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The Dissonance of Work for Hire in Commissioned Sound Recordings: Boulez v. Commissioner Revisited

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THE DISSONANCE OF WORK FOR HIRE IN COMMISSIONED SOUND RECORDINGS: BOULEZ V. COMMISSIONER REVISITED

I. INTRODUCTION

Though Boulez v. Commissioner1 is a twenty-year-old case concerning events that occurred almost thirty years ago, it is still highly relevant today. The Boulez court held that a conductor or artist had no conveyable property interest in a recording when he signed a standard recording contract, even where the contract stated that he granted rights in return for royalties based on future sales.2 The court held so on the basis that Boulez fell under the "works for hire" doctrine and that there were no express contract terms to the contrary.3 As such, Pierre Boulez had no copyrightable interest in the recordings and had no interest to convey in return for royalties.4 Therefore, the so-called royalties were actually income for personal services and any copyrightable interest in the recording vested from inception in the commissioning party, the record company.5 Furthermore, as income for personal services and not royalties, the earnings were subject to income tax in the United States as well as in Germany, where Boulez resided.6 This occurred despite the fact that a treaty between the United States and Germany was in effect to avoid this particular type of double taxation.7 However, Boulez remains good law today.8

4. Id. at 596.
5. See id.
6. See id.
7. See generally Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income, July 22, 1954, U.S.-F.R.G., 5 U.S.T. 2768 (creating a treaty that would subject royalty income of nonresident aliens only to the country of residence) [hereinafter Taxation Treaty].
8. See generally Priv. Ltr. Rul. 97-25-037 (June 20, 1997), available at 1997 WL 337371
Boulez represents an approach taken by the courts to wrongfully deny artists any rights in sound recordings that were made after the passage of the Sound Recording Amendment of 1971 and before 1978, when the 1976 Copyright Act was implemented. Though the cases that Boulez relied upon for its holding have been largely overturned or have fallen into disfavor, under Boulez there is still an avenue to deny artists their due under the copyright laws. The rights of artists who recorded in the time period in question are still denied by the Boulez holding. Boulez’s holding still resonates today; a sound recording artist’s work for a record company in the time period in question, absent express contractual terms to the contrary, is presumed a “work for hire.” Considering the recording industry’s customary practice of not expressly acknowledging an artist’s copyrightable rights in recording contracts, this puts the recording artist under the presumption of a “work for hire” situation in virtually any collaboration with a record company. In other words, any artist that made a sound recording as either an employee of the record company, or as a commissioned independent contractor of the record company, would have no copyrightable interest in the recording from the outset. Therefore, the artist would not have any property interest in the recording in which to exchange for royalties—the artist’s compensation would be merely for services rendered. Not only does Boulez deny creative authors their rights under copyright, it also subjects foreign recording artists to double taxation.  

(citing IRS rules based on Boulez that sums called “royalties” paid to recording artists for their services as writers, musicians, vocalists, or producers, with all copyrights retained by the record company, are “compensation for services rendered”; the ruling advises a record company to report royalties it pays recording artists as “compensation for services” rather than as “royalties” on its Form 1099.

11. See Brattleboro Publ’g Co. v. Winmill Publ’g Corp., 369 F.2d 565 (2d Cir. 1966); Ingrain v. Bowers, 57 F.2d 65 (2d Cir. 1932).
12. See Boulez, 83 T.C. at 596.
14. See generally Greenfield, 780 N.E.2d at 172 (noting that an artist had to have reserved a right in a recording contract to qualify for copyright protection).
15. See generally RICHARD SCHULENBERG, LEGAL ASPECTS OF THE MUSIC INDUSTRY 124 (Billboard Books, 1999) (discussing the unclear and stealthy contractual language the record industry uses to obtain rights from artists).
16. See generally Boulez, 83 T.C. at 593–94 (holding that Boulez had no property interest in the recordings he conducted due to a lack of express terms granting him an interest in the recording, causing his work to fall under the “work for hire” doctrine).
on "royalties" and denies them the benefits of tax treaties negotiated with the United States.17 Most recently, in 2002, the Boulez holding was cited in a brief on behalf of a defendant-appellant record company in Greenfield v. Philles Records.18 Greenfield concerned recordings made previous to the Sound Recording Amendment of 1971, but still under the 1909 Copyright Act.19 Boulez was cited for several propositions: that an artist under a standard recording industry contract had no copyrightable interest in the recording; that, under the "work for hire" doctrine, all copyrightable interests vested in the commissioning party, namely the record company; and that the payment of "royalties" to the artist did not denote that the artist had any copyrightable interest in the recording.20 Although the court itself did not explicitly cite Boulez,21 the rationale of Boulez prevailed.22

The same rationales were also successfully cited by the defendants-appellees in Mandrill Music Publishing v. Public Enemy.23 In Mandrill Music, the Ninth Circuit upheld the trial court's summary judgment for the defendants-appellees.24 Though most of the opinion dealt with the issue of the awarding of attorney's fees, the case revolved around a copyright issue under the same law as Boulez—the use of a recording made in 1973 under the 1909 Act.25 The appellees cited Boulez for the proposition that the

17. See Priv. Ltr. Rul. 97-25-037 (June 20, 1997), available at 1997 WL 337371 (citing IRS rules based on Boulez that sums called "royalties" paid to recording artists for their services as writers, musicians, vocalists, or producers, with all copyrights retained by the record company, are "compensation for services" rendered; the ruling advises a record company to report royalties it pays recording artists as "compensation for services" rather than as "royalties" on its Form 1099. This approach seemingly applies whether or not the recordings were made before or after the restriction of the "work for hire" doctrine with implementation of the 1976 Copyright Act. See id.)
21. See generally Greenfield, 780 N.E.2d at 172–73 (citing favorably Ingram v. Bowers, 57 F.2d 65 (2d Cir. 1932), holding that an artist must have reserved a right in a recording contract to qualify for copyright protection; also holding that a payment of royalties to the artist did not restrict the record company's rights in the recording).
22. See generally Boulez, 83 T.C. at 594 (1984) (citing Ingram, 57 F.2d 65 (2d Cir. 1932) as consistent with its holding that petitioner Boulez had no copyrightable interest in any recordings made under his 1969 contract); id. at 591 (holding that the term "royalties" are not dispositive of a property interest in a recording); id. at 595 (holding that absent express contractual terms to the contrary, Boulez's work on the recordings were "works made for hire").
23. See Appellees' Brief at 32, 38, Mandrill Music Publ'g v. Public Enemy, 129 F.3d 126 (9th Cir. 1997) (No. 96-55376).
24. Mandrill Music Publ'g v. Public Enemy, 129 F.3d 126 (9th Cir. 1997).
25. Id.
plaintiff's recording was made pursuant to a standard recording industry contract and was, therefore, a "work made for hire." Accordingly, the plaintiff had no copyrightable interest in the recording. Boulez was also cited by the appellees for the proposition that the plaintiff did not have a property interest in the recording merely by virtue of receiving "royalties." As such, the principles of Boulez are very much alive today.

Part II of this Note explores the development of copyright law and artist's rights, the doctrine of "works made for hire," and the pertinent international tax law at the time in question. Part III reviews the facts underlying Boulez. Part IV examines the tax court's analysis of the issue of whether Boulez had any copyrightable interest in the recordings, and if he was paid a royalty as per the definition of the tax treaty and the IRS Code. Part V critiques the tax court's holding, including a detailed analysis of the precedents relied upon by the court and an examination of the legislative intent of the Sound Recording Amendment of 1971. Part VI examines the subsequent development of copyright law, including the passage of the Copyright Act of 1976, and its effect on the "works for hire" doctrine and the rights of sound recording artists, developments that are not consistent with the core holdings of Boulez.

This Note argues that the holding in Boulez misapplied its precedents and ignored the customs and practices of the recording industry in determining the intention of the parties. Furthermore, this Note contends that the Boulez court overlooked congressional intent in its misapplication of the "works made for hire" doctrine. In doing so, the Boulez court wrongfully denies recording artists their just due under the copyright law in effect at the time—after the 1971 Sound Recording Amendment and prior to 1978 implementation of the 1976 Copyright Act. This Note concludes the Boulez holding should be set aside.

II. BACKGROUND OF THE RELEVANT LAW

A. The Subject Matter of Copyright Before and After the Sound Recording Amendment of 1971

Statutory copyright protection for sound recordings in the United

26. See Appellees' Brief at 32, Mandrill Music Pub'I'g v. Public Enemy, 129 F.3d 126 (9th Cir. 1997) (No. 96-55376).
27. Id. at 38.
28. See id.
States was first created under the Sound Recording Amendment of 1971. This principle was illustrated by the court’s holding in *Capitol Records v. Mercury Records*. However, the dissent in *Capitol Records* noted that even though sound recordings were not included in the Copyright Act of 1909, they were in fact constitutionally capable of copyright.

In his dissent in *Capitol Records*, Judge Hand was in agreement with the majority when he stated, “Congress could grant the performer a copyright upon [his performance or rendition], provided it was embodied in a physical form capable of being copied.” He went on to comment on the originality that may be contained in a performance, thereby making it copyrightable.

[A] musical score in ordinary notation does not determine the entire performance, certainly not when it is sung or played on a stringed or wind instrument. Musical notes are composed of a ‘fundamental note’ with harmonics and overtones which do not appear on the score. There may indeed be instruments—e.g. percussive—which do not allow any latitude, though I doubt even that; but in the vast number of renditions, the performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a ‘composition’ as an ‘arrangement’ or ‘adaptation’ of the score itself, which § 1(b) makes copyrightable.

The House and Senate Reports on the Sound Recording Amendment of 1971 (“the Reports”) adopted the principle that there is a potential copyrightable interest in the originality of the artist’s performance: “the House Report suggests that the required originality may emanate from . . . the performers whose performance is captured.”

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31. See id.
32. See id. at 665.
33. Id. at 664.
34. Id.
extended beyond protecting the artist. The Reports went on to present the possibility of a copyrightable interest for the producer of the record: “the required originality may emanate from . . . ‘the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.’” However, the possibility of a copyrightable interest was qualified by the fact that a record producer would not be given “authorship” status for merely “setting up the recording session,” if that is the only basis for the copyright claim. Therefore, a producer could have a claim for authorship only where the producer’s actions go beyond that of merely setting up the recording session. Both the House and Senate Reports specifically refer to the acts of “capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.” Accordingly, “a separate analysis of the respective claims to originality by ‘performers and record producers is necessary.’”

B. Works for Hire Doctrine Under the Copyright Act of 1909

Under the Copyright Act of 1909, “the word ‘author’ shall include an employer in the case of works made for hire.” Unfortunately, neither the term “employer” nor “works made for hire” were defined in the Act; this role was left to the courts. The subsequent decisions dealing with “works made for hire” under the 1909 Act were inconsistent.

36. See H.R. REP. NO. 92-487, at 5; S. REP. NO. 92-72, at 5 (stating that a producer may obtain authorship for recording, mixing and editing the session, and that “usually” there would be joint-authorship in both the performer and the creative producer in a sound recording).


38. NIMMER, supra note 35, § 2.10 [A][2][b]; see generally H.R REP. NO. 92-487, at 5, S. REP. NO. 92-72, at 5. (stating that a producer may obtain authorship for recording, mixing and editing the session).

39. See generally Forward v. Thorogood, 985 F.2d 604, 606 (1st Cir. 1993) (holding under the 1909 Act that a producer who merely set up and paid for the studio for a recording made in 1975 did not qualify for authorship); H.R REP. NO. 92-487, at 5, S. REP. NO. 92-72, at 5 (stating that a producer may obtain authorship for recording, mixing and editing the session); see also NIMMER, supra note 37, § 2.10 (A)(2)(b).


41. NIMMER, supra note 35, § 2.10 [A][2].

42. NIMMER, supra note 35, § 5.03 [B][1][a][i].

43. NIMMER, supra note 35, § 5.03 [B][2][a][i].

44. Compare Brattleboro Publ’g Co. v. Winnmill Publ’g Corp., 369 F.2d 565 (2d Cir. 1966) (holding that the “works for hire” doctrine applies to independent contractors, absent express or implied contractual language) with Uproar Co. v. Nat’l Broad. Co., 81 F.2d 373 (1st Cir. 1936), cert. denied, 298 U.S. 670 (1936) (holding that there is no presumption of authorship in the commissioning party and that a commissioning party can obtain authorship only through a
Initially, the courts defined the work for hire doctrine within the confines of the standard employer-employee relationship. The "works for hire" doctrine predates the Copyright Act of 1909. In Bleistein v. Donaldson Lithography Co., a case from 1903, the Court held that the copyright to advertisements created by an employee during the course of his employment belonged to his employer. This concept was subsequently incorporated into the Copyright Act of 1909. Later courts were consistent with this principle, holding that works created by employees in the course of their normal duties were considered works made for hire and any copyrightable interest vested in their employer.

The definition of "works for hire" was further developed in Brattleboro Publishing Co. v. Winmill Publishing Corp. The Brattleboro court held that "work for hire" is presumed to exist "whenever an employee's work is produced at the instance and expense of his employer"—the so-called "instance and expense" test. Brattleboro also extended the "works for hire" doctrine to independent contractors: "[w]e see no sound reason why these same principles are not applicable when the parties bear the relationship of employer and independent contractor."

However, the work for hire doctrine merely creates a presumption that could be overcome "by terms of the contract, express or implicit." Although the Brattleboro application of the "works for hire" doctrine to independent contractors may constitute the majority approach, there exists a series of contrary decisions that suggest the presumption that copyright initially vests in the independent contractor (i.e., the commissioned party). This minority approach is exemplified in Uproar Co. v. National Broadcasting Co.

In Uproar, the court held that the artist/author, Wynn, did not lose his

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46. See Brattleboro Publ'g Co., 369 F.2d at 567.
47. 188 U.S. 239 (1903).
49. See Brattleboro Publ'g Co., 369 F.2d at 568.
51. Brattleboro Publ'g Co., 369 F.2d at 565.
52. Id. at 567.
53. Id. at 568.
55. See Nimmer, supra note 35, § 5.03[B][2][b].
56. See id. at § 5.03[B][2][c]; W.H. Anderson Co. v. Baldwin Law Publ'g Co., 27 F.2d 82 (6th Cir. 1928); Uproar Co., 81 F.2d 373; Hartfield v. Herzfeld, 60 F.2d 599 (S.D.N.Y. 1932).
57. Uproar Co., 81 F.2d at 376.
copyrightable interest in the work by the mere fact that another party had commissioned the work. 58 Additionally, Wynn's copyrightable interest could only be divested through an express or implied contractual assignment based on the intention of the parties. 59 In other words, there was no presumption of a copyrightable interest in the commissioning party, NBC, and NBC could only obtain a copyrightable interest in the work through an assignment from Wynn.

Two other cases that stand for the proposition that the artist/author is not automatically divested of a copyrightable interest merely by the fact that the work is commissioned are Hartfield v. Herzfield 60 and W.H. Anderson v. Baldwin Law Publishing Co. 61 Both cases set forth the idea that “[a]n author is not necessarily precluded from copyrighting a work produced under contract with another person.” 62 The W.H. Anderson court distinguished the rights of an independent contractor by holding that the copyright presumption in favor of the employer was not applicable in the context of an independent contractor. 63 The W.H. Anderson court further stated that the commissioned author would not be expected to give up his copyrightable interest without pay unless there was a transfer of the interest to the commissioning party by the author for payment. 64 These cases represent an alternative approach to Brattleboro. 65 Though Brattleboro is the majority approach, 66 ultimately the intent of the parties is the dispositive factor in how these cases are decided—not a mechanical application of one doctrine or another. 67

C. Tax Treatment of Nonresident Alien Income

The United States has two different methods to determine tax

58. Id. at 376.
59. See id.
60. Hartfield, 60 F.2d at 599.
61. W.H. Anderson, 27 F.2d at 82.
62. Id. at 88; see Hartfield, 60 F.2d at 600.
64. See id.
65. Brattleboro Publ'g Co., 369 F.2d at 565.
66. See Nimmer, supra note 35, § 5.03[B][2][c].
67. See generally Brattleboro Publ'g Co. v. Winmill Publ'g Corp., 369 F.2d 565, 568 (2d Cir. 1966) (implying that it was the intent of the parties that the advertising belonged to the advertiser and not the newspaper, noting that the services of the advertising department were an inducement for the advertiser to solicit in the paper); W.H. Anderson Co. v. Baldwin Law Publ'g Co., 27 F.2d 82, 88 (6th Cir. 1928) (holding that “the intent of the parties as to which of them shall have the right to copyright is decisive”).
liabilities of nonresidents. If the income of a nonresident is connected with a United States trade or business, then the income is taxed at the same rate as for United States citizens. A nonresident is engaged in a United States trade or business “if he conducts regular and continuous business activities in the United States, either directly or through an agent or other representative.” Also, the income must be “effectively connected” to the activities of his business or trade in the United States. If the income is not “effectively connected” with a United States trade or business, the nonresident’s gross income is taxed at a flat rate of thirty percent. Additionally, the tax code treats income as being connected with a United States trade or business if the income is from a United States source.

Royalty income is taxed under a different scheme. The taxation of royalties depends upon the location of the income-generating property. Royalty income derived from a property in the United States is generally taxed under the United States tax scheme. If the property generating the royalty income is outside of the United States, then the income is not subject to tax in the United States. However, there is at least one circumstance where no United States taxes would be assessed on nonresident royalty income derived from a property in the United States: under an international tax treaty.

The United States and the Federal Republic of Germany have such a treaty. Under the 1954 Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation with Respect to Taxes on Income, the United States and Germany agreed that royalty income of nonresident aliens would only be taxed in the state where the individual resides. This principle is also reflected in the United States Treasury Department’s model income tax treaty (Model Treaty): “Article 12 of the Model Treaty provides that royalties may be taxed only by the state in which the individual resides and broadly defines royalties to include payments for the use of any

68. Spellman, supra note 2, at 224.
70. Spellman, supra note 2, at 225.
71. I.R.C. § 871(b)(1).
72. Id. § (a)(1).
73. Spellman, supra note 2, at 226.
74. Id. at 231.
76. Id. § (d)(1)(B).
77. Spellman, supra note 2, at 241.
78. See Taxation Treaty at 2770.
79. See id. at 2798.
copyright . . . [or] sale of a copyright . . . [provided] the payments are made contingent on its productivity, use, or disposition.  

The taxation of a nonresident alien’s income in the United States depends on whether the characterization of the income is for royalty or services.81 This was the question presented to the Boulez court.82 The characterization of Boulez’s income was, in turn, dependent upon a copyright issue: did Boulez have a copyrightable interest in the recordings he made and did that interest vest in him?83 Boulez’s musical interpretation was clearly within the subject matter of copyright.84 However, there were two conflicting approaches in determining if his potential copyrightable interest vested initially in him, or the record company.85 The approach taken would have serious tax implications for Boulez. If the copyrightable interest in the recordings initially vested in him, the income could be characterized as royalty income, and therefore not subject to tax in the United States.86 Conversely, if the copyrightable interests in the recording initially vested in the record company, then the income was for services and subject to tax in the United States.87 The following two sections examine the facts of Boulez and the court’s analysis of his predicament.

III. STATEMENT OF CASE FACTS

Petitioner Pierre Boulez, a French citizen and a nonresident alien of the United States, is a world-renowned music director and orchestra conductor.88 In February of 1969, Boulez contracted with CBS Records, a division of CBS of the United Kingdom and a subsidiary of CBS, Inc., a United States corporation, to make sound recordings.89 In September 1971, extensive modifications were made to the 1969 contract.90 In March of

80. See Spellman, supra note 2, at 243–44.
81. See Part II.C.
83. Id.
84. Id. at 594.
85. Compare Brattleboro Publ’g Co., 369 F.2d at 568, with Uproar Co. v. Nat'l Broad. Co., 81 F.2d 373, 376 (1st Cir. 1936), cert. denied, 298 U.S. 670 (1936) (holding that “work for hire” did not apply to someone who was not an employee).
86. See Part II.B–C.
87. See id.
89. Id. at 585; see Contract between CBS Records, a Division of CBS of the United Kingdom Limited, and Pierre Boulez at 7 (Feb. 19, 1969) (on file with the author).
90. See Contract Amendment between CBS Records, a Division of CBS of the United Kingdom Limited, and Pierre Boulez (Sept. 13, 1971) (on file with the author); see Boulez, 83 T.C. at 585.
1974, CBS Records exercised its option to renew the 1971 agreement. The 1974 renewal applied to the income generated in 1975. Under the terms of the contract in force in 1974, CBS engaged Boulez to record phonographs as a conductor with the New York Philharmonic. The contract stated, “we [CBS Records] hereby agree to engage and you [Boulez] agree to render your services exclusively for us as a producer and/or performer for the recording of musical and/or literary compositions for the purpose of making phonograph records.” The contract stipulated that Boulez would make a specific number of recordings for each year of the contract. The contract further stipulated that Boulez would record exclusively for CBS, the master would be the property of CBS, and that Boulez would be paid royalties for the recordings. Specifically, the contract required

Notwithstanding anything to the contrary contained in paragraph 4. of the Agreement [1969 contract], you will not give or sell your performances for the purpose of making or assisting in the making of recordings of any of the compositions or works which you shall have performed under the Agreement for a period of ten (10) years from the date of recording of such compositions but in no event shall such restriction prevent you from making such recordings after a period of five (5) years after expiration of the Agreement.

The contract also stated, “[a]ll master recordings recorded hereunder . . . shall be entirely our [CBS Records] property, free from any claims whatsoever by you.” Under a complex formula relating to sales of the recording, Boulez was to be paid royalties for services performed and rights granted. Additionally, this formula stated a percentage of sales to
be paid to Boulez, depending upon whether the work being recorded was in
the public domain or not.\footnote{101}

Boulez is a French citizen, but in 1975 he was a resident of Germany
and a nonresident alien of the United States.\footnote{102} As such he filed a federal
nonresident alien income tax return with the IRS.\footnote{103} On his 1975
nonresident alien tax return, Boulez listed $39,461.47 of royalty income
from his contract with CBS.\footnote{104} Accordingly, he listed it as being exempt
from taxation in the United States.\footnote{105} Boulez listed this royalty income on
his 1976 German income tax return and paid German taxes on it.\footnote{106}

The IRS audited Boulez’s 1975 United States income tax return and
held that the “royalty income” of $39,461 did not qualify as royalties under
the tax treaty between the United States and Germany; therefore, this
income was subject to income tax in the United States.\footnote{107} Boulez invoked
proceedings, as per the treaty, to resolve the dispute.\footnote{108} Unfortunately, no
resolution was reached, but the IRS did concede that $9,000 of the income
was from sources outside of the United States and therefore not subject to
taxes in the United States.\footnote{109} This concession still left $30,461 of income at
issue.\footnote{110} Accordingly, Boulez brought suit in United States federal tax
court seeking relief.\footnote{111}

IV. THE BOULEZ COURT’S HOLDINGS

A. Tax Treaty

The court held the tax treaty between Germany and the United States
was controlling.\footnote{112} The court used the treaty’s definition of royalties,
which are “[r]oyalties and other amounts derived as bona fide consideration
for the right to use copyrights, artistic and scientific works . . . ”\footnote{113} The

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102. Boulez, 83 T.C. at 584–85.
103. Id. at 585.
104. Id. at 587–88. 105. Id. at 588.
106. Id.
107. Id.
109. Id.
110. Id.
111. Id., at 584.
112. Id. at 589.
113. Taxation Treaty, supra note 77, at 2786.
court also held that the provisions of the treaty took precedence over the IRS Code.¹¹⁴

B. The Court Defines Royalties

The court imparted a twofold analysis regarding royalties.¹¹⁵ First, the court must ask a factual question: "[d]id petitioner intend and purport to license or convey to CBS Records, and did the latter agree to pay for, a property interest in the recordings he was engaged to make, which would give rise to royalties?"¹¹⁶ If so, then the court must address a second legal question: "did petitioner have a property interest in the recordings which he was capable of licensing or selling?"¹¹⁷

In Boulez, the court held that the first question was "purely factual" and depended on the parties’ intentions.¹¹⁸ The intent of the parties was to be determined by examining the record as a whole, including the terms of the 1974 contract.¹¹⁹ Ultimately, the court determined that the contract was unclear.¹²⁰

The court noted that the contract consistently referred to the compensation as "royalties."¹²¹ Nevertheless, the court held that affixing the label "royalty" was not dispositive of Boulez’s proprietary interest in the recordings.¹²² The court further noted that the payments were directly tied to the "proceeds which CBS Records was to receive from sales of recordings."¹²³ Once again, the court held that income generated from future sales was not dispositive of whether Boulez had a proprietary interest in the recordings.¹²⁴

On the other hand, the contract was "replete with language indicating that what was intended here was a contract for personal services."¹²⁵ The court specifically cited contract paragraphs one ("to render your services exclusively . . . as a producer"), three ("to ‘perform’ in the making of a certain a number of recordings"), four ("CBS considered petitioner’s

¹¹⁴ Boulez, 83 T.C. at 590.
¹¹⁵ Id.
¹¹⁶ Id.
¹¹⁷ Id.
¹¹⁸ Id.
¹¹⁹ Id. at 590–91.
¹²⁰ Boulez, 83 T.C. at 591.
¹²¹ Id.
¹²² Id. (citing Kimble Glass Co. v. Comm’r, 9 T.C. 183, 189 (1947)).
¹²³ Id.
¹²⁴ Id. (citing Karrer v. United States, 152 F. Supp. 66 (Ct. Cl. 1957)).
¹²⁵ See id. at 592.
services to be the essence of the contract: petitioner agreed not to perform for others with respect to similar recordings during the term of the contract”), and thirteen (“CBS Records was entitled to suspend or terminate its payments” if Boulez failed to perform for a variety of reasons). The court especially emphasized paragraph five ("it was agreed that the recordings, once made, should be entirely the property of CBS"), finding it significant that “nowhere in the contract is there any language of conveyance of any alleged property right in the recordings... nor any language indicating a licensing of any such purported right, other than the designation of petitioner’s remuneration as being ‘royalties.’” The court held that therefore the contract was for personal services and not for a sale or licensing of any property rights in the recordings.

Since the first prong was met, the court moved to the second prong of its analysis: the legal question of Boulez’s proprietary interest in the recordings. The court held that for a person to derive income from royalties, that person must have an ownership interest in the property generating the royalty income. This holding mirrored the approach followed by the IRS Code of 1959 § 861(a)(4), as well as that of the previous Code of 1939 § 861(a)(4).

The court observed that the original contract was from 1969, when conductors such as Boulez did not have a copyrightable interest in recordings they participated in making. Boulez argued that the Sound Recording Amendment of 1971 allowed music directors or performers a copyrightable interest. However, this “bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.” The court found it critically important that Boulez’s contractual relationship with CBS Records did not change after the amendment, when he could have had a copyrightable interest, and therefore, a property interest in the recording. This lack of change denoted that Boulez did not have a property interest in the recordings even after it was possible.

126. Boulez, 83 T.C. at 592.
127. Id.
128. Id.
129. Id. at 593.
130. See id.
133. Id.
The court concluded that "the parties saw no need to modify their contract because they understood that even after the Sound Recording Amendment of 1971, petitioner still had no licensable or transferable property rights in the recordings which he made for CBS Records..."\(^{136}\) This conclusion was further supported by the court's application of the "works for hire" doctrine.\(^{137}\)

The Boulez court held that the Sound Recording Amendment of 1971 did not change who had a copyrightable property interest under the "works for hire" doctrine.\(^{138}\) A worker, "employed for the specific purpose of creating a work, including a copyrightable item, the fruits of [the employee's] labor, carried out in accordance with the employment," creates a work that is the property of the employer.\(^{139}\) This creates a rebuttable presumption that can be overcome by express contractual language.\(^{140}\)

Though Boulez was not considered an employee under the common law, the court held that he was an independent contractor, analogizing his relationship to CBS Records to that of "a lawyer, an engineer, or an architect... to his client, or a doctor to his patient."\(^{141}\) The Boulez court adopted the Brattleboro approach, holding that the "works for hire" doctrine applied to independent contractors.\(^{142}\) Therefore, the "works for hire" doctrine applied to Boulez.\(^{143}\) As an independent contractor under this doctrine, and absent contractual language to the contrary, Boulez had no copyrightable interest or conveyable property interest in the recording. Therefore, Boulez could not derive royalty income from the recordings.\(^{144}\) The court found that even after the Sound Recording Amendment of 1971, the income CBS paid to Boulez did not qualify as royalties under the tax treaty with Germany and was properly subject to taxation in the United States.\(^{145}\)

V. ANALYSIS

The Boulez court misapplied the law in its decision of the case. First,

\(^{136}\) Id. at 595.
\(^{137}\) Id. (discussing 17 U.S.C. § 26).
\(^{138}\) See id. at 596.
\(^{139}\) Id. at 595.
\(^{140}\) Id. (citing Scherr v. Universal Match Corp., 417 F.2d 497 (2d Cir. 1969)).
\(^{141}\) Boulez, 83 T.C. at 595.
\(^{142}\) Id.; see also Brattleboro Publ’g Co. v. Winmill Publ’g Corp., 369 F.2d 565, 567–68 (2d Cir. 1966).
\(^{143}\) See Boulez, 83 T.C. at 596.
\(^{144}\) Id.
\(^{145}\) Id.
the court misapplied *Kimble Glass Co. v. Commissioner*\(^\text{146}\) and *Karrer v. United States*\(^\text{147}\) to the facts, disregarding the customs and practices of the recording industry in determining the intention of the parties. Second, *Boulez* ignored congressional intent and misapplied the *Brattleboro* conception of the "works made for hire" doctrine to the case. The congressional intent behind the Sound Recording Amendment is antithetical to the "instance and expense" test of *Brattleboro*.\(^\text{148}\) The *Boulez* court should have followed the *Uproar* approach, which comports with congressional intent. Additionally, the *Uproar* approach is consistent with the subsequent statutory changes Congress made with respect to recordings and the "works made for hire" doctrine, namely the 1976 Copyright Act.

A. The Court's Analysis of the Intention of the Parties Did Not Take into Consideration the Customs and Practices of the Recording Industry

The *Boulez* court's analysis of the intention of the parties was flawed for not taking into consideration the customs and practices of the recording industry. When contracts are deemed ambiguous on their face, trade usage and the customs and practices of an industry are admissible, and should be considered.\(^\text{149}\)

Generally, courts first examine the face of a contract as a whole to determine the intent of the parties.\(^\text{150}\) If a contractual term is ambiguous, the court will allow extrinsic evidence to clarify the term.\(^\text{151}\) However, the courts are split on whether extrinsic evidence is allowed to determine that a term in the contract is ambiguous.\(^\text{152}\) Under the stricter "New York" approach,\(^\text{153}\) a contract that is clear and unambiguous on its face must be

\(^{146}\) 9 T.C. 183 (1947)

\(^{147}\) 152 F. Supp. 66 (Ct. Cl. 1957)

\(^{148}\) See supra Part II.A.


\(^{151}\) See generally Frigaliment Importing Co., 190 F. Supp. at 119 (utilizing customs, practices and trade usage to interpret an ambiguous term in the contract).

\(^{152}\) Compare W.W.W. Assoc., 566 N.E.2d at 642 (holding that extrinsic evidence is not allowed in determining an unambiguous term in the contract), with Delta Dynamics, Inc. v. Arioto, 446 P.2d 785, 787 (Cal. 1968) (holding that the admissibility of extrinsic evidence to define a term is not whether it is ambiguous, but rather whether it is a meaning to which it is reasonably susceptible).

\(^{153}\) Compare W.W.W. Assoc., 566 N.E.2d at 642 (holding that extrinsic evidence is not allowed in determining an unambiguous term in the contract), with Delta Dynamics, 446 P.2d at 787 (holding that the admissibility of extrinsic evidence to define a term is not whether it is
enforced according to the plain meaning of its terms. In other words, if a judge determines that a contract’s language is unambiguous, the trier of fact will need to determine the meaning of the contract terms based on the face of the agreement and will not be able to consider extrinsic evidence. Conversely, if the judge determines that the language is ambiguous or unclear, extrinsic evidence will be admissible to determine the meaning of the contract’s terms. Some examples of extrinsic evidence are parol evidence, customs and practices of the industry, and trade usage. It is assumed the Boulez court followed the “New York” approach to the interpretation of ambiguous contractual terms.

The Boulez court held that the intention of the parties in granting Boulez a royalty was ambiguous: “the contract between the parties is by no means clear.” On the one hand, the contract contained consistent references to the income as royalties. The contract stipulated that the payment was to be based on a percentage of the sales of the recording. On the other hand, Boulez did not seem to be granting or licensing an explicit property right in exchange for the royalty. Therefore, extrinsic evidence was admissible to determine the meaning of the term “royalty.” Boulez relied on the holdings in Kimble and Karrer for the initial part of its analysis of the parties’ intentions with regards to the term “royalty.”

1. Kimble Was Misapplied in Boulez

The Boulez court relied on Kimble for the proposition that “the labels which the parties affix to a transaction are not necessarily determinative of their true nature.” The court was correct in citing Kimble for this proposition, but it misapplied the principle to the facts of the case at hand.

Kimble is an earlier tax case that involved payments for what was called a “patent license.” Petitioner Kimble made certain payments to
three nonresident aliens, who were not engaged in trade or business within the United States, for an exclusive “license” to use a glass manufacturing process. As such, the nonresident aliens were subject to withholding tax in the United States if the income was generated by a license. However, the nonresident aliens were not subject to withholding tax on the sale of a patent. The IRS contended that the agreements between petitioner Kimble and the nonresident aliens were licenses to use patents and that all payments were royalties, which constituted fixed or determinable annual or periodic income, subject to withholding under section 143(b) of the Internal Revenue Code of 1939.

The issue in *Kimble* was whether the contract language of an “exclusive right to make, use and vend” constituted an assignment or merely a license. The *Kimble* court held that “the true nature of the agreement is not to be determined according to the name by which it is called.” The *Kimble* court looked to what the parties actually did—what they transferred. There, the nonresident aliens transferred the exclusive rights to make, sell, and vend, thereby transferring all of their rights under the patent. In doing so, the nonresident aliens sold their patent to Kimble. Therefore, the court held that the income was for a sale and not royalties under a license.

The *Boulez* court used this principle of *Kimble* to hold that the income generated by Boulez was for personal services. This belies the facts in the case, especially in light of another type of extrinsic evidence admissible to explain an ambiguous term—the customs and practices of an industry.

First, Boulez’s income was analogous to the non-resident aliens’ income in *Kimble*; he granted an exclusive right to make, sell, and vend intellectual property to CBS Records in return for payment of royalties. Though there may be a distinction as Boulez’s intellectual property interest would have been a copyright rather than a patent, Boulez nonetheless allowed the exclusive use of an intellectual property right—his recorded interpretation—in return for payment. As noted earlier, under the Sound Recording Amendment of 1971, Boulez had a copyrightable interest in his

165. See id. at 184–89.
166. Id.
167. Id.
168. Id. at 188–89.
169. Id. at 189.
interpretation contained in the recordings. This is what CBS was interested in obtaining exclusive rights over.

Second, Boulez's interpretation of music was an intellectual commodity as much as the glass manufacturing process was in *Kimble*. The average consumer cannot enjoy music by looking at the score. Despite technological advancements, no mechanical devices can truly interpret a musical score. It must be played, brought to life by a trained musician—an interpreter. Buyers of classical recordings generally make purchases of recordings as much on the basis of who the performers are the interpreters—as on what the repertoire is. These buyers will often have multiple versions of the same composition, by different orchestras, conductors, and soloists. As a renowned conductor, and therefore interpreter, of certain composers' orchestral works, Boulez's recorded interpretations were highly marketable. For example, Boulez's recordings of Stravinsky are among the most highly regarded interpretations; therefore, they sell well. CBS's motivation behind including the exclusivity clause of the contract was not to keep Boulez from conducting the same works with other orchestras. That, in fact, would have been allowed under the contract. CBS's motivation was to have exclusive use of Boulez's interpretations in sound recordings—a copyrightable intellectual property—for a fixed period of time. This would have allowed CBS to monopolize the market for recordings of Boulez's interpretation of that repertoire for a specific period of time, ten years. In return, Boulez would receive a percentage of sales as a royalty payment. Based upon recording industry practices, what Boulez gave CBS was not

173. *Id.* at 594.


175. *See id.*

176. *See, e.g.*, GRAMAPHONE PUBLICATIONS LIMITED, GRAMAPHONE CLASSICAL GOOD CD GUIDE 960-61 (Kate Bettley ed., 2001) (recommending Boulez's recording of songs by Igor Stravinsky); ARTHUR COHEN, RECORDED CLASSICAL MUSIC: A CRITICAL GUIDE TO COMPOSITIONS AND PERFORMANCES 1830 (1981) (recommending Boulez's recordings of Stravinsky's *Four Etudes for Orchestra* and describing his performance as "ideal").

177. *See generally* Contract between CBS Records and Pierre Boulez, *supra* note 88, at para. 4 (stating the contract gave CBS exclusive rights to Boulez's services as a conductor or producer of sound recordings for a period of five years).


179. *See generally* *id.* at para. 3 (extending CBS's exclusive rights to Boulez's services as a conductor or producer of sound recordings from a period of five years to ten years).

his services, but the exclusive use of a copyrightable property interest in his recorded interpretation. In addition, there was a change of language in the 1971 amendment to Boulez’s contract that further bolsters the contention that Boulez tendered his interpretation of his performance and not merely his services. The Boulez court mistakenly held that Boulez’s original contract of 1969 remained unchanged after the 1971 amendment; the 1971 amendment to the 1969 agreement was four pages long and contained approximately three pages of amendments. Substituting the word “performances” for “services” in the amended exclusivity clause was highly probative when determining the intent of the contract.

Notwithstanding anything to the contrary contained in paragraph 4. of the Agreement [1969 contract], you will not give or sell your performances for the purposes of making or assisting in the making of recordings of any of the compositions or works which you shall have performed under the Agreement . . . (emphasis added). This is an explicit example that CBS was interested in exclusive control of Boulez’s interpretations—his performances—which are copyrightable interests. The language is clear evidence that neither Boulez nor CBS thought the contract merely included payment for services. Boulez had an exclusive contract with CBS to record performances of certain repertoire—a copyrightable interest. Boulez could neither “give” nor “sell” that copyrightable interest to another. In agreeing to do so, Boulez assigned all of his copyrightable interests in the recordings to CBS, similar to how the three nonresident aliens assigned their patent in Kimble.

2. The Boulez Court Misapplied the Karrer Holding on Royalties

The second part of the Boulez court’s analysis of the term “royalty” misapplied Karrer v. United States. Boulez cited Karrer for the

184. See Boulez, 83 T.C. 596.
186. See id.
proposition that remuneration based on future sales, was not indicative of a royalty for the licensing or sale of a property interest, rather than personal services. This proposition is problematic. First, it was a mischaracterization of the holding. Furthermore, even if the characterization was correct, it was not a necessary part of the holding—it was dictum.

_**Karrer** involved income earned by a Swiss scientist on processes that he discovered to manufacture vitamins._

Professor Karrer, a faculty member of the University of Zurich in Switzerland, conducted research on developing a synthetic manufacturing process for vitamin B-2 and vitamin E. Karrer collaborated with the Swiss pharmaceutical company F. Hoffmann-LaRoche & Co. Ltd. of Basle, Switzerland (“Basle”). The contract between Karrer and Basle constituted a “special employment contract.” Under Swiss law, this designation allowed Basle to own the patents that were issued from the collaboration. In return, Basle promised Karrer a percentage of the sales from the products made using techniques developed in the course of his research with Basle.

Patents for both processes were filed in several countries under Basle’s ownership, but not in the United States. The patent process in the United States requires that a patent be filed by a natural person, namely the inventor. Therefore, Karrer, at Basle’s expense, filed the patents and assigned them to Basle as per the terms of their contract.

The exclusive rights to exploit these patents were assigned to Basle and Hoffmann-LaRoche, Inc., of Nutley, New Jersey, a United States corporation (“Nutley”). Therefore, Nutley held the right to exploit these patents, based on Karrer’s processes, through Basle. Despite the fact that Nutley did not have a contract with Karrer, Nutley directly paid Karrer the percentage Basle owed him for the use of these processes. Additionally, Nutley listed the payments as royalties and withheld the appropriate

189. _Boulez_, 83 T.C. at 591.
191. See id. at 66–67.
192. _Id._ at 67.
193. _Id._
194. _Id._
196. See id. at 69.
199. _Id._
200. _Id._
Karrer sued claiming that the income was generated for services rendered to a Swiss company—by a Swiss national and resident under Swiss law—and therefore, should not have been subject to tax in the United States. The United States argued that the payments from Nutley to Karrer were subject to federal income tax because they were fixed, periodic payments to the plaintiff from sources within the United States and fell within the provisions of the Internal Revenue Code of 1939. Section 211(a)(1)(A) provides that royalty income from properties located in the United States is considered sourced in the United States and therefore, subject to tax in the United States.

The court held that Karrer had no property interest in the patents, having assigned them to Basle. Therefore, the income could not be characterized as a royalty. Additionally, Swiss law supported Karrer’s contention that the income was generated for services performed in Switzerland under the “special employment contract.” Since this point had not been disputed, the court accepted the designation and held for Karrer.

The Boulez court relied on Karrer to support its holding that income generated on a percentage of future sales is not determinative of whether such income is from royalties or from services rendered. This issue was not central to the holding in Karrer. The holding of Karrer and its dispositive factors were that (1) Karrer assigned his patents to another party and therefore had no property interest to derive royalty income from Nutley, (2) Karrer developed the patents as an employee of Basle as defined under Swiss law, and (3) no contract existed between Nutley and Karrer concerning the so-called royalty income.

Boulez is distinguishable from Karrer on the facts. First, Boulez did have a contract directly with CBS for royalties. Second, he had a copyrightable interest to convey under the Sound Recording Amendment. Finally, though there seems to be no express language in the contract with CBS concerning Boulez’s property interest in the recording, a property interest could be inferred from the contract, especially in light of industry

201. Id.
202. Id. at 70.
203. Id. at 70–71; see I.R.C. § 211(a)(1)(A) (1940).
204. I.R.C. § 211(a)(1)(A).
205. Id.
206. Id. at 67.
207. Id. at 71–72.
208. See Boulez, 83 T.C. at 591.
customs and practices.

B. The Sound Recording Amendment Presumes That Boulez Had a Proprietary Interest in the Recording

In holding that Boulez had no property interest in the recording absent express contractual language, the Boulez court ignored industry custom and practice. It is virtually unheard of that a record company would explicitly grant an artist a property interest in a recording. However, that does not mean that an artist lacks a property interest.

The Sound Recording Amendment of 1971 articulates how an artist and a producer may obtain a copyrightable interest. There is a strong presumption that the artist has a copyrightable interest. There is a weaker argument for the producer obtaining a copyrightable interest. The producer must do more than organize the recording session to obtain a copyrightable interest. The producer must be involved in the actual artistic endeavor of recording and editing the sound recording by making a qualitative artistic contribution to the recording process.

Based on these requirements, there is no evidence to suggest that CBS did more than arrange for Boulez to record with the New York Philharmonic orchestra. CBS presumably financed the endeavor, created the artwork and notes for the record jacket, and marketed and distributed the recording. On the other hand, there is contractual language that explicitly states that Boulez may have been a producer on the recordings: "It is understood . . . that such engagement by us shall include your services as a producer and/or performer . . . ." Even if CBS did have a copyright claim as a producer, this would not automatically exclude Boulez's interest; it would merely create co-authorship between Boulez and CBS. To divest an artist of the copyrightable interest, the artist must have been an employee, in the agency sense of the definition, or there must have been a

209. See generally SCHULENBERG, supra note 15, at 124 (discussing the unclear and stealthy contractual language the record industry will use to obtain rights); see also DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 365–66 (Simon & Schuster, 1997) (discussing the concept of royalties in classical music).


213. NIMMER, supra note 35, § 2.10 [A][2][b]; see H.R. REP. NO. 92-487, at 5; S. REP. NO. 92-72, at 5.


transfer of interest.

The House Report on the Sound Recording Amendment of 1971 states that "the bill does not fix the authorship, or resulting ownership of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved." Nonetheless, with the strong policy presumption in the bill, it would be seemingly contradictory to imply that an artist would not have a copyrightable interest merely because the contract lacks express language. The legislative purpose of the bill was to make sound recordings copyrightable, give artists a copyrightable interest, and to prohibit automatic copyrightable interests in merely business parties absent an agency employee-employer relationship.

The Boulez court ignored the legislative purpose in its analysis of the intent of the parties and in its misapplication of the "works for hire" doctrine to Boulez.

C. The Court Misapplied the "Works for Hire" Doctrine to Boulez

The Boulez court's application of the "works for hire" doctrine was inappropriate. Boulez relied upon Brattleboro for the proposition that the "works for hire" doctrine applies to independent contractors. Though Brattleboro was statutorily superseded by the 1976 Copyright Act, it was applicable to the copyright issues in Boulez, which occurred in 1975. First, the Boulez court misapplied the test from Brattleboro. Second, in light of the congressional intent in the Sound Recording Amendment of 1971, the court should not have applied the Brattleboro test. Instead, the approach characterized by Uproar Co. v. National Broadcasting Co. was more applicable to the facts.

The Boulez court's application of Brattleboro—that the "works for hire" rule creates a presumption of authorship in favor of the commissioning party absent express contractual language—does not

218. See id.; see also S. REP. NO. 92-72, at 4-5.
219. See Boulez, 83 T.C. at 595; see also Brattleboro Publ'g Co. v. Winmill Publ'g Corp., 369 F.2d 565, 568 (2d Cir. 1966) (holding that the "works for hire" doctrine should apply to independent contractors as well).
220. 1976 Copyright Act, 17 U.S.C. § 101 (2000) (stating that works for hire only applies in the context of an employer-employee relationship or where the contract expressly states that the work is a "work made for hire" in an enumerated category); see also Aldon Accessories v. Spiegel, Inc., 738 F.2d 548, 552 (2d Cir. 1984) (holding that the 1976 Copyright has nullified the doctrine of "works for hire" as to independent contractors, other than the nine statutory categories listed in the Act).
comport with Brattleboro. 222 Brattleboro clearly states that the presumption of authorship would be in favor of the commissioning party, "unless by the terms of the contract express or implicit, the artist has reserved a copyright to himself." 223

Boulez's contract contained language that would imply that a right was exchanged for payment. First, an exchange of a right for a royalty would implicitly, if not explicitly, denote that Boulez had a property interest to convey, and that he granted its use or assigned it in return for payment. Accordingly, the contract contained the following language: "For your services rendered hereunder and for the rights granted to us herein we will pay you the following royalties..." 224 (emphasis added). The contract thus expressly states that Boulez granted a right to CBS. Additionally, CBS paid Boulez a royalty in exchange for the granting of this right. If Boulez had no property interest, it would be logically inconsistent for him to grant a right to CBS and to receive royalties in return for the grant. In conjunction with the industry practice not to expressly state the artist has a property interest in a recording, this language clearly fulfills the Brattleboro test that there be at least language that implies that the artist had a property interest in the work. 225 Thus, the intention of the parties was that Boulez would grant his copyrightable interest to CBS—his interpretation—in return for a royalty payment, a type of income exempt from taxation in the United States. 226

Second, even absent any express or implied contractual language, the application of Brattleboro was inappropriate in light of the congressional intent behind the Sound Recording Amendment of 1971. The main holding of Brattleboro involved the application of the "instance and expense" test to independent contractors, absent express or implicit contractual language to the contrary. 227 The "instance and expense" test holds that the "works for hire" doctrine will be applied where the "employee's work is produced at the instance and expense of his employer..." 228 In such circumstances, the employer has been presumed to have the copyright. 229 The Brattleboro

223. Brattleboro Publ'g Co., 369 F.2d at 568 (quoting Yardley v. Houghton Mifflin Co., 108 F.2d 28, 31 (2d Cir. 1939)).
225. See supra Part V.B.
226. See generally Taxation Treaty (creating a treaty that would subject royalty income of nonresident aliens only to the country of residence).
227. Brattleboro Publ'g Co., 369 F.2d at 567–68.
228. See id. at 567; see also Sawyer v. Crowell Publ'g Co., 46 F. Supp. 471 (S.D.N.Y. 1942), aff'd, 142 F.2d 497 (2d Cir. 1944) (holding that a map created by a government employee was the property of the United States government as it was produced during the employee's
court found “no sound reason why these same principles are not applicable when the parties bear the relationship of employer and independent contractor.”229 This approach directly conflicts with the legislative intent that purely business interests in the creation of a recording do not have a copyrightable interest absent a transfer from the artist.230

Congress did not intend to grant producers authorship of a recording where their contributions were merely a business interest (i.e., setting up recording sessions).231 This directly conflicts with the rationale behind the “instance and expense” test, especially when applied to independent contractors in sound recordings, because the only basis for the test is purely business and financial interests.232 Congress went further to state that producers could obtain a copyrightable interest if they contributed to the artistic elements of the recording, i.e., a qualitative contribution to the actual recording and engineering of the sound recording.233 Those elements are not considered at all under the “instance and expense” test. As this test clearly contradicts the legislative intent of the Sound Recording Amendment of 1971, it should not be followed. However, there exists a series of cases that do comport with the congressional intent of the amendment.234 An example of this approach is found in *Uproar Co. v. National Broadcasting Co.*235

*Uproar* concerned Texaco’s engagement of a well-known actor and comedian, Ed Wynn, to give a series of thirteen weekly radio broadcasts on the National Broadcasting Company (NBC).236 Wynn’s contract stipulated that he was to be paid $5,000 for each program if he furnished the material, (i.e., wrote the script) and $3,500 if he did not.237 Wynn’s broadcasts were a success and NBC extended the contract for more than fifty

229. *Brattleboro Publ’g Co.*, 369 F.2d at 568.
231. *Nimmer*, supra note 35, § 2.10 [A][2][b]; *see generally* H.R. REP. No. 92-487 at 5; S. REP. NO. 92-72, at 5 (stating that a producer may obtain authorship for recording, mixing and editing the session).
232. *Nimmer*, supra note 35, § 2.10 [A][2][b]; *see generally* H.R. REP. No. 92-487, at 5; S. REP. NO. 92-72, at 5 (stating that a producer may obtain authorship for recording, mixing and editing the session).
233. *See generally* H.R. REP. No. 92-487, at 5 (1971) (stating that a producer may obtain authorship for recording, mixing and editing the session); *see also* S. REP. NO. 92-72, at 5 (1971).
234. *See e.g., Uproar*, 81 F.2d 373; W. H. Anderson Co. v. Baldwin Law Publ’g Co., 27 F.2d 82 (6th Cir. 1928); Hartfield v. Herzfeld, 60 F.2d 599 (S.D.N.Y. 1932).
235. 81 F.2d 373.
236. *Id.* at 375.
237. *Id.*
Wynn's jokes and witticisms were a hit with the public, which inspired him to publish his programs in pamphlet form. Uproar Company, in conjunction with Wynn, published these programs in a weekly pamphlet entitled "Uproar."

Texaco objected, claiming that they owned the subject matter of the broadcast and further publication was a violation of their rights. NBC sued on violations of other rights that are not pertinent to the analysis of Boulez.

The main issue was whether Texaco had "acquired exclusive rights in the personal script prepared by Wynn . . . or whether that right remained with him." The district court held that, in effect, Wynn was an employee of Texaco, and as the scripts were prepared in the scope of that employment, Texaco owned all the scripts. Essentially, the District Court applied the "work for hire" doctrine to an independent contractor. The First Circuit Court of Appeals rejected this application.

First, the Uproar court held that Wynn was not an employee of Texaco, and that the "work for hire" doctrine did not apply to him. Second, the court held that the scripts belonged to Wynn. Finally, the court held that Wynn did not lose the property interest unless the contract carried an implied or express assignment, despite the fact that he was paid an additional $1,500 when he provided the script.

In other words, in the context of a commissioned relationship, the author does not automatically lose all property interest in the work. The copyrightable interest initially vests with the commissioned author. The author can only be divested of this copyrightable interest through an assignment, either express or implied.

This principle comports with the congressional intent behind the Sound Recording Amendment of 1971. In congressional reports on the amendment, Congress stated that a producer could not have an authorship

238. Id.
239. Id.
240. Id.
241. Uproar, 81 F.2d at 375.
242. Id.
243. Id. at 376.
244. See id.
245. Id.
246. Id.
247. Uproar, 81 F.2d at 376.
248. Id.
249. See generally Copyright Act of 1976, 17 U.S.C. § 101 (2000) (omitting sound recordings from the categories of works in which a commissioned work may be a "work made for hire.").
claim absent artistic input in the recording.\textsuperscript{250} If producers complied with this requirement, they had co-authorship claims in conjunction with the artist, not an interest supplanting that of the artist.\textsuperscript{251} In other words, unlike the “work for hire” doctrine, the artist’s copyrightable interest could not be transferred to the producer by presumption.\textsuperscript{252} Instead, artists could transfer their interests to a producer through an assignment. When the employment relationship was not an employee-employer relationship in the agency sense, Congress left the form of the assignment to the existing contractual relations available—an assignment, either express or implied.\textsuperscript{253} This approach is consistent with the language of the Reports.

\textbf{D. Boulez Is Inconsistent with the Congressional Intent of the Sound Recording Amendment}

The Reports state that “a sound recording will usually, though not always, involve ‘authorship’ both on the part of the performers ... and on the part of the record producer” who has made an artistic contribution to the recording.\textsuperscript{254} Congress noted that the contribution of the producer might be “so minimal that the performance is the only copyrightable element in the work.”\textsuperscript{255} Conversely, Congress also recognized that certain recordings (e.g., sound effects or sounds of nature) might not vest a copyrightable interest in a performer, thereby leaving the producer as the only person with a potential authorship claim.\textsuperscript{256} Thus, both the performer’s and the producer’s claims of authorship were qualified.\textsuperscript{257} Congress’ intent was to grant authorship to parties that artistically contributed to the recording.\textsuperscript{258} However, Congress presumed that the

\textsuperscript{251} See H.R. REP. NO. 92-487, at 5.
\textsuperscript{252} We confine our discussions here to the “work for hire” doctrine as applied to commissioned parties and not employees in the traditional agency sense. Congress presumably addressed the latter issue in stating “that the bill does not fix the authorship ... but leaves these matters to the employment relationship.” H.R. REP. NO. 92-487, at 5 (1971); S. REP. NO. 92-72, at 5 (1971). The application of “work for hire” in a traditional employee-employer situation was expressly allowed under the 1909 Act. 17 U.S.C. § 26 (1946).
\textsuperscript{253} See generally H.R. REP. NO. 92-487, at 5; S. REP. NO. 92-72, at 5 (stating “the bill does not fix the authorship, or the resulting ownership of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.”).
\textsuperscript{254} H.R. REP. NO. 92-487, at 5; S. REP. NO. 92-72, at 5.
\textsuperscript{255} H.R. REP. NO. 92-487, at 5.
\textsuperscript{256} \textit{Id.}
\textsuperscript{257} \textit{Id.}
\textsuperscript{258} \textit{Id.}
“usual” authorship status would be one of joint authorship. Both of these qualifying factors of authorship—artistic contribution and the usual joint authorship—fly in the face of the “instance and expense” test in a commissioned relationship.

It is impossible for joint authorship to be the usual scenario in a recording under the Brattleboro “instance and expense” test. Generally, a recording project will involve a featured artist, like Boulez, who is not an employee, but an independent contractor; therefore, Brattleboro would apply to most recordings. Furthermore, it is not the practice in the recording industry for the record company to expressly reserve the right of the artist in a recording. Under Brattleboro, these artists are divested of authorship in their performances. Therefore, the usual—or de facto—authorship in a recording is solely in the record company. For a performer to obtain a claim of authorship, he would have to negotiate an express grant to himself from the record company. Not only would this be difficult in light of industry practices, but it also creates a presumption that copyright authorship is held solely by the record company. This belies congressional intent that joint authorship in the artist and producer be the “usual” result in a collaboration between artist and producer in a sound recording. Congress did not qualify this presumption with the requirement that the artist must obtain his rights in authorship through contractual negotiation. Congress did, however, recognize the function of the marketplace in the determination of authorship and ownership.

In its application of Brattleboro, the Boulez court ignored the congressional language dealing with its intent of joint authorship, in favor...
of the language in the Reports concerning business interests: "'As in the case of motion pictures, the bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.'" 

The Boulez court found this portion of the legislative history to be a "significant statement," and used it to rationalize the extension of Brattleboro to independent contractors in sound recordings. Oddly enough, the court did not analogize Boulez's relationship to CBS to that of creative artists in the motion picture industry, but instead compared it to that of a "lawyer, an engineer, or an architect . . . to his client, or a doctor to his patient[,]" generally professions not involved with authorship issues. This begs the question of whether the extension of Brattleboro—i.e., the "work for hire" doctrine applied to independent contractors—to sound recordings was justified under the legislative history. There are two reasons why it was not.

First, the Boulez approach makes the legislative statement concerning a presumption of joint authorship in the artist and creative producer superfluous. This runs contrary to the accepted canons of interpretation. For example, a court will generally not interpret a term in a contract to negate other portions of the contract. Therefore, a court should not interpret a statement in legislative history to make other statements superfluous. Generally, interpreting language requires knowledge of the context of the statement. The sentence that the Boulez court relied on is in the same paragraph as the presumption of joint authorship in the artist and creative producer; in fact, the sentence concerning joint authorship is the first sentence of the paragraph. As previously noted, the recording industry does not customarily include an express contractual reservation in the artist. In combination with this industry practice, Boulez creates a de facto, if not a de juris, authorship solely in the record company. The Boulez interpretation of the legislative history makes it impossible to

272. See Boulez, 83 T.C. at 594 (citing H.R. No. 92-487, at 5).
274. Id. at 595.
275. See Sayers v. Rochester Tel. Corp. Supp. Mgmt. Pension Plan, 7 F.3d 1091, 1095 (holding that "[b]y examining the entire contract, we safeguard against adopting an interpretation that would render any individual provision superfluous.").
276. Id.
277. Id.
278. See H.R. No. 92-487, at 5; S. REP. NO. 92-72, at 5.
279. See SCHULENBERG, supra note 15, at 124.
280. See Boulez, 83 T.C. at 595–96 (1984) (holding that an independent contractor artist does not have property in a recording absent express language to the contrary).
reconcile those two statements. Therefore, the interpretation should be rejected.

Second, this conclusion is further supported by the so-called revision studies.²⁸¹ Beginning in 1955, the Copyright Office, under a congressional grant, commissioned studies to examine current aspects of the copyright law.²⁸² Its purpose was to summarize the current law and to prepare for the revision of the 1909 Act.²⁸³ Though not an official indicator of congressional intent, the studies do give an objective insight into the law as it existed at the time.²⁸⁴

Though Study No. 13, Works Made for Hire and on Commission (the "Study"), predates Brattleboro, its general conclusions are not reconcilable with the broad application of the the "work for hire" doctrine to commissioned works.²⁸⁵ The Study concluded that case law where copyright ownership of commissioned works had been vested in the commissioning party had generally been relegated to situations concerning portrait photographs and paintings.²⁸⁶ However, the transfers of ownership in these cases were not accomplished by the application of the "work for hire" doctrine. Instead, the courts in these cases found either an implied transfer or that a transfer of copyright passed with the physical object.²⁸⁷ They provided, "[w]here the photographer takes the portrait for the sitter under employment by the latter, it is the implied agreement that the property in the portrait is in the sitter, and neither the photographer nor a stranger has a right to print or make copies without permission from the sitter.²⁸⁸ Further, the courts stated, "[w]e believe, therefore . . . that the right to copyright should be held to have passed with the painting, unless the plaintiff can prove that the parties intended it to be reserved to the artist."²⁸⁹

In other words, copyrights in commissioned portraits were transferred to the commissioning party through the same type of implied transfer as in

²⁸². Id.
²⁸³. Id. at xv.
²⁸⁴. Id. at ix.
²⁸⁶. Id. at 722.
²⁸⁷. Id.
²⁸⁸. Id. (quoting from Altman v. New Haven Union Co., 254 F. 113, 118 (D.C. Conn. 1918)).
²⁸⁹. Id. (quoting from Yardley v. Houghton Mifflin Co., Inc., 108. F.2d 28, 31 (2d Cir. 1939)).
Uproar, and not through the “work for hire” doctrine.\textsuperscript{290} Furthermore, this approach is mirrored in the several proposed revisions of the 1909 Act.\textsuperscript{291}

Between 1924 and 1940, several bills for the general revision of copyright law were introduced into Congress. None of the bills envisioned that copyright in a commissioned work, other than a portrait, would be deemed to be in the commissioning party: “Except for the foregoing provisions regarding portraits, the various general revision bills did not provide affirmative rules regarding the ownership of copyright in commissioned works.”\textsuperscript{292} In fact, virtually all of the bills provided a strong presumption of copyright in the commissioned party: “Instead, most of the bills contained the negative proviso that the provisions regarding the authorship or ownership of works made by employees would not apply to commissioned works in the absence of a contrary agreement.”\textsuperscript{293} Though none of these bills were enacted into law, they do provide strong and consistent evidence of Congress’s general attitude towards copyright in commissioned works: that commissioned parties should generally not be divested of copyright authorship. This is consistent with the approach generally adopted in the Copyright Act of 1976.\textsuperscript{294} Furthermore, it is also consistent with the subsequent developments in artists’ rights in sound recordings and the application of the “works made for hire” doctrine to sound recordings.\textsuperscript{295}

\section{VI. Subsequent Developments in Copyright Law}

\subsection{A. The Boulez Holdings Are Inconsistent with the Copyright Act of 1976}

Though the Copyright Act of 1976 was not in effect when the events in Boulez occurred, the Act embodies Congress’s intentions in the

\begin{footnotesize}
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\item \textsuperscript{290} See id.; Altman, 254 F. at 118; compare Uproar Co. v. Nat’l Broad. Co., 81 F.2d 373 (1st Cir. 1936), cert. denied, 298 U.S. 670, (1936). Interestingly, \textit{Brattleboro} used the same line of “portrait” cases to extend the “work for hire” doctrine to independent contractors. \textit{Brattleboro Publ’g Co.}, 369 F.2d at 567–68. \textit{Brattleboro} was a case concerning advertising, similar to \textit{Bleistein}, the case that developed the “work for hire” doctrine. \textit{Id.} at 567. These are two additional factors to weigh in favor of a narrow reading of \textit{Brattleboro}; that “work for hire” should not apply indiscriminately to all independent contractors, absent intent to the contrary.
\item \textsuperscript{291} See generally Varmer, supra note 282 at 722–727.
\item \textsuperscript{292} \textit{Id.} at 727.
\item \textsuperscript{293} \textit{Id.}
\item \textsuperscript{294} See generally 17 U.S.C. § 101 (2000) (allowing “work for hire” doctrine in commissioned works only for nine specific categories).
\item \textsuperscript{295} See generally \textit{id.} (omitting sound recordings from the categories of works in which a commissioned work may be a “work made for hire”).
\end{itemize}
\end{footnotesize}
development of copyright law and the principles that courts should follow. The primary holdings of Boulez are not consistent with these principles. Congress defined commissioned "works made for hire" categorically and omitted sound recordings from the category. The 1976 Act created categories of commissioned works that could qualify as a "work made for hire." If the commissioned work does not fall into one of the listed categories, then the work cannot qualify as a "work made for hire;" sound recordings were not included in those categories. Therefore, commissioned sound recordings generally cannot qualify as a "work made for hire" under the 1976 Act; however, there may be a limited exception under the "compilations" and "collective work" categories.

Though the Congressional Reports to the 1976 Act do not explain why sound recordings were not included in the commissioned "work for hire" categories, the bizarre events that took place surrounding the brief inclusion, and the subsequent exclusion, of sound recordings in these categories clarified Congress's rationale. Absent a traditional employer-employee relationship, Congress did not intend producers to have a claim for authorship based only on a business contribution.

Sound recordings were "stealthily" and briefly amended into the commissioned "work for hire" categories. Within a year, Congress repealed the amendment in a "flip-flop [that] is unparalleled in the annals of the Copyright Act." In hearings before the House that ultimately led to the repeal of the amendment, the Register of the Copyright Office, Marybeth Peters, testified as to the criteria she felt should apply to authorship claims. Peters testified that the environment no longer...
existed in which record companies could claim that artists were employees and that the “work made for hire” doctrine applied. Instead, she proposed a new scheme to determine authorship, which would take into consideration the interests and contributions of the record companies, the artists, the producers, and the modern environment in which sound recordings were made and sold. The proposal was that the Copyright Office would assign authorship to “key contributors,” defined as those who have made a major contribution of copyrightable expression to a sound recording. Included in this category were featured artists and producers.

Peters specifically mentioned the contribution that producers make to a recording, stating that in some circumstances the producer’s contribution could equal or even exceed those of the featured recording artist. Though the language of the repeal does not explicitly mention Peters’ statements, her statements echo and elaborate on the language used in the Reports to the Sound Recording Amendment of 1971—that the only viable claims for authorship are from the artist, and the producer’s claim for authorship occurs when the producer makes a significant artistic/expressive contribution to the sound recording, not merely a business contribution.

VII. FINALE: BOULEZ SHOULD BE REJECTED

Boulez was improperly decided. Its holding, that an artist under a standard recording agreement had no property interest, and that the Brattleboro “works for hire” doctrine applied to commissioned sound recordings, was derived from a faulty analysis. There was sufficient language to at least imply a property interest in Boulez. The holdings also contradict the congressional intent behind the Sound Recording Amendment that the “work for hire” doctrine does not apply to artists who are independent contractors, and absent an assignment, Congress presumed that artists and producers who contributed to the expressive qualities on the sound recording would be co-authors. Furthermore, Boulez is contrary to

305. Id.
306. Id.
307. Id.
308. Id.
309. Id.
310. See H.R. REP. NO. 92-487, at 5; S. REP. NO. 92-72, at 5; see generally Nimmer, supra note 35, § 2.10[A][2][b] (stating that a producer would not have a claim to authorship if the only basis was “setting up the recording”).
311. See H.R. REP. NO. 92-487, at 5 (1971); S. REP. NO. 92-72, at 5 (1971); see generally Nimmer, supra note 35, § 2.10[A][2][b] (stating that a producer would not have a claim to
the developments in copyright law that are embodied in the Copyright Act of 1976. Additionally, there is an alternative approach that not only comports with congressional intent, but is also consistent with the parties’ intent, which is the touchstone of the analysis.

Boulez’s interpretation of the music was a copyrightable interest in the sound recordings he made for CBS. He transferred these interests for a payment of royalties. Therefore, according to the tax treaty, these royalties were subject to tax only in Germany. This is the just and fair outcome of this case. The aberrant holdings of Boulez should no longer be used to deny sound recording artists their just due under the copyright law. Boulez should be overturned and rejected by future courts.

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