enters., 815 F.2d 323, 327 (5th Cir. 1987) (same).

As the Second Circuit has noted, under the 1909 Act “[a] work is made at the hiring party’s ‘instance and expense’ when the employer induces the creation of the work and has the right to direct and supervise the manner in which the work is carried out. The right to direct and supervise the manner in which work is created need never be exercised.” Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 635 (2d Cir. 2004). The recordings here were unmistakably made at the “instance and expense” of MCA, which contracted for the delivery of the recordings, approved and paid the budget for such recordings and had the right to approve such recordings as satisfactory.

In any event, even if the 1976 Act were controlling for purposes of determining the work made for hire status of the recordings made pursuant to pre-1978 agreements, the recordings would still constitute works made for hire. The Copyright Act defines a work made for hire as “a work prepared by an employee within the scope of his or her employment.” 17 U.S.C. § 101(1); see also 17 U.S.C. § 201(b) (under which “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”). The Supreme Court held in Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989), that whether a person created a work as an “employee within the scope of his or her employment” under the 1976 Act is to be determined by reference to the common law of agency. The primary consideration in determining whether a hired party is an employee under the common law of agency is “the hiring party’s right to control the manner and means by which the product is accomplished.” Reid, 490 U.S. at 751. The contract here provided MCA with such ultimate control, including the ability to accept or reject the



Cowan, Liebowitz & Latman, P.C.

Mr. Joe Ely

May 6, 2016

Page 3

recordings delivered. See 1976 Agreement ¶ 2(c). Moreover, numerous other indicia of an employment relationship exist, including the fact that recording was a regular part of MCA's business, the parties' express acknowledgement of an employment relationship (see 1976 Agreement ¶ 8(c)) and the extended duration of the relationship. See generally Reid, 490 U.S. at 751. Accordingly, the recordings are appropriately categorized as works made for hire, regardless of any artistic control that you may have exercised in the recording process. See Fifty-Six Hope Rd. Music Ltd. v. UMG Recordings, Inc., 2010 U.S. Dist. LEXIS 94500, \*29-30 (S.D.N.Y. Sept. 10, 2010) ("The fact that [Bob] Marley may have exercised artistic control over the recording process ... is legally irrelevant; what is dispositive is that Island had the contractual right to accept, reject, modify, and otherwise control the creation of the Sound Recordings.").

The recordings created pursuant to the 1976 Agreement also constitute works made for hire under § 101(2) of the Copyright Act, which defines a "work made for hire" as

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.

17 U.S.C. § 101(2). The recordings were specially commissioned for use in a compilation, *i.e.*, a long-playing record album. The 1982 Agreement provides in paragraph 1 for the delivery of "LPs," with "LP" or "album" defined in paragraph 21(g) to mean "a sufficient number of master recordings to constitute one (1) 12-inch, 33-1/3 rpm, long-playing phonograph record album of not less than thirty (30) minutes playing time."

Such albums are compilations under the 1976 Act:

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

17 U.S.C. § 101. "An album is a collection of preexisting materials—songs—that are selected and arranged by the author in a way that results in an original work of authorship—the album." Bryant v. Media Right Prods., 603 F.3d 135, 140-41 (2d Cir. 2010). Accordingly, "[a]n album falls within the Act's expansive definition of compilation." Id. at 140.

The recordings selected and arranged to comprise the relevant albums were subject to a signed, written agreement deeming MCA to be the owner of copyright from inception as a work made for hire. In addition, the copyright registrations for the recordings specifically identify MCA's ownership status as "employer for hire." Accordingly, no indication of a transfer of copyright from you to MCA appears on the registrations, which have also never been amended since their issuance to reflect any such purported transfers that could potentially be subject to

Cowan, Liebowitz & Latman, P.C.

Mr. Joe Ely

May 6, 2016

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termination. The registrations were timely made under 17 U.S.C. § 410(c), and are thus prima facie evidence that the master recordings are works made for hire. You would bear the burden of proving otherwise and rebutting the presumption that MCA owned all right, title and interest in the copyright to the recordings in its own name as works made for hire.

In any case, even if the sound recordings were not works made for hire, you would be time-barred from challenging that issue. Under the three-year statute of limitations for copyright claims, 17 U.S.C. § 507(b), claims regarding the initial ownership status of a work must be brought within three years of creation. See, e.g., Robles Vasquez v. Torres-Negron, 2007 U.S. Dist. LEXIS 57872, \*21 (S.D.N.Y. July 11, 2007) (“Since plaintiffs’ claim ... relates to a claim of copyright ownership, the normal three-year limitations period applies.”). Accordingly, in Aday v. Sony Music, 44 U.S.P.Q.2d 1688 (S.D.N.Y. 1997), the recording artist Meat Loaf was held to be time-barred when in 1997 he sought to contest the work-for-hire provision in his 1977 recording agreement with Sony after a royalty dispute. The artist sought a declaration that he was not an employee for hire, but the Southern District of New York rejected the claim, stating the singer “had reason to know in 1977 about any of the problems with the work-for-hire provision that [he] now contend[s] violates the Copyright Act.”

#### The 1980 Agreement

With respect to the last three works in Schedule A of your termination notice, MCA obtained ownership of such recordings by virtue of a July 13, 1979 agreement (the “1979 Production Agreement”) between two corporate entities, MCA and South Coast Records, Inc. (“South Coast”), which furnished the recording services of various artists, including you, to MCA. Under the 1979 Production Agreement, South Coast represented that it had or would enter into valid written exclusive recording agreements with each artist furnished to MCA, and that such recording agreements would contain all appropriate provisions allowing South Coast to perform its obligations under the 1979 Production Agreement and vesting MCA with ownership of the rights in the works covered by the contract. See 1979 Production Agreement ¶ 1(c)(ii). In paragraph 8, South Coast further acknowledged that MCA was the sole and exclusive owner of all the recordings created under the 1979 Production Agreement from inception. Such ownership was also provided for specifically with respect to your recordings in paragraph 4(e) of a July 1, 1980 amendment to the 1979 Production Agreement, as well as in paragraph 5 of the inducement letter to your July 1, 1980 recording agreement with South Coast (the “1980 Recording Agreement”). Accordingly, there is no operative grant to terminate, but simply a work made for hire relationship that vested ownership in the works in MCA from inception.

Moreover, even if MCA were not itself deemed to be the author of a work made for hire, but rather to have acquired copyright by virtue of a grant of rights under the 1979 Production Agreement, the result would still not be a transfer terminable under the Copyright Act because any such transfer was made by the corporate furnishing company, South Coast, and not by you. A copyrighted work of which a corporate entity is the legal author is ipso facto a work made for hire, and transfers of rights in works made for hire are categorically not terminable under § 203. South Coast expressly warranted in the 1979 Production Agreement that it had or would have a

Cowan, Liebowitz & Latman, P.C.

Mr. Joe Ely

May 6, 2016

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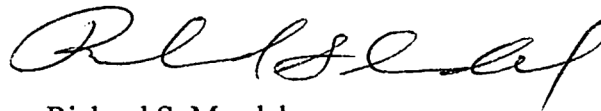
valid recording agreement in place with all artists furnished to MCA, including you, and that as the “employer of Artist, ... [it] shall pay withholding, payroll and other taxes, and pension and welfare contributions, if any, required to be paid in connection with Artist’s ... services to [South Coast].” 1979 Production Agreement ¶ 1(h). Such a recording agreement plainly existed in the form of the 1980 Recording Agreement, which expressly provided in paragraph 12 for South Coast’s ownership of your recordings based on your status as South Coast’s “employee for hire.” You cannot now turn around and claim that the rights all along belonged to you and not the furnishing company that represented to MCA that it owned the rights necessary for purposes of its agreement with MCA. The recordings were created by you within the scope of your employment by South Coast, and accordingly are works made for hire under § 101(1) of the Copyright Act.

These recordings also constitute works made for hire under § 101(2) of the Copyright Act for the same reasons discussed above with respect to the recordings created pursuant to the 1976 Agreement. Once again, the copyright registrations reflect MCA’s ownership of the relevant recordings as “employer for hire” and create a presumption that the recordings are works made for hire. And you are also barred by the statute of limitations from challenging MCA’s ownership of such recordings in the same manner and for the same reasons addressed above under the 1976 Agreement

For all these reasons, UMG continues to possess the right to exploit the recordings pursuant to its rights as outlined above. You are hereby advised to refrain from attempting to exploit the recordings yourself or taking any other actions interfering with UMG’s continuing rights in the recordings that are the subject of your termination notice.

This letter is without prejudice to any of UMG’s rights, remedies, or defenses, all of which are expressly reserved.

Sincerely,



Richard S. Mandel

cc: Evan S. Cohen (Via Certified Mail)  
1180 South Beverly Drive, Suite 510  
Los Angeles, CA 90035-1157

# ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [Sony, Universal Music Group Hit with Copyright Infringement Class Actions from Artists Vying to Reclaim Ownership of Music](#)

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