NOTE

GOING FOR BROKE IN THE MUSIC INDUSTRY: ALIGNING THE CODE WITH THE INTERESTS OF RECORDING ARTISTS

INTRODUCTION

What do singers Toni Braxton, M.C. Hammer, James Taylor,[1] Meat Loaf, and TLC all have in common? They all filed bankruptcy despite their successful careers as recording artists.[2] The combination of the current economic downturn, coupled with the changes in the music industry over the past decade,[3] will likely create an atmosphere that will foster increased bankruptcy filings by more recording artists in the future. Although bankruptcy may have, in the past, had a negative stigma attached to it,[4] it is now more frequently recognized as a useful tool for recording artists burdened with unfavorable recording contracts, or those in need of a fresh start. And while filing bankruptcy may not be exactly what the recording artist envisioned as a part of his or her career, it may be the recording artist's best option for success.

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[1] Note that this reference is to James Taylor of the band Kool & the Gang.

[2] *See* RICHARD STIM, MUSIC LAW: HOW TO RUN YOUR BAND'S BUSINESS (3d ed. 2003) (explaining business side of running bands from legal perspective); *see also* Melissa B. Jacoby & Diane L. Zimmerman, *Foreclosing On Fame: Exploring the Uncharted Boundaries of the Right of Publicity*, 77 N.Y.U. L. REV. 1322, 1325 (2002) (identifying M.C. Hammer and Toni Braxton as valuable artists who filed for bankruptcy); Jennifer A. Brewer, Note, *Bankruptcy & Entertainment Law: The Controversial Rejection of Recording Contracts*, 11 AM. BANKR. INST. L. REV. 581, 581 & n.5 (2003) (citing increase in recording industry bankruptcies, including Meat Loaf's 1983 filing and Toni Braxton's 1998 filing).

[3] *See* Sunny Noh, *Better Late Than Never: The Legal Theoretical Reasons Supporting the Performance Rights Act of 2009*, 6 BUFF. INTELL. PROP. L.J. 83, 85 (2009) ("[The] industry is clearly changing - due to revenue shifting, innovation in technology, and new expedited avenues of access to music and media - the heads of the music industry have been slow to react. The big players in the industry remain focused on album sales as the industry's central earning asset, but as discussed above, album sales are not creating the profits they used to. Yet despite the fact that records are not selling, the belief that radio play promotes record sales has long justified an imbalance in copyright law as it is applied to music."); Zeb G. Schorr, *The Future Of Online Music: Balancing the Interests of Labels, Artists, and the Public*, 3 VA. SPORTS & ENT. L.J. 67, 72 (2003) ("[M]ajor labels are experiencing economic downturn.").

[4] *See* Jean Braucher, *Lawyers and Consumer Bankruptcy: One Code, Many Cultures*, 67 AM. BANKR. L.J. 501, 545 (1993) (noting many lawyers have claimed decrease in sense of social stigma about bankruptcy); *see also* Nathalie Martin, *Common Law Bankruptcy Systems: Similarities and Differences*, 11 AM. BANKR. INST. L. REV. 367, 374 n.38 (2003) ("The U.S. did away with the word 'bankrupt' in the 1978 Code, replacing it with the more genteel 'debtor,' exactly because 'bankrupt' carried such negative stigma."); Burton Perlman, *A View from the Bench*, 61 U. CIN. L. REV. 511, 517 (1992) ("No one doubts that there is a stigma to the filing of bankruptcy . . . .").

As this Note will discuss, the Bankruptcy Code ("Code") already favors recording artists, but slight alterations in interpretations of section 365 are needed to make the Code align with the interests of all recording artists. As an enormous barrier to entry, the recording industry demands that recording artists enter into decidedly unfavorable contracts with record companies to break into the music industry. These contracts force recording artists to incur substantial debt to the record companies.[5] Many times, this debt can become so insurmountable, that even fame and success cannot make the recording artist's work profitable.[6] The Code already provides significant benefits to recording artists when they file bankruptcy, specifically in connection with copyrights. In addition, due to the nature of the recording contracts, which frequently include performance requirements, the rejection of an executory recording contract has a much more powerful impact on the debtor-recording artist and record company in the context of a recording artist bankruptcy than in other non-recording artist bankruptcies. Nonetheless, in order to fulfill the purpose of the Code, and provide the recording artist with the full protection of the statutes, a few minor interpretive amendments should occur.

These interpretive amendments include providing owners of copyrights true property rights similar to those of real property owners. This interpretation would protect the owners of co-owned copyrights from potential garnishment by the debtor-co-owner. Also, copyright and royalty contracts should be construed as personal service contracts. This interpretation would prevent the creator of the original work from losing all interest in the copyright upon its sale, resulting in an unsecured claim for royalty payments upon the copyright owner's bankruptcy.

Additionally, trademarks should be included in the definition of intellectual property in section 365(n). This amendment would streamline the treatment of all intellectual property and lead to more consistent results for intellectual property rights that are usually intertwined. Furthermore, the right of publicity, where recognized, should be treated as a hybrid of intellectual property and a personal service contract. Rights of publicity are also usually combined with other intellectual property rights, and therefore, this amendment would provide more consistent results. Finally, the treatment of executory recording contracts should

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[5] *See* Sara Karubian, *360° Deals: An Industry Reaction to the Devaluation of Recorded Music*, 18 S. CAL. INTERDISC. L.J. 395, 410 (2009) (noting incurring substantial recording costs for one album could leave artists in debt for their remaining major label life); Risa C. Letowsky, Note, *Broke or Exploited: The Real Reason Behind Artist Bankruptcies*, 20 CARDOZO ARTS & ENT. L.J. 625, 644–45 (2002) (explaining negative effects from forcing artists to remain bound to recording contracts, including increased debt incurred by artist and need for record companies to make more advances); *see also infra* note 17 & Part I.

[6] *See* Theresa E. Van Beveren, *The Demise of the Long-Term Personal Services Contract in the Music Industry: Artistic Freedom Against Company Profit*, 3 UCLA ENT. L. REV. 377, 423 (1996) ("[N]ew musician puts out song and gets instant fame. Besides the money that the album makes, the record company may pour money into new artist as an advance on the next album. When next album fails to do as well as the first, the artist is in debt to the company. Young, inexperienced artists may not be able to handle the pressure, and after a year or two, the company lets the musician go."); Letowsky, *supra* note 5, at 644 (indicating many recording artists wind up in debt because they are bound by "truly evil contracts"); *infra* note 17 & Part I.

remain the same because the current treatment, combined with the interpretive amendments, will remain beneficial to bankrupt recording artists.

Part I of this Note will discuss the historical relationship between bankruptcy and recording artists. Part II of this Note will discuss the effect of bankruptcy on copyrights and suggest amendments to further align the Code with the Copyright Act. Part III of this Note will discuss the effect of bankruptcy on trademarks, the current differences in treatment between trademarks and copyrights, and the proposed interpretive amendments. Part IV of this Note will discuss the effect of bankruptcy on the right of publicity and the proposed interpretive amendments for the treatment of the right of publicity in bankruptcy. Finally, Part V of this Note will discuss the rejection of recording contracts, the unique effect the Code has on these contracts, and the likelihood of increased filings in the future.

I. THE RELATIONSHIP BETWEEN BANKRUPTCY AND RECORDING ARTISTS

As of September 2010, the number of bankruptcies reached an astounding 1.59 million, up 13.8 percent from 2009.[7] Although business filings dropped slightly, non-business filings continued to rise in 2010.[8] Economic downturns, like the current recession, make more people and industries susceptible to bankruptcy, including famous recording artists.[9] Although there are many recording artists who have not needed the help of the bankruptcy system, there are some very successful artists who have used bankruptcy as a way to resolve debt problems and reject unfavorable recording contracts.[10] It is therefore not surprising that some successful

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[7] *See Bankruptcy Filings Up Nearly 14 Percent Over Last Fiscal Year*, USCOURTS.GOV, (Nov. 8, 2010), http://www.uscourts.gov/News/NewsView/10-11-08/Bankruptcy_Filings_Up_Nearly_14_Percent_over_Last_Fiscal_Year.aspx [hereinafter *Bankruptcy Filings Up*]; *see also In re* Phillips, 417 B.R. 30, 36 (Bankr. S.D. Ohio 2009) (noting BAPCPA's effect on presumption favoring chapter 7 relief); Ralph Brubaker & Kenneth N. Klee, *Resolved: The 1978 Bankruptcy Code Has Been a Success*, 12 AM. BANKR. INST. L. REV. 273, 285 (2004) (describing rise in bankruptcy filings). As of 2009, 1.41 million parties filed bankruptcy, which was up a whopping 38% from 2008. *See* Sara Murray & Conor Dougherty, *U.S. News: Personal Bankruptcy Filings Rising Fast*, WALL ST. J., Jan. 5, 2010, at A3 (pertaining to personal bankruptcies); *see also In re* Bradley, 38 B.R. 425, 426 (Bankr. C.D. Cal. 1984) (discussing historical increase in bankruptcy filings); Jack F. Williams, *American Bankruptcy Institute Media Teleconference to Examine the Future of Automotive Sector Distress*, 17 AM. BANKR. INST. L. REV. 105, 112 (2009) (concluding significant increase in 2008 bankruptcy filings).

[8] *See Bankruptcy Filings Up*, *supra* note 7 (examining change in filings from 2009 to 2010). *See generally* Brubaker & Klee, *supra* note 7, at 286 (analyzing use of business bankruptcies); Williams, *supra* note 7 (positing probable increase in bankruptcy filings).

[9] *See* Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 218 (1999) (analyzing celebrity bankruptcies); Letowsky, *supra* note 5, at 626 ("[As of 2002,] the number of bankruptcies has increased by more than 400 percent since 1980, and the music industry 'is not immune to this trend.'"); *Bankruptcy Filings Up, supra* note 7 (highlighting how bankruptcies impact both business and non-business industries).

[10] *See* Jones & Zywicki, *supra* note 9, at 218 (discussing celebrity use of bankruptcy); Brewer, *supra* note 2, at 587 (explaining impact on artists of rejection of executory contracts).

> [A]rtists contend that they initially lack the leverage necessary to change the recording contract provisions demanded by the record labels. They also argue that contracts are

recording artists seek the shelter of bankruptcy and the automatic stay to get a "breathing spell from creditors,"[11] especially in light of their notorious spending habits.[12] As one author noted, "the best career move in show business . . . may be going broke."[13]

There are many reasons why a recording artist may decide to file bankruptcy, but the structure of recording contracts and the recording industry itself should incur much of the blame. On May 16, 2000, in front of a crowd of industry professionals at the Digital Hollywood Online Entertainment Conference, Courtney Love gave her now famous explanation of the inherent problems with recording companies and recording contracts.[14] Ms. Love hypothesized that, after a recording artist pays all the expenses the recording company incurs to promote the artist, the fees the company takes to perform these acts, and the advances the company made to the artist, the artist is left with virtually no income, and in many cases, no right to exploit their own musical creations.[15] If a recording artist does not generate enough

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> usually unfavorable to artists, who are so desperate to 'make it' that they will sign just about anything. These unfavorable provisions mean that an artist will very often be unable to financially benefit from her increased popularity. It also means that a famous artist, such as [Toni] Braxton, could end up broke after paying off her debt to the record label.

Letowsky, *supra* note 5, at 626 (citations omitted).

[11] *In re* Phila. Newspapers, LLC, 407 B.R. 606, 615 (E.D. Pa. 2009) ("The automatic stay serves to give the debtor a 'breathing spell' from creditors by stopping all collection efforts and foreclosure actions, and permits the debtor to attempt a repayment or reorganization plan."); *see* 11 U.S.C. § 362(a) (2006) (describing applicability of automatic stay); *In re* Henry, 266 B.R. 457, 468 (Bankr. C.D. Cal. 2001) (discussing how stay impacts creditors).

[12] *See, e.g.*, Jessica Barbanel, *Britney Lost Her Panties . . . and Now She May Lose Her Shirt*, FOXNEWS.COM, (Nov. 15, 2007), http://www.foxnews.com/story/0,2933,311802,00.html (noting Britney Spears "doesn't save or invest any of her roughly $737,000 monthly income"); *see also* Brewer, *supra* note 2, at 585 (acknowledging irresponsible spending habits of artists); Letowsky, *supra* note 5, at 625 (articulating belief in amount of money artists obtain).

[13] Michael Higgins, *Putting Back the Bite*, A.B.A. J., June 1998, at 74.

[14] *See* Courtney Love, Musician, Remarks at the Digital Hollywood Online Entm't Conference in N.Y. (May 16, 2000) (transcript available at *Courtney Love Does the Math*, SALON.COM, (June 14, 2000), http://www.salon.com/technology/feature/2000/06/14/love) (expressing distaste for record companies).

[15] *Id.*

> To see how the [] procedures actually work, take the following example: a new artist with a royalty rate of fourteen percent pays the producer three percent and has recording costs of $200,000. His royalty for the sale of 500,000 units of the album will be the following:
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> Cassette (suggested retail price) $10.98
> Less: Packaging (20%) - *2.19* Royalty Base $8.79
> Royalty Rate (14% less 3% for producer) x 11%
> Gross Royalty (11% of $ 7.99) $ .96
> x 500,000 units x *500,000*
> $480,000
> Less 15% "free goods factor" *-72,000*
> $408,000
> Less Recording Costs -200,000
> Less Other Costs (i.e. videos) *-150,000*

money to pay back the record company's original recoupable advance to the artist, the record company will take the earnings from future recordings.[16] The record company will then add a second advance to the artist's original debt, thereby piling one debt on top of another, making it extremely difficult for the recording artist to ever make a profit.[17]

One of the most important aspects of bankruptcy for a recording artist is the ability to accept or reject executory contracts, such as those referenced by Ms. Love. As discussed below, bankruptcy has different effects on copyrights, trademarks, right of publicity, and personal service contracts that are included in most recording contracts.[18] Although each aspect of a recording contract is treated differently, bankruptcy still favors the recording artist. With a few minor interpretive amendments, bankruptcy can continue to remain an advantageous option for recording artists to level the power in contracts and to continue to protect and promote artistic creativity.

> $58,000
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> The artist comes away with only $58,000. And do not forget that the company will put at least thirty-five to fifty percent of this money in reserve. If the artist does not have any other source of income, it will be very difficult for him to pay his bills.

Letowsky, *supra* note 5, at 635–36 (footnotes omitted)

[16] *See* Lynn Morrow, *The Recording Artist Agreement: Does It Empower or Enslave?*, 3 VAND. J. ENT. L. & PRAC. 40, 43–44 (2001) (discussing cross-collaterization of advancements by record companies to artists with artist's future earnings); Letowsky, *supra* note 5, at 647 (stating issues created for recording artists when they cannot adequately pay back record company's advances); Kaleena Scamman, Note, *ADR in the Music Industry: Tailoring Dispute Resolution to the Different Stages of the Artist-Label Relationship*, 10 CARDOZO J. CONFLICT RESOL. 269, 274–75 (2008) (describing process by which record companies recover advances given to artists to create album).

[17] *See* Brewer, *supra* note 2, at 596–97 (discussing cross collateralization of losses from first album with profits from later albums after advancing money for first album); Tracy C. Gardner, Note, *Expanding the Rights of Recording Artists: An Argument to Repeal Section 2855(b) of the California Labor Code*, 72 BROOK. L. REV. 721, 736–37 (2007) (stating artist's unprofitable first album will make it difficult to make profit on second album because record company will offset losses on first album with any gain on second album).

> A problem arises when an artist does not make enough money from the initial album sales to pay back the record company for advances. Currently, the record company can then take money from future albums to recoup its loss on the first album. While this may seem fair at first glance, a vicious cycle again may emerge. It is conceivable in a situation like this that the artist will never be able to profit from his or her albums. At some point, a record company needs to cut its losses from the first album and move on. There should be provisions in the contract that enable a record company to recoup losses, only for a designated period of time. When that time expires, the record company will either release the artist or accept the royalty agreement on the newer, more successful albums.

Letowsky, *supra* note 5, at 647.

[18] *See infra* Parts II–V.

II. THE EFFECT OF BANKRUPTCY ON COPYRIGHT LICENSES

Copyrights are an integral part of a recording artist's business.[19] Although some protection is afforded to copyrights in bankruptcy currently, a few minor interpretive changes would give recording artists a more complete and fair bankruptcy process. Generally, section 365(n) of the Code governs the treatment of most intellectual property rights in bankruptcy.[20] Section 365 permits a trustee to accept or reject a debtor/licensor's intellectual property rights in an executory contract.[21] Many times, a recording artist's most valuable asset is the intellectual property and the rights to that intellectual property.[22] Section 365(n) plays an important role in deciphering what can be included as part of the bankruptcy estate and how a license must be treated after it has been rejected.[23] Although this statute was enacted to specifically deal with the many issues presented upon rejection of intellectual property rights and licenses, it purposely omitted licenses for

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[19] *See* Lauren E. Kilgore, Note, *Guerrilla Radio: Has the Time Come for a Full Performance Right in Sound Recordings?*, 12 VAND. J. ENT. & TECH. L. 549, 561–62 (2010) (explaining copyright holder entitled to royalties after licensing their exclusive right in musical recording); Starr Nelson, Comment, *Rock and Roll Royalties, Copyrights and Contracts of Adhesion: Why Musicians May Be Chasing Waterfalls*, 1 J. MARSHALL REV. INTELL. PROP. 163, 166–67 (2001) ("With respect to musical recordings, copyrights allow artists to control the ways in which their works are exploited. Artists have the power to sell, trade or license their rights in their copyrighted work."); Kathryn Starshak, Note, *It's The End of the World as Musicians Know It, or Is It? Artists Battle the Record Industry and Congress to Restore Their Termination Rights in Sound Recordings*, 51 DEPAUL L. REV. 71, 74 (2001) ("Through the Copyright Clause, Congress created the [Copyright] Act, which gives authors an incentive to create by providing them special protection for their works.").

[20] *See* 11 U.S.C. § 365(n) (2006).

[21] *Id.* § 365(a), (n) (permitting trustee to assume or reject any executory contract of debtor and providing special protections to licensees of rejected intellectual property licenses); *see also In re* Exide Techs., 607 F.3d 957, 966 (3d Cir. 2010) (Ambro, J., concurring) ("Thus, in the event that a bankrupt licensor rejects an intellectual property license, § 365(n) allows a licensee to retain its licensed rights–along with its duties–absent any obligations owed by the debtor-licensor.").

> Subsection (n) permits a rejected licensee to treat the licensing agreement as terminated . . . or to retain its rights . . . . If the licensee elects to retain those rights, the trustee is to allow the use of the property and the licensee shall make appropriate royalty payments as specified in the contract. If the licensee elects to retain its license rights, the trustee shall provide any intellectual property in its possession to the licensee and not interfere with the licensee's rights.

In re Dynamic Tooling Sys., Inc., 349 B.R. 847, 856 (Bankr. D. Kan. 2006).

[22] *See In re* La Toya Jackson, 434 B.R. 159, 165 (Bankr. S.D.N.Y. 2010) ("Undoubtedly the most valuable assets held by the Trust are the rights to receive royalties associated with intellectual property created by La Toya Jackson as an artist and a performer."); Brewer, *supra* note 2, at 584–85 (clarifying industry practice of paying recording artist royalty fees only after recoupment of all advances and expenses by record company). *See generally* David C. Norrell, Note, *The Strong Getting Stronger: Record Labels Benefit from Proposed Changes to the Bankruptcy Code*, 19 LOY. L.A. ENT. L. REV. 445, 454 (1998) (explaining recording artist earning power linked to contractual percentage of royalties received by artist).

[23] *See* 11 U.S.C. § 365(n); *In re Exide Techs.*, 607 F.3d at 966; *In re Dynamic Tooling Sys., Inc.*, 349 B.R. at 856.

trademarks under this law.[24] Therefore, for a recording artist, the current interpretation of section 365(n) primarily concerns copyrights licenses.

At one point in the late 1990s, the Recording Industry Association of America ("RIAA") attempted to modify section 365(n).[25] RIAA's proposed 1998 version of section 365(n) carved out an exception to the rejection of executory contracts for personal services contracts where an advance was already paid to the artist.[26] This amendment effectively left a recording artist with less power in bankruptcy than other debtors. The proposed language of section 365(n) stated:

> Where the court finds that a personal services contract is property of the estate, the trustee may not reject an executory contract for the personal services in which advances are paid for the creation of copyrighted sound recordings in the future if a material purpose for commencing a case under this title is to reject such contract, unless, absent such rejection, economic rehabilitation of the debtor's finances, including such contract, cannot be achieved.[27]

Thankfully for recording artists, this carve out exception never became law,[28] and today, section 365(n) is a useful tool for recording artists in bankruptcy.

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[24] The term "intellectual property" means—

> (A) trade secret;
> (B) invention, process, design, or plant protected under title 35;
> (C) patent application;
> (D) plant variety;
> (E) work of authorship protected under title 17; or
> (F) mask work protected under chapter 9 of title 17;
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> to the extent protected by applicable nonbankruptcy law.

11 U.S.C. § 101(35A); *see In re Dynamic Tooling Sys., Inc.*, 349 B.R. at 856 ("Hantover's license to use DTS's trademarks and service marks is not protected by § 365(n) at all because trademarks are not 'intellectual property' as that term is defined in the Code, § 101(35A)."); Ron E. Meisler et al., *Rejection of Intellectual Property License Agreements Under Section 365(n) of the Code: Still Hazy After All These Years*, 19 NORTON J. BANKR. L. & PRAC. 163, 166 (2010) (citation omitted) ("According to the U.S. Senate Report, the definition of 'intellectual property' was meant to cover 'virtually all types of rights (other than trademarks or similar rights) whether protected by federal or state law statutory or common law.'").

[25] *See* Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 212 (1998); Letowsky, *supra* note 5, at 626–27.

[26] H.R. 3150, § 212.

[27] *Id.*

[28] *See* Brewer, *supra* note 2, at 601; Letowsky, *supra* note 5, at 627.

> The recording industry lobbied for stiff limits on rejection of recording contracts, but artists' unions were vigilant, and the provision finally enacted is far weaker than the flat prohibition the industry sought. In fact, the provision finally enacted may miss its intended targets altogether, because it was not placed in section 365, the section on executory contracts. Instead, the amendment was codified in section 707(b), which limits it to individual chapter 7 debtors whose debts are primarily consumer debts. Since the costs to be recouped under recording contracts are treated as business claims

Copyrights are governed by title 17 of the United States Code, and section 102 explains the breadth of copyright protection.[29] In general, a copyright protects "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[30] Included in works of authorship are "musical works, including any accompanying words" and "sound recordings."[31]

Copyrights are, like other property, "a 'bundle of discrete rights' regarding the owner's ability to use his property."[32] Therefore, a recording artist, as

> the owner of [a] copyright . . .[,] has the exclusive rights to do and to authorize any of the following:
> (1) to reproduce . . .;
> (2) to prepare derivative works . . .;
> (3) to distribute copies or phonorecords . . .
> . . . ; and
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[33]

These rights are valuable assets that the copyright owner can license and contract to receive royalty payments for the use of these rights.[34]

A copyright license can be either an exclusive license or a nonexclusive license.[35] The language and terms of the copyright licenses determine whether the license is exclusive or nonexclusive.[36] The distinction between exclusive and nonexclusive copyright licenses is important because, "'[u]nder copyright law, 'a

> in bankruptcy, many recording artists may be able to show that their debts are not primarily consumer debts.

Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 693 (2005).

[29] *See* 17 U.S.C. § 102 (2006) (explaining copyright protection subsists in "original works of authorship" and listing examples of "works of authorship").

[30] *Id.*

[31] *Id.*

[32] Davis v. Blige, 505 F.3d 90, 98 (2d Cir. 2007) (citations omitted).

[33] 17 U.S.C. § 106.

[34] *See Davis*, 503 F.3d at 98 (allowing copyright owners to license their rights to others or sue for infringement of those rights).

[35] *See* Jacob Maxwell, Inc. v. Veeck, 110 F.3d 749, 752 (11th Cir. 1997) (comparing higher burdens of forming exclusive copyright licenses to lower standards for nonexclusive copyright licenses); Gilson v. Ireland, 787 F.2d 655, 658 (D.C. Cir. 1986) (reiterating well-settled law that nonexclusive licensees have only personal interests while exclusive licensees have both personal and property interests); *In re* Golden Books Family Entm't, Inc., 269 B.R. 300, 309 (Bankr. D. Del. 2001) (defining rights of exclusive and nonexclusive licensees).

[36] *See Jacob Maxwell, Inc.*, 110 F.3d at 753 (finding orally contracting parties to have created nonexclusive license); *In re Golden Books*, 269 B.R. at 309 (examining agreements to find if they were exclusive or nonexclusive); *In re* Patient Educ. Media, Inc., 210 B.R. 237, 242–43 (Bankr. S.D.N.Y. 1997) (looking to license terms to determine whether agreements exclusive or nonexclusive).

nonexclusive licensee . . . has only a personal and not a property interest in the [intellectual property],' which 'cannot be assigned unless the [intellectual property] owner authorizes the assignment . . . .'"[37] Conversely, an exclusive licensee "does acquire property rights and 'may freely transfer his rights, and moreover, the licensor cannot transfer the same rights to anyone else.'"[38] The difference between the two types of licenses controls whether the license can be assigned in bankruptcy. Since copyright and other intellectual property licenses are generally considered "'executory' within the meaning of section 365(c),"[39] only exclusive copyright licenses can be freely assigned without permission of the owner of the copyright in bankruptcy.[40]

Owners of copyrights and other intellectual property receive special protection in bankruptcy. After a recording artist files for bankruptcy, the trustee can accept or reject any executory contract, including those for licenses of intellectual property, under section 365.[41] However, section 365(n) provides an added benefit to owners of intellectual property rights. Section 365(n) requires the licensee of a rejected executory contract for the use of intellectual property rights to continue to make royalty payments even though the licensee has limited or no use of the intellectual property.[42]

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[37] *In re Golden Books*, 269 B.R. at 309 (alterations in original) (quoting *In re Patient Educ. Media*, 210 B.R. at 242–43); *see In re Patient Educ. Media*, 210 B.R. at 240, 243 (stating nonexclusive copyright license is personal to licensee, not freely assignable, and releases non-debtor from performing under 11 U.S.C. § 365(c) and applicable state law prohibiting assignment of personal service contracts).

[38] *In re Golden Books*, 269 B.R. at 309 (quoting *In re Patient Educ. Media*, 210 B.R. at 240).

[39] *Id.* at 308–09 (citing *In re* Access Beyond Techs. Inc., 237 B.R. 32 (Bankr. D. Del. 1999)) (explaining executory licenses are assignable "because each party to the license had the material duty of 'refraining from suing the other for infringement of any of the [intellectual property] covered by the license'"); *see, e.g., In re* CFLC, Inc., 89 F.3d 673, 677 (9th Cir. 1996) (finding patent license was executory contract); *In re* HQ Global Holdings, Inc., 290 B.R. 507, 509–11 (Bankr. D. Del. 2003) (concluding trademark and trade name licenses were executory contracts).

[40] *See In re Golden Books*, 269 B.R. at 309; *see also In re CFLC, Inc.*, 89 F.3d at 679 (noting nonexclusive licenses cannot be freely assigned); Gilson v. Ireland, 787 F.2d 655, 658 (D.C. Cir. 1986) (noting it to be "well settled that" nonexclusive licenses cannot be assigned authorization from owner or license itself). However, the ability to freely assign an exclusive license as discussed in *In re Golden Books* does not extend to the licensee in all circuits. 269 B.R. at 309; *accord* Cadsoft Corp. v. Riverdeep, LLC, No. C-06-42255SC, 2007 WL 1462394, at *2 (N.D. Cal. 2007) (noting copyright licensee not permitted to freely transfer rights without permission of original licensor); Miller v. Glenn Miller Prods., 318 F. Supp. 2d 923, 937–38 (C.D. Cal. 2004) (requiring express permission from trademark licensor before licensee could sub-license). The Ninth Circuit in *Gardner v. Nike, Inc.*, explained that "the 1976 Act does not allow a copyright licensee to transfer its rights under an exclusive license, without the consent of the original licensor." 279 F.3d 774, 780 (9th Cir. 2002). Throughout this Note, any reference to rejecting a copyright license assumes that the copyright license is executory and exclusive.

[41] *See* 11 U.S.C. § 365(a) (2006); Madlyn Gleich Primoff & Erica G. Weinberger, *E-Commerce and Dot-Com Bankruptcies: Assumption, Assignment and Rejection of Executory Contracts Including Intellectual Property Agreements, and Related Issues Under Section 365(c), and 365(e) and 365(n)of the Bankruptcy Code*, 8 AM. BANKR. INST. L. REV. 307, 338 (2000) (discussing rejection of intellectual property licenses in bankruptcy); *see also In re* Exide Techs., 607 F.3d 957, 966 (3d Cir. 2010) (Ambro, J., concurring) (discussing trustee's ability to reject executory intellectual property license in bankruptcy).

[42] *See* 11 U.S.C. § 365(n)(1)–(2); *see also* Marjorie F. Chertok, *Structuring License Agreements with Companies in Financial Difficulty Section 365(n)–Divining Rod or Obstacle Course?*, 65 ST. JOHN'S L. REV. 1045, 1064–65 (1991) ("Section 365(n)(2) attempts, with limited success, to balance the benefits given to

Once a trustee has rejected an executory copyright license, the licensee has two options. The licensee may treat the contract as completely terminated, or it can elect to retain the rights of the contract as it existed immediately before the commencement of the bankruptcy case for the remaining duration of the contract.[43] If the licensee elects to retain the rights of the contract, the licensee will be required to pay royalties, which "[c]ourts have broadly interpreted . . . to include any payment for use of the [intellectual property], regardless of nomenclature and regardless of whether based on a flat fee or on a percentage of sales."[44]

In some cases, if the benefits under the license have changed, a "licensee may be required to make the same payments under the rejected license agreement, even though the licensee may be receiving fewer services and benefits going forward."[45] Therefore, if the intellectual property has been improved post-petition, a recording artist may be able to continue to receive payments for the post-petition intellectual property, and the licensee will have nothing more than a general unsecured claim for damages as a result of these payments.[46] The special treatment of intellectual property under executory contracts in bankruptcy is a significant benefit to recording artists who use bankruptcy to restructure, and clearly favors holders of intellectual property.[47]

Even with the special protection afforded to copyright owners in bankruptcy under section 365(n), copyrights can still be subjected to creditors. Artists who are subject to insurmountable debt can protect these rights by filing bankruptcy or risk

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licensees under section 365(n)(1). This subsection virtually has eliminated the debtor's obligations to the licensee and has provided the estate with an unconditional income flow."); Peter S. Menell, *Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis*, 22 BERKELEY TECH. L.J. 733, 783 (2007) (discussing licensee's royalty payment obligations for retaining its rights under section 365(n)).

[43] *See* 11 U.S.C. § 365(n)(1); *see also In re Exide Techs.*, 607 F. 3d at 965–66 (highlighting rights of licensee under section 365(n) when bankruptcy licensor rejects intellectual property license); Chertok, *supra* note 42, at 1056–63 (discussing protections offered to licensees under section 365(n)(1)).

[44] Meisler et al., *supra* note 24, at 172.

[45] *Id.*

[46] *See id.* (citing 11 U.S.C. §§ 365(g), 502(g)(1) (2006)) ("If a licensee elects to retain the [intellectual property] after a debtor rejects a license agreement, and the licensee is not allowed to use postpetition, prerejection improvements to the licensor's [intellectual property] following such rejection as suggested by the plain language of section 365(n), then what recourse does the licensee have for its damages? Clearly the licensee may assert a general unsecured claim.").

[47]
> The purpose of the bill is to amend Section 365 of the Code to make clear that the rights of an intellectual property licensee to use the licensed property cannot be unilaterally cut off as a result of the rejection of the license pursuant to Section 365 in the event of the licensor's bankruptcy. Certain recent court decisions interpreting Section 365 have imposed a burden on American technological development that was never intended by Congress in enacting Section 365. The adoption of this bill will immediately remove that burden and its attendant threat to the development of American Technology and will further clarify that Congress never intended for Section 365 to be so applied.

S. REP. NO. 100-506, at 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3200; *see also* 11 U.S.C. § 365(n) (stating special rights where debtor is licensor of right to intellectual property). *See generally* Jay Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227, 240 (1989) (stating Code makes special amendment for intellectual property).

potentially exposing their copyright rights to liens. In *In re Cusano*, the debtor was Vincent Cusano, better known as Vinnie Vincent ("Vincent"), lead guitarist of the rock band KISS from the early 1980s.[48] While a member of KISS, Vincent co-authored multiple songs and entered into an agreement with his band mates to share equally in the royalties.[49] Not long after, Vincent filed chapter 11, and his bankruptcy case was closed by 1993.[50]

In 1997, however, Vincent filed a lawsuit against his former band members Gene Klein (also known as Gene Simmons), Paul Stanley, The KISS Company, Gene Simmons Worldwide, Inc., SimStan Music, Ltd., KIS Story, Ltd., and Polygram Records, Inc. (collectively the "Defendants") for unpaid royalties and other claims.[51] The court explained that Vincent's "postpetition song right royalties were [Vincent's] property"[52] and he was entitled to his share of the royalties. Nonetheless, the court imposed sanctions on Vincent because his other claims were frivolous.[53] After this judgment was entered against Vincent,

> the [defendants] secured their judgment lien on copyrights owned by [Vincent] and perfected their lien by recording their judgment in the United States Copyright Office on November 30, 2004. In 2004 and 2005, the [defendants] served notices of garnishment on several companies that administer the Debtor's copyrights and disburse[d] his royalties . . . .[54]

Vincent will have this lien on his copyrights and royalties until the value of the judgment liens are satisfied, thus limiting his ability to profit from his copyrights and compositions.

Copyright and royalty payments liens can be problematic when one party of a co-owned copyright files bankruptcy. The Ninth Circuit, in *Pilate v. Burrell* (*In re Burrell*),[55] discussed co-ownership of a copyright in bankruptcy. Stanley Burrell, better known as M.C. Hammer, discussed co-ownership of a copyright and bankruptcy. M.C. Hammer began recording songs in 1986 and collaborated with an established music producer without a written agreement until 1990.[56] In January 1990, the two parties finally entered into collaboration contracts.[57] In 1996, M.C. Hammer filed a petition for chapter 11, which was later converted to a chapter 7.[58]

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[48] 431 B.R. 726, 730 (B.A.P. 6th Cir. 2010).
[49] *Id.*
[50] *Id.*
[51] *Id.* at 730–31.
[52] *Id.* at 731.
[53] *Id* at 738 (ruling bankruptcy court did not abuse its discretion by imposing sanctions upon debtor's bad faith filings).
[54] *Id.* at 731.
[55] 415 F.3d 994 (9th Cir. 2005).
[56] *Id.* at 996.
[57] *Id.* at 997 (noting contracts consisted of production and songwriting agreements).
[58] *Id.* at 996 (stating conversion took place in 1998).

Later in the bankruptcy, the music producer "objected to the discharge of Burrell's debt to him," and requested denial of the discharge based on breach of fiduciary duty.[59]

The music producer alleged that the breach of fiduciary duty was based on their co-ownership of copyright agreements.[60] The bankruptcy court explained that "co-ownership of a copyright does not create a fiduciary relationship."[61] Although the co-owner appealed, the decisions were remanded with instructions to dismiss based on mootness, and the bankruptcy court's determination that the lack of fiduciary duty generally does not exist based on co-ownership of a copyright was upheld.[62] However, a copyright is subject to the owner's creditors, and since copyrights are property rights, they can be sold and assigned in bankruptcy.[63]

Since there is no fiduciary duty between co-owners, and copyrights can be subjected to creditors, the Code should provide protection for the co-author who is not the debtor. The appropriate protection could be afforded by treating co-authored copyrights as joint tenancies in bankruptcy.[64] This designation is consistent with the bundle of property rights that are given to copyright owners upon the creation of the original work of authorship. Joint tenancy would permit the sale of the debtor's one-half interest subject to the right of survivorship and the co-author's remaining one-half interest.[65] Although the value of the debtor's interest in the copyright will be less valuable than if it was sold free and clear of other owners, this provides protection to the original, non-debtor co-author, while still permitting the sale of a valuable asset of the debtor.

Another issue arises in bankruptcy when a recording artist contracts away his copyright entirely. For instance, in *Yount v. Acuff Rose-Opryland*,[66] the composers of the song "Release Me" granted a record company "the right to secure copyright

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[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* (dismissing appeal as moot because co-owner's "claims for denial of discharge of debt were rendered moot when the bankruptcy court denied discharge on other grounds while [the co-owner's] appeal was pending before the district court"); *see also* Cambridge Literary Properties, Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co. KG., 448 F. Supp. 2d 244, 266 n.19 (D. Mass. 2006) (holding plaintiff could not establish fiduciary duty based on co-ownership); Willsea v. Theis, No. 98 Civ. 6773, 1999 WL 595629, at *6 (S.D.N.Y. Aug. 6, 1999) ("It is doubtful that co-authorship creates a fiduciary relationship."); Margo v. Weiss, No. 96 Civ 3842, 1998 WL 2558, at *9 (S.D.N.Y. 1998) ("[T]he only duty that exists between co-authors is the duty to account for profits.").
[63] *See* Thompkins v. Lil' Joe Records, Inc., 476 F.3d 1294, 1312 (11th Cir. 2007) ("[A] trustee may sell copyrights out of a bankruptcy estate."); *Notice of Bankruptcy Trustee's Request for Offers, and Notice to Songwriters*, BILLBOARD, Nov. 5, 2005, at 57.
[64] *See* 11 U.S.C. § 363(h) (2006) (permitting sale of co-owner's interest in property of estate); Mangus v. Miller, 317 U.S. 178, 187 (1942) (allowing bankruptcy court to effect sale of co-tenant's interest); Official Comm. of Unsecured Creditors v. Anderson Senior Living Prop., LLC (*In re* Nashville Senior Living, LLC), 620 F.3d 584, 591 (6th Cir. 2010) (applying statutory mootness to sale of tenancy in common).
[65] *See, e.g.*, 11 U.S.C. § 363(h); *In re* Blair, 330 B.R. 206, 211 (Bankr. N.D. Ill. 2005) (explaining debtor's interest in joint property may be sold in bankruptcy); *In re* Zeigler, 320 B.R. 362, 382 (Bankr. N.D. Ill. 2005) (authorizing trustee to sell real property along with non-debtor's possessory interest).
[66] 103 F.3d 830 (9th Cir. 1996).

[in 'Release Me'] throughout the entire world, and to have and to hold the said copyright and all rights of whatsoever nature thereunder existing, including any and all renewals of copyright to which the writer(s) may be entitled hereafter."[67] The record company registered the copyright for the song in their name, and subsequently filed bankruptcy.[68] "The bankruptcy of [the record company's] successor in interest led to the sale of the 'Release Me' copyright to Acuff-Rose Music, Inc."[69] While Acuff-Rose Music, Inc., owned the copyright, the original composer of the song used the copyright in another contract to assign his royalties to a third party, even though he had essentially sold his copyright many years ago.[70] The court explained that, when the artist "transferred the underlying copyright, he obtained a contractual right to royalties. He no longer had a copyright; he had a mere contractual right—a promise by [the record company] that it would make royalty payments."[71] Therefore, a recording artist may unknowingly contract away the copyright entirely in exchange for a contract for royalty payments.

Additionally, as the recording company did in *Yount*, organizations with contracts to pay royalties in exchange for owning the copyright may sell the rights to these copyrights independently of the royalty payment in bankruptcy.[72] This may leave the recording artist with few[73] or no copyright rights, no royalty payments for the use of those rights, and little recourse aside from a claim for damages for breach of contract.[74] Section 365 gives the parameters for rejecting the contract and essentially leaves the debtor with a claim for damages for a pre-petition breach.[75]

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[67] *Id.* at 832.

[68] Brief for Appellants at 5, 6, Yount v. Acuff Rose-Opryland, 103 F.3d 830 (9th Cir. 1996) (No. 95-56072), 1996 WL 33487537.

[69] *Yount*, 103 F.3d at 833.

[70] *Id.*

[71] *Id.* at 835.

[72] *See id.* at 835; *see also* 11 U.S.C. § 363(b)(1) (2006) ("The trustee may use, sell, or lease . . . property of the estate."), § 541(a)(1) ("[E]state is comprised of . . . all legal or equitable interests of the debtor . . . ."); Isbell Records, Inc. v. DM Records, Inc. (*In re* Isbell Records, Inc.), 586 F.3d 334, 337–38 (5th Cir. 2009) (holding assignment of copyright did not include underlying rights to pursue copyright infringement claims).

[73] Depending on when the work was created, if a renewal term arises, the original author of the work can renew the copyright, even if the copyright belongs to someone else. *See* U.S. Copyright Office, *Renewal of Copyright*, http://www.copyright.gov/circs/circ15.pdf [hereinafter *Renewal of Copyright*]; *see also* Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 653 (1943) (noting Congress was aware assignment of copyright by author did not include renewal rights); Corcovado Music Corp. v. Hollis Music, Inc., 981 F.2d 679, 684 (2d Cir. 1993) (explaining purpose of presumption against transferring renewal rights).

[74] *See, e.g.*, Thompkins v. Lil' Joe Records, Inc., 476 F.3d 1294, 1312–13 (11th Cir. 2007) (stating author-assignor can claim breach of contract when original copyrights, assigned in consideration of future royalties, are sold to third party free of royalty obligations); *Yount*, 103 F.3d at 835 (recognizing when musician assigned copyright, he acquired contractual right to royalties, rendering federal copyright law inapplicable regarding how contractual rights would be enforced); *In re* Diomed Inc., 394 B.R. 260, 268 (Bankr. D. Mass. 2008) (acknowledging royalty claim asserted by licensor was unsecured claim for damages arising from rejection of licensing agreement).

[75] *See* 11 U.S.C. § 365(g)(1) (2006) (stating rejection of executory contract constitutes pre-petition breach of contract). *See generally In re* Am. Homepatient, Inc., 309 B.R. 738, 743 (M.D. Tenn. 2004) (remarking under section 365(g)(1), contract is breached as of date immediately prior to filing petition and contract rejection claims are unsecured pre-petition claims); *In re* Alongi, 272 B.R. 148, 153 (Bankr. D. Md. 2001)

However, an early Second Circuit case that was adjudicated prior to the Code provided a more equitable treatment for the sale of a copyright free and clear of the obligation to pay royalties.

In *Fain v. Irving Trust Co.* (*In re Waterson, Berlin & Snyder Co*.),[76] a pre-Code bankruptcy case, a music publisher that owned multiple music copyrights filed bankruptcy.[77] The District Court for the Southern District of New York ordered that the copyrights be returned to the artists and the contracts for the royalties be rescinded because "such royalty contracts as those under consideration [] involve[d] such personal elements of trust and confidence that they [were] not assignable without the consent of the parties."[78]

The trustee appealed to the Second Circuit arguing that the trustee for Waterson, Berlin & Snyder, the debtor, wanted to sell the copyrights in bankruptcy without the attached burden of royalty payments to the composer.[79] The Second Circuit reversed the order and held that the trustee was able to sell or assign the copyrights from the music publisher to a third party.[80] However, the court further clarified that, "while the copyrights may be sold by the trustee, they should be sold subject to the right of the composers to have them worked in their behalf and to be paid royalties according to the terms of the contracts."[81] Therefore, in 1931, the Second Circuit established that a copyright interest may be sold and assigned in bankruptcy, but must be sold subject to the payment of royalties to the creator of such material under the copyright.[82]

More recently, the Eleventh Circuit dealt with the sale of a copyright free and clear from the obligation to pay royalties under the section 365 of the Code. The Eleventh Circuit held the sale of a copyright was separate from the right to receive royalties in bankruptcy.[83] In *Thompkins v. Lil' Joe Records, Inc.*, a rap artist known as JT Money contracted with the debtor, Luke Records, to "record and deliver master recordings ('masters') for production and release by Luke Records."[84] In exchange for the "exclusive, unlimited and perpetual rights" to the copyrights of these recordings and licenses to "exploit the musical compositions," Luke Records agreed to pay the artist royalty payments.[85]

("Once the determination not to assume a contract has been made, and as set out in § 365(g), the contract is treated as if it had been breached just before the bankruptcy petition was filed.").

[76] 48 F.2d 704 (2d Cir. 1931).

[77] *Id.* at 705 (noting agreements with twenty-two composers were identical except as to royalty provisions).

[78] *In re* Waterson, Berlin & Snyder Co., 36 F.2d 94, 98–99 (S.D.N.Y. 1929), *rev'd*, 48 F.2d 704 (2d Cir. 1931).

[79] *In re Waterson, Berlin & Snyder Co.*, 48 F.2d at 706.

[80] *Id.* at 711 (imposing lien for royalties accruing through sub-vendee's copyright use, because, otherwise, composer would have no right to royalties once publisher parted with title).

[81] *Id.* at 710.

[82] *See* Thompkins v. Lil' Joe Records, Inc., 476 F.3d 1294, 1312 (11th Cir. 2007) (stating section 365 resolves concerns in *Waterson*).

[83] *Id.* at 1312–13.

[84] *Id.* at 1298.

[85] *Id.*

In 1995, Luke Records and its principal, Luther Campbell, a member of the infamous rap group 2 Live Crew,[86] filed chapter 11.[87] Approximately one year later, the bankruptcy court entered a confirmation order stating that all executory contracts were rejected, including the royalty payment contracts with JT Money.[88] Luke Records then sold and assigned all rights in the compositions "free and clear of any and all liens, claims, encumbrances, charges, setoffs or recoupments of any kind," to Lil' Joe Records, Inc., and its owner, Joseph Weinberger.[89] Subsequently, JT Money brought a suit in district court claiming the rejection of the royalty payment contracts did not entitle Luke Records to gain ownership of the copyrights, and therefore the purchaser of the copyrights, Lil' Joe Records, Inc., was violating his copyright and trademark rights by using the copyrights.[90]

On appeal, the Eleventh Circuit clarified the purpose of section 365 and, specifically, the rejection of executory contracts. The court explained that, "when the bankruptcy court approved the rejection of the [contracts between JT Money and Luke Records], it freed Luke Records from the obligation, or 'burden,' to pay royalties under the contractual terms and gave [JT Money] a pre-petition claim for damages resulting from the breach."[91] Therefore, in the Eleventh Circuit, the rejection of an executory contract for copyright royalty payments under section 365 and the subsequent sale and assignment of the copyright in bankruptcy severs the relationship between the copyright ownership and the right to receive royalty payments, and frees the new owner from having to pay royalties.[92]

The difference between the Second Circuit and the Eleventh Circuit's views on the sale of copyrights and royalty payments is a result of the changes in bankruptcy law.[93] However, the Second Circuit's decision to retain the royalty payments in connection with the sale of the copyright is a far more fair and equitable solution and should be re-implemented under the current Code. As discussed in *Thompkins*, a recording artist is left with nothing more than a damages claim for royalties against an already bankrupt corporation and no control over the future of the copyrighted work.[94] Although this approach is seemingly more aligned with the overall purpose of bankruptcy,[95] it is incongruent with the generosity afforded to

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[86] *See, e.g.*, Luke Records v. Navarro, 960 F.2d 134, 138 (11th Cir. 1992) (discussing potential obscenity of 2 Live Crew's music under *Miller* test).
[87] *Thompkins*, 476 F.3d at 1299.
[88] *Id.* at 1301–02.
[89] *Id.* at 1300.
[90] *Id.* at 1302.
[91] *Id.* at 1308.
[92] *See id.* at 1313 (stating after rejection no obligation to pay royalties exists).
[93] *In re Waterson, Berlin & Snyder Co.* was decided under the Bankruptcy Act of 1898 and *Thompkins* was decided under the current Bankruptcy Code.
[94] 476 F.3d at 1312–13 (describing damages claim for artist).
[95] *See* Schneiderman v. Bogdanovich (*In re* Bogdanovich), 292 F.3d 104, 107 (2d Cir. 2002) ("Congress made it a central purpose of the bankruptcy code to give debtors a fresh start in life and a clear field for future effort unburdened by the existence of old debts."); *In re* Brody, 297 B.R. 5, 8 (Bankr. S.D.N.Y. 2003) (discussing "fresh start" policy of Bankruptcy Code); *see also* Case v. L.A. Lumber Prod. Co., 308 U.S. 106, 114 (1939) (finding Congress intended to protect all classes of security holders by requiring reorganization

intellectual property owners in section 365(n) and the overall purpose of the copyright laws.[96] Separating the royalty payments from the ownership of the copyright effectively deprives a recording artist from the fruits of his labor with little recourse aside from a damages claim.

The Second Circuit's approach in *In re Waterson, Berlin & Snyder Co.* is a more equitable solution, is far more aligned with the purpose of the Copyright Act—to protect original works of authorship—and gives credence to section 365(n) as well.[97] A small change in the interpretation of copyright-royalty contracts would fit within the current Code. A recording artist can still contract away the copyright in exchange for royalty payments. However, by making a copyright and the right to royalty payments inseparable in bankruptcy under section 365(c), the recording artist could continue to receive royalty payments from a new entity that owns and uses the copyright, which is fair to the debtor, artist, and purchaser. The solution lies in construing the copyright-royalty payment contract a personal service contract.[98] Therefore, under section 365(c), the trustee would not be able to assume or assign such contract because the non-debtor could not be subjected to personal service by the debtor or a third party pursuant to applicable law.[99]

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plans to be "fair and equitable"). Nonetheless, there are situations where a sale free and clear of a duty to pay may not necessarily be a sale completely free and clear of such duty. *See* Ninth Ave. Remedial Grp. v. Allis-Chambers Corp., 195 B.R. 716, 732 (Bankr. N.D. Ind. 1996) (holding sale free and clear does not include future claims arising after bankruptcy proceedings concluded).

[96] *See* 11 U.S.C. § 365(n)(1) (2006) (allowing licensee of intellectual property to choose between treating contract as terminated or retain licensee rights if trustee rejects contract).

> The first copyright law of the United States was enacted by the First Congress in 1790, in exercise of the constitutional power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (U.S. Constitution, Art. I, sec. 8). Comprehensive revisions were enacted, at intervals of about 40 years, in 1831, 1870, and 1909. The present copyright law, title 17 of the United States Code, is basically the same as the act of 1909.

H.R. REP. NO. 94-1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660; *see also* Lee v. Runge, 404 U.S. 887, 888–89 (1971) (Douglas, J., dissenting) (stating Article I, Section 8 of Constitution acts as both grant of power to regulate issuance copyrights in useful sciences and as limitation on Congress in granting monopolies, which would limit access to information and suffocate innovation).

[97] *In re* Waterson, Berlin & Snyder Co., 48 F.2d 704, 710 (2d. Cir. 1931) (allowing trustee to sell copyrights but subject to royalty rights of composers contained in contract terms).

[98] *See* 11 U.S.C. § 365(c)(1) (prohibiting trustee from assuming or assigning certain executory contracts); *see also* Yount v. Acuff Rose-Opryland, 103 F.3d 830, 834 (9th Cir. 1996) (holding copyright owner always obligated to pay royalties and cannot "shrug it off through bankruptcy proceedings"); Bell v. Streetwise Records, Ltd., 761 F.2d 67, 73–74 (1st Cir. 1985) (explaining if owner of trademark becomes insolvent or assigns trademark, successor in legal title remains obligated to pay royalties as agreed to in original contract).

[99] 11 U.S.C. § 365(c); *accord In re* Taylor, 913 F.2d 102, 107 (3d Cir. 1990) (discussing how personal service contracts cannot be assigned without non-debtor's consent to avoid involuntary servitude); Miller v. Glenn Miller Prods., 318 F. Supp. 2d 923, 937–38 (C.D. Cal. 2004) (applying prohibition of assignment of copyrights to trademarks so original licensor retains control and supervision over how mark is used).

The performance aspect of the contract is based on the duration of the existence of a copyright allotted before becoming a part of the public domain. For works created before 1978, a renewal of the copyright is possible after 28 years.[100] The renewal can only be done by the original creator of the work or his heirs.[101] Even if another party owns the copyright, the original creator must renew the term or it becomes part of the public domain. Therefore, an owner of a copyright will want the original creator of the work to renew so the owner can continue to profit from it. This requirement of personal service by the original owner to renew the copyright gives the copyright-royalty agreement the characteristics of a personal service contract, which cannot be assumed or assigned under section 365(c).[102]

For works created after 1978, the renewal term was removed, and, currently, a copyright exists for the life of the creator plus 70 years.[103] Consequently, for the owner to get the longest time to profit from the copyright before it becomes part of the domain, the original creator must stay alive for as long as possible. The personal service requirement by the original creator is to stay alive, which gives a copyright-royalty agreement—for works created after 1978—the characteristics of a personal service contract. Although the rejection of any executory contract in bankruptcy relieves parties of performance, the Second Circuit's approach, selling the copyright subject to the royalty payment, is the more fair and equitable approach by giving the recording artist more than just a claim for breach of contract against a

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[100] *See* 17 U.S.C. § 304(a); *see also* Broad. Music, Inc. v. Roger Miller Music, Inc., 396 F.3d 762, 764 (6th Cir. 2005) (describing how Copyright Act allows copyrights registered before 1978 to endure for 28 years, then can be renewed by registration or automatically); *How Long Does Copyright Protection Last?*, COPYRIGHT.GOV, (Apr. 9, 2011), http://www.copyright.gov/help/faq/faq-duration.html (answering commonly asked questions on how long copyright protections last and when copyrights can be renewed).

[101] *See* 17 U.S.C. § 304(a)(1)(C) (authorizing only author or widow, children or estate executor or next of kin to renew copyright of author's work for 67 years); *see also* Venegas Hernandez v. Peer Intern. Corp., 270 F. Supp. 2d 207, 216 (D.P.R. 2003) (suggesting section 304 of 1976 Copyright Act allows heirs of original creators above all other possible claims, including allocation to others by creator in creator's last will and testament). The U.S. Copyright Office states:

> A. The following persons may claim renewal in all types of works except those enumerated in Paragraph B below:
>
> 1 The author, if living, may claim as *the author*.
>
> 2 If the author is dead, the widow or widower of the author, or the child or children of the author, or both, may claim as *the widow of the author* or the *widower of the author* and/or *the child of the deceased author* or *the children of the deceased author*.
>
> 3 If there is no surviving widow, widower, or child, and the author left a will, the author's executors may claim as the *executors of the author*.
>
> 4 If there is no surviving widow, widower, or child, and the author left no will or the will has been discharged, the next of kin may claim as *the next of kin of the deceased author, there being no will*.

Renewal of Copyright, *supra* note 73, at 2.

[102] The same logic would apply to all copyrights with renewal terms.

[103] *See* 17 U.S.C. § 302(a) (codifying length of copyright protection after 1978); *see also How Long Does Copyright Protection Last?*, *supra* note 100.

debtor. It also reinforces the purpose of the copyright laws, which is to protect creators of original works.[104]

Moreover, it gives weight to section 365(n) by providing an artist with royalty payments even when the copyright belongs to another party, and by demonstrating the importance of the connection between royalty payments and use of the copyright.[105] Re-defining the copyright-royalty agreement as a personal service contract effectively creates an exception for copyrights sold in bankruptcy by a debtor that is not the creator of the original work of authorship. This approach emphasizes the importance of the Copyright Act, follows the policy of favoring artists in bankruptcy, and is the more suitable method of handling copyrights and royalty payment contracts.

III. THE EFFECT OF BANKRUPTCY ON TRADEMARKS.

Trademarks are an additional source of income for many recording artists.[106] Even though the Code currently treats trademarks and copyrights differently, extending the protections afforded to copyrights under section 365(n) to trademarks would create a more streamlined bankruptcy process for intellectual property.[107] Trademarks are governed by the Lanham Act,[108] which protects a trademark by permitting the owner or "person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce" to register the trademark in the federal registry.[109] The Lanham Act protects both registered and unregistered trademarks from persons who use, in connection with any goods or services, "any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact" that is "likely to cause confusion" in the "commercial advertising or promotion" of such goods or services.[110]

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[104] *See* H.R. REP. NO. 94-1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660.

[105] *See* 11 U.S.C. § 365(n)(2) (2006) (permitting licensee to exercise rights under rejected contract).

[106] *See, e.g.*, Joseph J. Beard, *Fresh Flowers for Forest Lawn: Amendment of the California Post-Mortem Right of Publicity Statute*, 17 ENT. & SPORTS LAW. 3, 9 (2000) (discussing protection of artist's name as trademark as extremely important); Andrew E. Clark, *The Trouble With T-Shirts: Merchandise Bootlegging in the Music Industry*, 6 HASTINGS COMM. & ENT. L.J. 1, 2 (1983) (stressing merchandising for recording artists is multi-million dollar industry).

[107] *See, e.g.*, Meisler et al., *supra* note 24, at 166 ("According to the U.S. Senate Report, the definition of 'intellectual property' was meant to cover 'virtually all types of rights (other than trademarks or similar rights) whether protected by federal or state law statutory or common law.'"); Sharon K. Sandeen, *Identifying and Keeping the Genie in the Bottle: The Practical and Legal Realities of Trade Secrets in Bankruptcy Proceedings*, 44 GONZ. L. REV. 81, 82 n.4 (2008) (commenting trademarks are treated differently than other intellectual property); Ashley H. Wilkes, Comment, *In re Gucci: The Lack of Goodwill in Matters Regarding Bankruptcy, Trademarks, and High Fashion*, 23 EMORY BANKR. DEV. J. 647, 647 (2007) (stating although trademarks traditionally included as subset of intellectual property, trademarks treated differently under Code).

[108] Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended in scattered sections of 15 U.S.C.); *see* 15 U.S.C. § 1051 (2006) (codifying requirements for trademark protection).

[109] 15 U.S.C. § 1051(b)(1).

[110] *Id.* § 1125(a)(1).

A trademark is defined as:

> any word, name, symbol, or device, or any combination thereof—
> (1) used by a person, or
> (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.[111]

Recording artists typically use trademarks to generate income from products other than their songs, such as t-shirts, posters, and other propaganda.[112] However, as the Sixth Circuit interpreted in *ETW Corp. v. Jireh Publishing, Inc.*,[113] a person cannot be a trademark.[114] A trademark can only be a person's image or likeness within the limited circumstance of a particular photograph.[115] Therefore, it is common for a recording artist to license and/or assign the trademark of their name or symbol in order to produce goods as a supplementary source of income.[116]

Licenses for trademark usage are frequently considered executory contracts and therefore subject to a trustee's rejection in bankruptcy.[117] Similar to copyright licenses, trademark licenses can also be exclusive or nonexclusive, which affects a trustee or debtor's ability to assign them in bankruptcy.[118] Under section 365(n), a

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[111] *Id.* § 1127.

[112] *See* Richard Salmon, *Making Money from Merchandising: Selling Branded Merchandise for your Brand*, PERFORMING MUSICIAN, Sept. 2009, http://www.performing-musician.com/pm/sep09/articles/merchandising.htm (discussing sale of musician merchandise and importance of trademark protection).

[113] 332 F.3d 915 (6th Cir. 2003).

[114] *Id.* at 922.

[115] *See id.* at 922–23 (rejecting Tiger Woods as person to be trademarked); *accord* Pirone v. MacMillian, Inc., 894 F.2d 579, 583 (2nd Cir. 1990) (holding Babe Ruth pictures not entitled to trademark protection unless pictures serve "origin-indicating function"); Estate of Presley v. Russen, 513 F. Supp. 1339, 1364 (D.N.J. 1981) (describing conditions required for trademark protection).

[116] *See* New Kids On The Block v. News Am. Publ'g, Inc., 971 F.2d 302, 304 (9th Cir. 1992) (describing financial benefit for entertainers to endorse products bearing their trademark); *In re* Bicoastal Corp., 164 B.R. 1009, 1017 (Bankr. M.D. Fla. 1993) (illustrating potential financial gain from entertainer's use of trademark); L. Lee Wilson, *Naming Names: How Trademarks Go Platinum*, 1 VAND. J. ENT. L. & PRAC. 33, 36 (1999) (indicating trademark of recording artist may be more valuable than recording artist's ability).

[117] *See In re* Kmart Corp., 290 B.R. 614, 619 (Bankr. N.D. Ill. 2003) (citing case law holding licensing agreements are executory contracts); Steve Jakubowski, *Treatment of IP Licenses in Bankruptcy*, *in* ADVANCED LICENSING AGREEMENTS 2010, 439, 443 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 22756, 2010) (discussing requirement of ongoing obligations for licenses, including trademarks, to be considered executory). *But see In re* Exide Techs., 607 F.3d 957, 964 (3d Cir. 2010) (holding trademark and trade name license were not executory agreements).

[118] *See* Menell, *supra* note 42, at 750–51 (describing inability to assign trademark in bankruptcy whether license is exclusive or nonexclusive); Karen Turner & Craig S. Blumsack, *The Licensing of Intellectual Property in Bankruptcy*, AM. BANKR. INST. J., Oct. 2005, at 65 n.6 (noting trademark license can be either exclusive or nonexclusive and requires licensor's consent to assignment in bankruptcy); Jeffrey M. Levinsohn, Note, *Intellectual Property Collaboration Stresses in Bankruptcy: Protecting the Rights of the Nonbankrupt Parties*, 54 HASTINGS L.J. 471, 478 (2003) (discussing assignment of exclusive and

trustee has the ability to accept or reject executory contracts for intellectual property as discussed in Part II for copyrights and Part V for other contracts.[119] However, trademarks are currently not governed by section 365(n), and therefore the owners of such trademark licenses are not governed by the same rules following the rejection of an executory contract.

Historically, the definition of "intellectual property" used in section 365(n) has been interpreted to exclude trademarks.[120] The basis for this interpretation arises from the language of the House and Senate Reports indicating that the inclusion of trademarks under section 365(n) would burden a debtor with obligations post-bankruptcy, and conflict with the underlying purpose of the Code.[121] Although copyright licenses are given more protection than trademark licenses under section 365(n), a court can extend section 365(n) to include trademarks and apply the same protections afforded to copyrights to trademarks.[122] As Judge Ambro discussed in his concurring opinion in *In re Exide Technologies*:

> Courts may use § 365 to free a bankrupt trademark licensor from burdensome duties that hinder its reorganization. They should not—as occurred in this case—use it to let a licensor take back trademark rights it bargained away. This makes bankruptcy more a sword than a shield, putting debtor-licensors in a catbird seat they often do not deserve.[123]

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nonexclusive licenses in bankruptcy). A recent decision in the Ninth Circuit concludes that trademark licenses are inherently nonassignable. *See* Miller v. Glenn Miller Prods. Inc., 454 F.3d 975, 988 (9th Cir. 2006). The licensee of the "Glen Miller" trademark and related publicity rights could not sublicense those rights to third parties without express permission from the successors of the original owner/licensor because the original licensor was to retain supervision over the manner in which the license was used. *Id.* Nevertheless, the offending licensee was entitled to summary judgment because the lawsuit brought by the owners of the mark was barred under the doctrine of laches. *Id.* at 1000.

[119] *See* 11 U.S.C. § 365(n) (2006) (detailing trustee's rights concerning executory agreement where debtor is licensor of intellectual property); *supra* Part II; *infra* Part V.

[120] *See In re Exide Techs.*, 607 F.3d at 966 (Ambro, J., concurring) (recognizing bankruptcy definition of "intellectual property" excludes trademark licenses); *In re* Old Carco LLC, 406 B.R. 180, 211 (Bankr. S.D.N.Y. 2009) ("Trademarks are not 'intellectual property' under the Bankruptcy Code."); Meisler et al., *supra* note 24, at 166 (specifying Congress's intent when enacting section 365(n) to exclude trademark from definition of "intellectual property").

[121] *See* H.R. REP. NO. 100-1012, at 7 (1988) ("The debtor/trustee will essentially have no obligation to the licensee after rejection other than to turn over existing technology and permit the licensee to use the technology."); S. REP. NO. 100-505, at 5–6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200, 3204 (expressing intent to leave decision on inclusion of trademarks to bankruptcy courts); Meisler et al., *supra* note 24, at 166–67 (discussing congressional intent behind exclusion of trademarks).

[122] *See In re Exide Techs.*, 607 F.3d at 967 (Ambro, J., concurring) (suggesting courts should use their equitable powers to allow trademark licensees to retain rights after contract rejection); Xuan-Thao N. Nguyen, *Bankrupting Trademarks*, 37 U.C. DAVIS L. REV. 1267, 1292 (2004) (stating legislative history indicates Congress wanted courts to determine how to deal with trademark licenses). *But see In re* Dynamic Tooling Sys., Inc., 349 B.R. 847, 856 (Bankr. D. Kan. 2006) (holding licensee's rights are not protected because trademarks do not constitute "intellectual property" under section 101(35A)).

[123] 607 F.3d at 967–68.

Judge Ambro explained that the legislative history surrounding section 365(n) and the overall purpose of section 365 was not to permit outright rejection of the trademark contracts, and therefore courts should permit the trademark owner to retain some rights.[124] This treatment would be similar to copyrights under section 365(n), and a recording artist would be able to reject a trademark license while still retaining some of the benefits of that license, such as royalty payments.[125] The holder of the license would also be able to retain some rights, although they may be limited.[126] Excluding trademarks from intellectual property under section 365(n) treats the two types of intellectual property inconsistently. Therefore, the Code's treatment of trademarks should be aligned with the treatment of copyrights and favoring the artist.

However, since courts have yet to extend section 365(n) to trademarks, it would appear that a recording artist could reject an exclusive, executory trademark license agreement in bankruptcy under section 365(a).[127] However, many courts have determined that trademarks are personal and inherently non-assignable without the consent of the licensor, unless the license specifically indicates otherwise.[128] According to some courts, trademarks are non-assignable because "[t]he owner of a trademark has not only a right to license the use of his trademark to others, but also a concurrent duty to exercise control and supervision over the licensee's use of the mark."[129] The non-exclusivity, control, and supervision components of trademark licenses confine these licenses to personal service contracts.[130] Consequently, under

[124] *Id.* at 966–68.

[125] *See id.*

[126] *See* 11 U.S.C. § 365(n)(1)(B) (2006) (allowing license holders to retain certain rights after contract rejection); *see also* Schlumberger Res. Mgmt. Servs., Inc. v. Cellnet Data Sys., Inc. (*In re* Cellnet Data Sys., Inc.), 327 F.3d 242, 246 (3d Cir. 2003) (noting rights retained by licensee limited to those existing immediately before case commenced); *In re* Matusalem, 158 B.R. 514, 522 (Bankr. S.D. Fla. 1993) (demonstrating rights retained by licensee after contract rejection).

[127] *See* 11 U.S.C. § 365(a) ("Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."); *In re Exide Techs.*, 607 F.3d at 966 (Ambro, J., concurring) (stating trademark licensees not protected by Congress under section 365(n)); *In re* Centura Software Corp., 281 B.R. 660, 674 (Bankr. N.D. Cal. 2002) (concluding section 365(n) plainly excludes trademarks).

[128] *See In re* N.C.P. Mktg. Grp., Inc., 337 B.R. 230, 237 (D. Nev. 2005) ("[T]rademarks are personal and non-assignable without the consent of the licensor."); Tap Publ'ns, Inc. v. Chinese Yellow Pages (New York) Inc., 925 F. Supp. 212, 218 (S.D.N.Y. 1996) (finding right of licensee to sub-license determined by whether license clearly grants power); *In re* Travelot Co., 286 B.R. 447, 455 (Bankr. S.D. Ga. 2002) (stating grant of nonexclusive license is personal to assignee and not freely assignable to third party). *But see* 15 U.S.C. § 1060(a)(1) (2006) (permitting assignment of trademark in bankruptcy when made with goodwill of business).

[129] Sheila's Shine Prods., Inc. v. Sheila Shine, Inc., 486 F.2d 114, 123–24 (5th Cir. 1973).

[130] *See In re N.C.P. Mktg. Grp.*, 337 B.R. at 236 (finding trademark owner has right to assign trademark and right and duty to control goods sold under mark); *see also Sheila's Shine Prods.*, 486 F.2d at 123–24 (stating owner of trademark has right to license use of trademark, and to exercise control and supervision); Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403, 409 (5th Cir. 1962) (asserting licensee only acquires limited use of trademark, while owner maintains control, right, and title).

section 365(c), trademark licenses cannot be assumed or assigned in bankruptcy without express contractual language to the contrary.[131]

The ability to reject an unfavorable exclusive trademark license agreement can greatly benefit a recording artist who can then enter into new, more profitable agreements, and leave the licensee with a claim for damages for breach of the contract.[132] Even though a recording artist can reject an exclusive trademark license in bankruptcy, under section 365(n), if the recording artist also rejects the copyright license, the licensee may be able to retain certain licensing rights, but will be forced to use the copyright license without the artist's trademark on it.[133] Therefore, including trademarks under section 365(n) will greatly benefit recording artists, and treat intellectual property more consistently.

IV. THE EFFECT OF BANKRUPTCY ON THE RIGHT OF PUBLICITY

The right of publicity is unlike copyright and trademark rights outside of bankruptcy. The right of publicity is not governed by federal statute outside of bankruptcy like copyrights or trademarks. The right of publicity is governed by state law and, therefore, the treatment of the right in bankruptcy varies from state to state, and from bankruptcy to bankruptcy.[134] Although this right originally stemmed from the right of privacy, many states are moving towards treatment of the right of publicity as an intellectual property right, enabling the owners to sell, license, and

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[131] *See In re N.C.P. Mktg. Grp.*, 337 B.R. at 237 (stating trademarks non-assignable without consent of licensor); *Tap Publ'ns*, 925 F. Supp. at 218 (finding licensee cannot assign trademark rights unless license states otherwise); *In re Travelot*, 286 B.R. at 454 (concluding section 365(c) prohibits debtor-in-possession from assuming executory contract if law would forbid assignment to hypothetical third party). However, courts are split as to whether the same rule applies to sub-licenses. *See In re* Rooster, Inc., 100 B.R. 228, 234 (Bankr. E.D. Pa. 1989) (concluding licensee's control over sub-licensee's "performance removes [the sub-licensee's] duties [under the trademark license] from the sphere of personal service and from the ambit of § 365(c)(1)(A)"). *But see* Harris v. Emus Records Corp., 734 F.2d 1329, 1334 (9th Cir. 1984) (stating owner's ability to monitor use of mark would be jeopardized if licensee could sublicense without permission); Miller v. Glenn Miller Prods., 318 F. Supp. 2d 923, 939 (C.D. Cal. 2004) ("If, without Plaintiffs' knowledge or permission, [licensee] could sub-license the Glenn Miller mark to third parties who use the mark to sell products or causes at odds with what Glenn Miller stood for, the public's image of Glenn Miller's persona surely would become tainted in a manner that Plaintiffs did not intend."). For the remainder of this discussion, when referring to a trademark license that can be rejected, this Note refers to an executory, exclusive trademark license.

[132] *See In re Exide Techs.*, 607 F.3d at 966 (Ambro, J., concurring) (stating section 365(n) allows licensee to retain licensed rights if bankrupt licensor rejects intellectual property license); *In re Centura Software Corp.*, 281 B.R. at 675 (concluding licensee's remedy resulting from rejection of trademark was to file claim for damages for breach); *In re* Chipwich, Inc., 54 B.R. 427, 431 (Bankr. S.D.N.Y. 1985) (finding debtor may reject licenses if such rejection is advantageous and licensee may file damages claim for breach of contract).

[133] *See In re* Old Carco LLC, 406 B.R. 180, 211 (Bankr. S.D.N.Y. 2009) (allowing licensee to continue using trademark post-rejection under section 365(n)); *In re Centura Software Corp.*, 281 B.R. at 673 (holding licensee cannot retain trademark rights under rejected agreement); *In re Chipwich*, 54 B.R. at 431 (concluding rejection of two licenses will deprive licensee of right to use trademark for products).

[134] *See In re* Coleman, 392 B.R. 767, 771 (B.A.P. 8th Cir. 2008) (articulating state law governs when no conflict with bankruptcy laws); *see also* Miller v. Glenn Miller Prods. Inc., 454 F.3d 975, 989 (9th Cir. 2006) (explaining right of publicity codified in California law); *In re* Murphy, 331 B.R. 107, 122 (Bankr. S.D.N.Y. 2005) (explaining bankruptcy courts should give effect to state law).

assign those rights.[135] In states that recognize the right of publicity, the right usually includes the use of one's own name and likeness for the purpose of commercialization.[136] Some states go further and protect the use of one's own voice.[137] Although the right of publicity is often discussed in terms of an individual's right, it also extends to groups and organizations, which can be very profitable in the music industry.[138]

In *Philadelphia Orchestra Association v. Walt Disney Co.*, the Eastern District of Pennsylvania discussed Walt Disney's alleged infringement on the Philadelphia Orchestra's right of publicity.[139] Although the court could not award summary judgment and damages because of outstanding issues of fact, the court defined a right of publicity as a valuable asset for both recording artists individually and organizations or groups of artists as well.[140]

The court explained that an orchestra can have a right of publicity when the words no longer have a general meaning in the public, but are "instantly associated with one enterprise."[141] The court determined the Philadelphia Orchestra had reached that level of association, and when Disney used the orchestra's name and likeness in the home video production of "Fantasia" without permission or payments to the orchestra, it violated the orchestra's right of publicity.[142]

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[135] *See* Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (explaining right of publicity not grounded in right of privacy); Jacoby & Zimmerman, *supra* note 2, at 1330 (citations omitted) (explaining how right of publicity is now thought of as intellectual property right); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127, 142 (1993) (explaining right of publicity evolving into intellectual property law).

[136] *See* Martin Luther King, Jr., Ctr. For Social Change, Inc. v. Am. Heritage Prods., Inc., 694 F.2d 674, 680 (11th Cir. 1983) (holding non-consensual appropriation of name and likeness constitutes tort under Georgia law); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 827 (9th Cir. 1974) (remanding case to determine whether "likeness" was misappropriated); Jacoby & Zimmerman, *supra* note 2, at 1336–37 ("In all states recognizing publicity rights, the use of likenesses and names is covered. In some places, however, voices, signatures, and even tag lines may be protected as well.").

[137] *See* Smith v. NBC Universal, 524 F. Supp. 2d 315, 324 (S.D.N.Y. 2007) (explaining California's right of publicity involves voice); *see also* Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 832–33 (6th Cir. 1983) (involving voice of Johnny Carson); Jacoby & Zimmerman, *supra* note 2, at 1336–37 ("In all states recognizing publicity rights, the use of likenesses and names is covered. In some places, however, voices, signatures, and even tag lines may be protected as well.").

[138] *See* Phila. Orchestra Ass'n v. Walt Disney Co., 821 F. Supp. 341, 349 (E.D. Pa. 1993) (explaining individuals and groups enjoy right of publicity); Winterland Concesssions Co. v. Sileo, 528 F. Supp. 1201, 1213 (N.D. Ill. 1981) (involving musical groups' right to publicity); Jacoby & Zimmerman, *supra* note 2, at 1336–37 (explaining right extends to groups).

[139] 821 F. Supp. at 342.

[140] *Id.* at 349 (defining right of publicity as right to control commercial exploitation of names and likenesses).

[141] *Id.* at 350 (citations omitted).

[142] *Id.* at 349–50.

> Individuals and groups hold the right to control the commercial exploitation of their inherently distinctive names and likenesses, which right is referred to as their "right of publicity." A defendant violates a plaintiff's right of publicity by appropriating its valuable name or likeness, without authorization, to defendant's commercial advantage . . . . The plaintiff established that the name "The Philadelphia Orchestra" has attained such a secondary meaning. The name is synonymous with the Orchestra.

Since the right of publicity is a valuable asset in some states, it may be considered a part of a recording artist's estate in bankruptcy.[143] While this right can be a valuable asset for both individuals and organizations, it can be difficult to determine the extent and value of the right, especially if the right is sold or assumed and assigned in the context of a bankruptcy proceeding. A recording artist's right of publicity in photos and voiceovers that have already been created can be rejected or assumed and assigned, but a court most likely will not force a person to perform future work for future photos or voiceovers.[144] "Simply put, publicity rights, standing alone, do not include the right to direct a person's future labor."[145] Therefore, a recording artist may include publicity rights as part of their estate in bankruptcy, but may ultimately be "forced to part with her interest in controlling and exploiting the value of her identity in advertising and a broad range of other 'commercial' settings."[146]

Furthermore, the right of publicity is not within the realm of protection afforded to intellectual property in section 365(n),[147] and is treated similar to trademarks in bankruptcy.[148] Therefore, exclusive executory contracts surrounding the right of publicity for an individual or organization can be rejected outright by a trustee in bankruptcy under section 365(a).[149] In doing so, a recording artist is not afforded any of the additional protection of continued payments under section 365(n) for the

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> The Orchestra Association has used the name "The Philadelphia Orchestra" for over 90 years and the Orchestra enjoys an outstanding reputation. The Orchestra Association holds a right of publicity in the inherently distinctive name, "The Philadelphia Orchestra."

Id. (citations omitted).

[143] *See* Jacoby & Zimmerman, *supra* note 2, at 1348–50; *cf.* CAL. CIV. CODE § 3344.1 (describing deceased person's right of publicity); Third Brief on Cross-Appeal of Marilyn Monroe LLC and Anna Strasberg at 69–70, Milton H. Green Archives v. CMG Worldwide, Inc., 2009 WL 7418306 (9th Cir. Dec. 9, 2009) (No. 08-56552), 2009 WL 4921569 (arguing right of publicity existed at death and thus vested in estate).

[144] *See* Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 993 (9th Cir. 2006) (stating right of publicity protects individual's persona from commercial exploitation); Wendt v. Host Intern., Inc., 125 F.3d 806, 811–12 (9th Cir. 1997) (discussing statutory and common law right of publicity); Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 415 (9th Cir. 1996) (noting common law protection of identity more flexible than statutory protection).

[145] Jacoby & Zimmerman, *supra* note 2, at 1351–52.

[146] *Id.* at 1367.

[147] *See generally supra* Part III.

[148] *See, e.g.*, *Miller*, 454 F.3d at 993–94 (discussing similarities and differences between publicity rights and trademark rights); Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn From Trademark Law*, 58 STAN. L. REV. 1161, 1164 (2006) (analogizing publicity rights to trademark rights); Jacoby & Zimmerman, *supra* note 2, at 1363–64 (exploring implications of treating publicity rights similarly to trademark rights in bankruptcy).

[149] *See* 11 U.S.C. § 365(a) (2006); *Miller*, 454 F.3d at 978 (ruling publicity rights incapable of being sub-licensed without permission of licensor). *See generally* Gen. Datacomm Indus., Inc. v. Arcara (*In re* Gen. Datacomm Indus., Inc.), 407 F.3d 616, 620 (3d Cir. 2005) (acknowledging trustee's right to reject executor contracts).

right to use the name or likeness of the person.[150] However, once the contract is rejected, the recording artist will no longer be required to perform under the contract.[151] Therefore, for example, a recording artist may be forced to relinquish old images of his or herself, but would not be required to create any future images.[152] The right of publicity should be treated as both a copyright and trademark license, as proposed, under section 365(n) and as a personal service contract under section 365(c).[153] A right of publicity that is similar to a trademark, such as an image of the recording artist, should be treated like a trademark and copyright in bankruptcy. Therefore, the Code would treat intellectual property the same, and would not result in inequities. A right of publicity that is similar to a personal service contract, such as a performance requirement, should be treated like a service contract. Therefore, the Code would treat all personal service contracts for recording artist performances the same as well. Examining the components of right of publicity contracts will determine which section applies the contract or actions. Even though each state has different variations and treatments of the right of publicity, their treatment under the Code would remain consistent.

V. THE REJECTION OF RECORDING CONTRACTS

Recording artists have historically used bankruptcy as a method for escaping difficult and unfavorable recording contracts.[154] The ability for a recording artist to reject an unfavorable recording contract in bankruptcy is essential to maintaining favoritism towards artists of all kinds in bankruptcy. The minor interpretive amendments suggested above should not affect the treatment of these contracts in bankruptcy. At one point in the late 1990s and early 2000s, as bankruptcy filings were on the rise, it became apparent that recording artists were using bankruptcy as

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[150] 11 U.S.C. § 365(n); *see In re* Gucci, 202 B.R. 686, 690–91 (Bankr. S.D.N.Y. 1996) (denying debtor right to collect on trademark sold by trustee); *see also* Jacoby & Zimmerman, *supra* note 2, at 1356–57 (noting debtor may lose right to profit from publicity rights once trustee disposes of them); Meisler et al., *supra* note 24, at 166–67 (discussing rejected trademarks under section 365(n)).

[151] *See* 11 U.S.C. § 365(n) (giving debtor right to refuse performance upon rejection of contract); Schlumberger Res. Mgmt. Serv., Inc. v. Cellnet Data Sys., Inc. (*In re* Cellnet Data Sys., Inc.), 327 F.3d 242, 246 (3d Cir. 2003) (acknowledging debtor's right to refuse to perform executor contract after rejected by trustee); Jacoby & Zimmerman, *supra* note 2, at 1351–52 (noting debtor may refuse to perform after publicity rights sold).

[152] *See generally* Cusano v. Klein, 264 F.3d 936, 950 (9th Cir. 2001) (affirming district court's determination that right of publicity issue should have been decided in bankruptcy case); Lemon v. Harlem Globetrotters Int'l, Inc., 437 F. Supp. 2d 1089, 1101 (D. Ariz. 2006) (discussing right of publicity contract is executory and potential damages); Jacoby & Zimmerman, *supra* note 2, at 1355–57 (noting important differences between proceeds from past trademarks and future publicity rights).

[153] *See infra* Part V.

[154] *See* Delightful Music Ltd. v. Taylor (*In re* Taylor), 913 F.2d 102, 103–04 (3d Cir. 1990) (noting James Taylor's use of bankruptcy to reject unfavorable executory contract); Jacoby & Zimmerman, *supra* note 2, at 1325–26 (listing recording artists and other celebrities who have filed for bankruptcy); Letowsky, *supra* note 5, at 625–26 (noting trend among recording artists to file bankruptcy petitions).

a successful method for renegotiating their recording contracts.[155] Even the threat of bankruptcy gave recording artists some much-needed leverage in contract deals with their record labels.[156] This leverage primarily came from the trustee's ability to assume or reject executory contracts under section 365.[157] In addition to the leverage gained by rejecting contracts, most bankruptcy courts conclude that recording contracts fall within the definition of an executory contract for personal services.[158] Therefore, artists cannot be forced into performances after the rejection of a contract for personal service as it would amount to indentured servitude.

In *Delightful Music Ltd. v. Taylor* (*In re Taylor*), the Third Circuit rejected the appellant's argument that a debtor in possession must still perform under a rejected executory contract. [159] The debtor, James Taylor, was the lead singer and principal songwriter for the successful music group, Kool and the Gang.[160] By the time Taylor filed bankruptcy in 1988, he and his group had borrowed significant amounts of money in exchange for assignments on their future revenues.[161]

> [Taylor was] owed substantial amounts by [Kool and the Gang's] entities, but with virtually no prospect of payment; he was contractually obliged to write and perform enough musical compositions to provide at least seven additional albums, but any revenues these efforts might generate would be retained by [Kool

[155] *See* Katherine L. McDaniel, *Accounting for Taste: An Analysis of Tax-and-Reward Alternative Compensation Schemes*, 9 TUL. J. TECH. & INTELL. PROP. 235, 281 (2007) (positing artists can use bankruptcy to gain bargaining power in contract renegotiations); *see also* Brewer, *supra* note 2, at 581 (acknowledging bankruptcy filings have increased in entertainment arena, enabling artists to receive higher pay from record companies); Alison J. Winick, Note, *Can Superstars Really Sing the Blues? An Argument for the Adoption of an Undue Hardship Standard When Considering Rejection of Executory Personal Services Contracts in Bankruptcy*, 63 BROOK. L. REV. 409, 411 (1997) (suggesting artists' ability to reject contracts in bankruptcy when renegotiation fails is growing concern).

[156] *See* Culhane & White, *supra* note 28, at 692 (noting threat of contract rejection in bankruptcy enables artist to renegotiate contracts signed when artist had less bargaining power); *see also* Brewer, *supra* note 2, at 585 (positing artists' threats of bankruptcy provide redress for imbalance of power between record industry and artists); Todd M. Murphy, Comment, *Crossroads: Modern Contract Dissatisfaction as Applied to Songwriter and Recording Agreements*, 35 J. MARSHALL L. REV. 795, 807 & nn.82–86 (2002) (citations omitted) ("Record companies say they are increasingly being confronted by artists who are willing to exchange the stigma of bankruptcy for the chance to scrap a contract and land a more lucrative deal with another studio.").

[157] *See* Michelle Morgan Harner et al., *Debtors Beware: The Expanding Universe of Non-Assumable/Non-Assignable Contracts in Bankruptcy*, 13 AM. BANKR. INST. L. REV. 187, 187 & n.2 (2005) (proposing right to reject executory contracts is one of Code's most important tools); Brewer, *supra* note 2, at 587–88 (indicating trustee may reject executory contracts if court approves); *see also* 3 COLLIER ON BANKRUPTCY ¶ 365.02, at 365–15 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010) (stating pre-petition agreement cannot waive trustee's right to reject executory contracts).

[158] *See In re* Taylor, 91 B.R. 302, 310–11 (Bankr. D.N.J. 1988) (concluding recording contract was executory contract); *In re* Noonan, 17 B.R. 793, 797 (Bankr. S.D.N.Y. 1982) (finding recording contract was "clearly" executory in nature); Brewer, *supra* note 2, at 587–88 (suggesting record companies dislike classification of recording contracts as executory contracts).

[159] 913 F.2d at 106–07.

[160] *Id.* at 104 (noting Taylor played with Kool and the Gang from 1979 through 1988).

[161] *Id.* at 105 (indicating money was borrowed from their agent, their pension funds, and various banks).

> and the Gang's] creditors; and he had personally guaranteed the obligations of The [Kool and the Gang's] and its related entities in amounts greatly in excess of the remaining equity in his home, which was his only significant asset.[162]

The bankruptcy trustee rejected these ongoing contracts as executory personal services contracts. The court explained that personal services contracts were "differ[ent] from other executory contracts only in that the consent of the parties is required before the trustee has authority to assume them—a qualification which reflects the peculiar nature of such contracts and the widespread distaste for involuntary servitude."[163] Therefore, any recording contracts with a performance element can be rejected outright by the trustee with the permission of the artist, and the recording artist cannot be forced to perform. This is incredibly helpful to a recording artist who has contracted for future albums or performances and has finally become popular, but only after generating insurmountable debt with the record company.

One of the most notorious cases for using bankruptcy to reject unfavorable recording contracts involved the group TLC. TLC was a very successful group in the 1990s and became one of the top-selling artists of all time.[164] Despite the success of their first and second albums, the group filed chapter 11 in 1995.[165] One of the primary reasons for filing chapter 11 was because the members had entered into standard, but very unfavorable, recording contracts with a record label.[166] The contracts gave each member an approximate annual salary of no larger than $70,000, while their albums generated over $100 million in sales for their record label, LaFace.[167] The recording industry watched the bankruptcy case closely out of fear that this would become the usual practice for artists that enter into unfavorable

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[162] *Id.*

[163] *Id.* at 107.

[164] *Top Selling Artists*, RECORDING INDUSTRY ASSOCIATION OF AMERICA, http://www.riaa.com/goldandplatinumdata.php?table=tblTopArt (noting 22 million units sold).

[165] *See In re* Watkins, 210 B.R. 394, 397 (Bankr. N.D. Ga. 1997); *see also* Noh, *supra* note 3, at 83 (summarizing TLC's bankruptcy); John P. Musone, Note & Comment, *Crystallizing the Intellectual Property Licenses in Bankruptcy Act: A Proposed Solution to Achieve Congress' Intent*, 13 BANKR. DEV. J. 509, 527 (1997) ("[TLC] sold an estimated fourteen million albums, was paid approximately $1.2 million, and is undisputedly owed an additional $2 million since 1992.").

[166] *See In re Watkins*, 210 B.R. at 403 (holding TLC did not file for bankruptcy in bad faith because rejection of recording contract was not sole purpose for filing); Letowsky, *supra* note 5, at 632 (outlining basic components of standard recording contracts, which are usually unfavorable to artists); Musone, *supra* note 165, at 527 (explaining TLC was seeking new contract with higher royalty rate prior to filing for bankruptcy).

[167] *See* S. COMM. ON THE JUDICIARY, 111TH CONG., RADIO BROADCAST ROYALTIES—PART 2 (Aug. 5, 2009) (written testimony of Steven Newberry, CEO of Commonwealth Broadcasting Corp.), *available at* 2009 WLNR 15107998; Noh, *supra* note 3, at 83 & n.3 (noting TLC's members earned $50,000 to $70,000 despite their albums generating more than $100 million in sales annually); Joseph V. Tirella, *Crazy Sexy Broke*, VIBE, Aug. 1996, at 36 (quoting TLC's group manager as explaining group has "generated $100 million in revenue and they're making $75,000 a year").

recording contracts.[168] Luckily for the record labels, the recording artists and record label ultimately settled in 1996,[169] easing immediate worries about the future of the recording contract and the recording industry.

Since the TLC bankruptcies, recording artists have not stopped using bankruptcy as a method for getting out of a losing contract. However, in 2005, recording artists were faced with additional hurdles in order to fit within the required parameters for liquidation with the introduction of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")[170] and the use of the means test.[171] After 2005, recording artists could no longer freely file chapter 7 liquidations and reject their recording contracts as they did prior to BAPCPA.[172] At the same time, recording contracts also began to change. The so called "360" deal started to take over for the traditional recording contract, giving record labels "a piece of nearly every dollar a band makes, from concerts to merchandise."[173] With the change in recording contracts and the implementation of the means test, the rate of chapter 7 filings will likely decrease; however, chapter 11 filings will most likely increase, and still be available as a successful way to level the playing field for recording artists.[174]

For example, in *In re Brown*,[175] a rap artist entered into a recording contract with Death Row Records, a well-known record label. The debtor, Ricardo E. Brown, Jr., an inexperienced, young musician, entered into personal service and recording contracts with a management company and record label.[176] Even though

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[168] *See* Beth Burkstrand, *TLC Settles Suit, Setting Aside a Troubling Use of Bankruptcy*, N.Y. TIMES, Nov. 25, 1996, at D2 (reporting case closely followed by recording industry for bankruptcy implications); Justin Pritchard, *Hatch, Union in Harmony on Bankruptcy Reform Bill*, L.A. TIMES, June 23, 1999, at 1 (describing response by lobbyists to performers exploiting bankruptcy law).

[169] *See* Burkstrand, *supra* note 168; Don Jeffrey, *TLC Settlement Includes Pact for LaFace Set*, BILLBOARD, Dec. 7, 1996, at 18; *cf.* R&B (RHYTHM AND BUSINESS): THE POLITICAL ECONOMY OF BLACK MUSIC 244 (Norman Kelley ed., 2005) (noting nervousness of recording industry).

[170] Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

[171] 11 U.S.C. § 707(b)(2)(A)(i) (2006).

[172] *See* Culhane & White, *supra* note 28, at 692–93 (stating some pre-BAPCPA cases disallowed rejection, but it was more common for courts to free artists from their contracts); Brewer, *supra* note 2, at 602–05 (2003) (discussing effect of means testing on recording artists); Stephen J. Shimshak et al., *Bankruptcy Reforms and the High Net Worth Individual*, N.Y.L.J., Mar. 3, 2008, *available at* http://www.paulweiss.com/files/Publication/ae7fb80b-70b2-41eb-9e9f-ccbeb010c85b/Presentation/PublicationAttachment/aa79932e-3602-4d9b-a35a-ce8f2259dd19/NYLJ3Mar08.pdf (highlighting hardships imposed on recording artists filing chapter 7 post BAPCPA).

[173] Ben Sisario, *Looking to a Sneaker For a Band's Big Break*, N.Y. TIMES, Oct. 10, 2010, at AR1.

[174] Although chapter 11 is a viable option for recording artists, the absolute priority rule may dampen a recording artists' hope of wiping away all prior debts and this Note will not discuss that potential issue.

[175] No. Civ. A. 97-5425, 1997 WL 786994 (E.D. Pa. Nov. 26, 1997).

[176] *Id.* at *1.

> The underlying facts are not in dispute. In November 1991, Brown executed several person services contracts with two individuals, Lamont Brumfield and Kenneth Brumfield ("Brumfield Contracts"). The Brumfield Contracts included a Recording Contract, an Exclusive Songwriting Contract, and a Management Contract. Over a year later, in January 1993, Brown signed several contracts with a recording entity known as Death Row Records and various individuals and entities associated with Death Row

Brown successfully performed under the contracts, of which he earned no more than $200,000, "he never received royalty payments for any of his collaborative efforts."[177] By the time Brown filed for bankruptcy, Death Row had not paid Brown at all, and claimed that he owed more than $1,000,000 to the record label.[178]

Upon filing chapter 11, the trustee rejected the recording contracts in their entirety, including their non-compete clauses.[179] However, the bankruptcy court "denied Brown's request for a declaration that none of [the non-compete clauses could] be enforced against him and that Brown [could] seek future employment in the music world without further liability."[180] The record label and management company appealed, seeking equitable relief for the rejection of these non-compete clauses, but the District Court for the Eastern District of Pennsylvania agreed with Brown.[181] The court reversed and remanded the bankruptcy court's order and requested an "appropriate order declaring unenforceable any and all future obligations and burdens of Ricardo E. Brown, Jr., the debtor-in-possession, under the contracts in issue."[182]

Although bankruptcy law and recording contracts may have both changed over the last two decades, record labels continue to have substantial advantages and power over recording artists. Consequently, recording companies will still create one-sided recording contracts, and artists will still resort to filing bankruptcy as a technique for balancing these contracts. Therefore, a recording artist's ability to reject the executory contracts, especially those involving future performances, is essential to keeping bankruptcy a viable option for restructuring, and should not be affected by the other interpretive changes in the Code.

CONCLUSION

Bankruptcy clearly favors recording artists generally through the rejection of executory contracts in section 365 and specifically through the preservation of payments in section 365(n). However, minor interpretation amendments for co-authors of licensed copyrighted work, and adoption of the Second Circuit's treatment of copyright royalty payments, should still be made to the Code to further protect recording artists and remain consistent with the protection of intellectual

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Records ("Death Row"). The Death Row contracts included: (1) a Recording Contract with Death Row; (2) a Publishing Contract with Suge Music, an entity owned by the President of Death Row; (3) an Inducement Letter with Interscope Records, an entity related to Death Row; and (4) a Management Contract with Sharitha Knight, the wife of Death Row's president.

Id.

[177] *Id.*
[178] *Id.*
[179] *Id.* at *6.
[180] *Id.* at *1.
[181] *Id.* at *6.
[182] *Id.*

property under the Copyright Act. Although there may have been a negative stigma attached to bankruptcy in the past, filing for chapter 11 or 7 can prove to be very cost-effective for a recording artist, and these small changes will improve the bankruptcy system's effectiveness for recording artists.

Bankruptcy offers special protection for owners of intellectual property like copyrights, which enables a recording artist to reject an executory contract or license in connection with a copyright, and still receive royalties for that license. However, an interpretive amendment is needed to ensure copyrights and royalty payments remain inseparable if the debtor selling the copyright is not the original creator. Furthermore, co-authored works should be interpreted as joint tenancies to protect the non-debtor co-author in a sale of the debtor's half interest.

Bankruptcy does not offer the same protection for trademark licenses, right of publicity licenses, or recording contracts; however, minor interpretive amendments for trademarks and right of publicity licenses will streamline the treatment of all intellectual property in bankruptcy. Including trademarks in intellectual property under section 365(n), and treating right of publicity contracts as intellectual property and personal service contract hybrids will provide uniform treatment of intellectual property in bankruptcy. Bankruptcy currently permits an artist to emerge free and clear of its previous obligations and unprofitable recording contracts and able to negotiate more favorable contracts and licenses. These protections are afforded equally to recording artists and all other debtors. However, because the recording contract is so unfavorable to recording artists and can be a catalyst for filing bankruptcy, the rejection of an unfavorable recording contract can increase the likelihood of the artist's success post-bankruptcy.

Since the recording contract is moving towards an all-encompassing 360 deal, it is likely that more recording artists will be faced with the same problems that recording artists had in the past; namely, large upfront advances that have to be repaid before the artist receives any of the small portion of royalties left after the record label takes its share. With the 360 deal, however, an artist will have fewer places from which to reap the benefit of his or her success, and the artist will again be left in a very unbalanced situation.[183] With the proposed minor interpretive changes to the Code, bankruptcy should continue to provide many benefits to recording artists to make the recording industry more profitable for musicians.

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[183] *See* Gardner, *supra* note 17, at 739 n.107 (citations omitted) ("We are submitting this critique here as a means to shed light on the major-label working environment, which leaves an estimated 99.6% of artists in debt to their record labels."); *see also* Jeff Leeds, *The New Deal: Band As Brand,* N.Y. TIMES, Nov. 11, 2007, at 2.1 (discussing record company option to seek percentage of royalties by paying cash up front); Janet Morrissey, *If It's Retail, Is It Still Rock?,* N.Y. TIMES, Oct. 28, 2007, at BU1 (describing pressure on artists to take 360 deals).

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