"TAYLOR'S VERSION": A MASTERMIND OR SERIES OF COPYRIGHT VIOLATIONS BY TAYLOR SWIFT?

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Abstract

In 2019, Taylor Swift shook the entire global music industry by announcing re-recording of her albums. Today, she is halfway through re-recording her early albums and carving her path to ownership. These re-recorded versions are named the same as the original album but with an addition of the words "Taylor's Version" at the end. While her fan base who call themselves swifties are helping her promote the new versions and ensuring they break the same records as the original versions did, there is legal question to be asked, "whether the process of re-recording is a plain and simple violation of US Copyright laws or a masterplan to own her work?". The paper attempts at answering this legal question. The paper analyses arguments from both sides to come to a conclusion and strives to understand the implications of two 'slightly' different versions and two 'very' different owners. It further analyses whether the Record Labels can sue Swift for a copyright infringement or whether Taylor has a claim against her record labels.

Keywords: Copyright, Infringement, Protection, Originality

1. Introduction

At age 15, Taylor Swift signed her first contract with a recording company, and since then there has been no looking back. In Spotify's words, "she is the sharpest, savviest populist singer/songwriter of her generation"[1] and as Barbara Walters once said, "Taylor Swift is the music industry."[2] Her name has not only been famous in the pop culture for decades now, but also been heard often in disputes of Intellectual Property (IP).

To begin with, a contract was signed by Swift at the age of 15 years, which later became the root cause of legal drama. Swift had entered into a legal agreement with Big Machine Label Group (BMLG) in 2005 giving BMLG complete rights over all her master

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[1] Spotify, '*Artists: Taylor Swift'*.

[2] ABC News, *Taylor Swift Interview 2014: Singer Premieres 'Shake It Off', Announces New Album*, 2014, *available at:* https://www.youtube.com/watch?v=AM9sq93pXVg.

recordings of the 6 albums recorded till 2018. In return, BMLG (her first record label) promised promoting and funding her music.[3] This was a 13 yearlong contractual commitment and Swift, new to pop culture, could not foresee the repercussions of the contract.[4] She had no clue as to how the master recordings would operate given her inexperience and young age and thus could not own her initial 6 albums because of the legal effect of this contractual agreement.

After years of success and a fan base of millions, Swift tried to own her masters by approaching BMLG to negotiate a purchase of her masters. These attempts were unsuccessful but the final blow to the situation was in 2019 when BMLG sold the rights of her entire catalogue (that is 6 albums till 2018) to Mr. Scooter Braun.[5] He is a highly successful talent agent but there is a history of bitterness with Swift.[6] This sale of her life's work to Mr. Braun, allegedly a music industry bully, was a trigger for Swift given the extreme tension between the two celebrities. She did not foresee the sale until it hit the news leaving her with no remedy.[7] Taking undue advantage of owning her work, he began imposing restrictions on the use of her catalogue.[8] So Swift attempted at negotiating a deal with him as well, and in response received unreasonable terms in exchange. Mr. Braun demanded extreme terms such as requiring Swift to sign an "ironclad non-disclosure agreement which required her to not say anything negative but only positive about Mr. Braun in public."[9]

When she ran out of options, she decided to entirely walk down the path of ownership and she shook the entire global music industry in 2019 by announcing re-recording of her albums. She negotiated a fresh contract with Universal Music Group (UMG) which now allows her to own all the master recordings of her new albums that she would record under their record label. Although this deal is fair and nice, it does not automatically apply to the previous masters. In copyright law, once the records are owned

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3 Aswin Pradeep, "How Taylor Swift Wrested Back Ownership of Her Masters", *Khurana and Khurana*, Feb. 25, 2022, *available at*: https://www.khuranaandkhurana.com/2022/02/25/how-taylor-swift-wrested-back-ownership-of-her-masters/ (last visited on Aug. 31, 2024).

4 Justin Tilghman, "Exposing the Folklore of Re-recording Clauses (Taylor's Version)" 29 *Journal of Intellectual Property Law* 402 (2022).

5 *Ibid.*

6 *Supra* note 3.

7 CBS Sunday Morning, *Taylor Swift on Lover and haters*, 2019 *available at:* https://www.youtube.com/watch?v=nDzhoofkRJI.

8 *Supra* note 3.

9 *Supra* note 4.

by a third party, such retrospective application is not possible.[10] So, she began again from scratch, re-recoding her all six albums and stamping them with "Taylor's Version" to own her masters.[11] Her announcement in 2019 of this radical step led to Mr. Braun selling her master recordings for a reported 405 Million Dollars to Shamrock Holdings.

Today, she is halfway through re-recording her early albums and carving her path to ownership. These re-recorded versions are named the same as the original album but with an addition of the words "Taylor's Version" at the end. While her fan base who call themselves swifties are helping her promote the new versions and ensuring they break the same records as the original versions did, there is legal question to be asked, "whether the process of re-recording is a plain and simple violation of US Copyright laws or a masterplan to own her work?" The reason why this question arises is because of the shocking similarity between the revised versions that Taylor herself owns and the original versions which she does not own.

Thus, this paper attempts to answer this question while examining different provisions and judicial precedents in the context of US copyright jurisprudence.

2. Legal Context

As per the US Law, there are two different copyrights in a song, which come with different sets of rights and liabilities and thus may also have different owners.

The first copyright is the written song that is called the Musical Work Copyright. This is merely the lyrical composition of the song.[12] The musical rights' copyright owner has all the exclusive rights as mentioned in Section 106 of the US Copyright Act,[13] including reproduction, derivative work, distribution of copies, performing the work etc. These rights include[14] performance royalties from radio play and live performances, mechanical license royalties (a form of fee paid for every copy of the song made) and synchronization license (that is a fee given to allow for the syncing of the song to a film

[10] *Supra* note 4 at 406.
[11] Rachel Sih, *Taylor's Version: A Case Study on Taylor Swift and Ownership in the Music Industry* (2022) (Wellesley College, Economics Department).
[12] Brian T. Yeh, "Copyright Licensing in Music Distribution, Reproduction, and Public Performance" *Congressional Research Service* (2005)
[13] The United States Copyright Act of 1976, Title 17, Section 106
[14] Kurt Dahl, "The 2 Copyrights in a Song and How to Make More Money from Them" *Lawyer Drummer*

or television by a third party, also known as Sync Fee). In common parlance, these rights are called publishing rights.

The second copyright is the Sound Recording Copyright, which is essentially on the expression of the music, that is the recorded version of the artist singing combined with the musical instruments. This sound recording is essentially the tangible medium which comprises of the original work of authorship being a product of fixation as defined in Section 101 of the US Copyright Act.[15] Mostly, the owners of the sound recording copyright have similar rights to the musical work copyright owners as given in Section 106. The only difference is that the later has limited performance rights but at the same time have the most important right to distribute phono records. This involves[16] receiving the record sales revenue (both physical and online in digital form) and the master use licence fees, which is essentially the mainstream source of profits, that includes the right to use the actual recording of the songs on online platforms and in different modes. Thus, master recordings are essentially the original recordings of the music.[17] In common parlance, these rights are called masters rights which usually the record labels have ownership of. They become the centre of this dispute between Taylor and Mr. Braun as they are the main revenue source for the owner of the masters.[18]

3. Synchronisation Rights & Re-Recording

As discussed above, the musical work copyright includes:[19] Performance Royalties earned from live performances, radio play, etc.; Mechanical License Royalties that is a fee paid to the artist for every time a copy of the song is produced and Synchronization Rights. Generally, when the rights for the music are sold, the artists have no legal recourse; but in the case of Swift, the musical work copyright operated differently. As Swift herself writes and composes almost every song on her albums, she thus owns the Musical Work Copyright.[20] As per Business Insider, more than 60 tracks

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15 *Supra* note 13, s. 101.
16 *Supra* note 14.
17 Leni, "What Does It Mean to Own Your Masters?", *available at:* https://www.amuse.io/en/categories/industry/owning-your-masters/ (last visited on July 15, 2024).
18 *Supra* note 3.
19 *Supra* note 14.
20 Rhea Rao, "Explained: Why Taylor Swift is re-recording her studio albums, and what it says about copyright battles with mega music labels" *available at:* https://www.firstpost.com/entertainment/explained-why-taylor-swift-is-re-recording-her-studio-albums-and-what-it-says-about-copyright-battles-with-mega-music-labels-10138211.html (last visited on July 20, 2024).

credit Swift as the sole writer, because she composed the lyrics and melody all by herself.[21] Swift has written the lyrics and the melody of every song released in the first six albums. Thus, even today she continues to own these synchronization rights and earns the synchronization fees for allowing the syncing of the song to a film or television by a third party.

Thus, holding this copyright over the musical works allows her to legally re-record her initial albums as per Section 114(b) of the US Copyright Act,[22] that is "Scope of Exclusive Rights in Sound Recordings". To pull out the provision verbatim, the exclusive rights of the owner of copyright in a sound recording under clauses (1) [making copies] and (2) [making derivative works] of Section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording. Swift is thus given the copyright of the musical work and hence also the right that comes along with this to duplicate the sound recording. She is free to execute a re-creation of the original musical composition as long as there is a new recording and a new medium.[23] In fact, even if the two versions are ditto copy of one another, Swift has the right to go ahead and re-record. She is halfway through her goal of re-recording her albums, with new versions of Fearless (Taylor's Version), Red (Taylor's Version) and Speak Now (Taylor's Version) already released and promoted in collaboration with Universal Music Group (UMG). In light of the given provisions, the re-recordings are completely legal in terms of the synchronisation rights and Swift has a water tight case. There is very little or no scope of being sued for infringement of copyright by the record label owner of originals, Shamrock Holdings.

There is another benefit of owning the right to musical works. This keeps her at a bargaining power with her latest record label owner, Ithaca Holdings and Shamrock Holdings. By owning the synchronization rights, she has the power to block the use of her original songs to a huge extent by refusing the permission on the projects which require her approval and a "synchronisation license". For example, if the song Love

[21] Callie Ahlgrim, "All 62 songs that Taylor Swift has written by herself", *available at:* https://africa.businessinsider.com/entertainment/all-62-songs-that-taylor-swift-has-written-by-herself/41b2r7m (last visited on August 02, 2024).
[22] *Supra* note 13, s. 114(b).
[23] *Supra* note 3.

Story[24] needs to be played in a movie, the movie-makers need two sets of permissions, one of Shamrock Holdings (because they hold the ownership of the master rights) and the other from Taylor Swift (to allow for syncing the song, love story with moving images of the movie). So, for every time that Swift says no to such requests, millions of dollars are lost for the record owners, Shamrock Holdings. At such junctures, the movie makers will have no choice but to use a slightly different version that is Love Story (Taylor's Version)[25] which is completely owned by Taylor Swift. This is a mastermind move and also explains why Swift is rushing the production of the re-recordings so that they can be used instead while she blocks the use of her original songs. She is ensuring that there is no middle man eating up the profits and exercising control over her work.

To quote Swift in her interview with Forbes[26], "Every week, we get a dozen synch requests to use 'Shake It Off' in some advertisement or 'Blank Space' in some movie trailer, and we say no to every single one of them. And the reason I'm rerecording my music next year is because I do want my music to live on. I do want it to be in movies, I do want it to be in commercials. But I only want that if I own it."

4. The Clause Barring Re-Recording has Expired

As aforementioned, the second copyright is the sound recording copyright. This right, in common industry parlance is called Masters Right and is essentially on the expression of the music in a fixated medium to form the recorded version of the artist singing combined with the musical instruments. Masters right are essentially the original work in tangible form to express the work of authorship by the artist under the US Copyright Act.[27] The owners of the masters right have similar rights to the owners of the publishing rights owners as given in Section 106.

Even though the copyright holders of sound recording have limited performance rights, they have the most important right to distribute phono records. This right majorly involves[28] receiving the record sales revenue and the masters use licence fees, which is

[24] Taylor Swift, Taylor Swift - Love Story, *available at:* https://www.youtube.com/watch?v=8xg3vE8Ie_E.
[25] Taylor Swift, Taylor Swift - Love Story (Taylor's Version), *available at*: https://www.youtube.com/watch?v=aXzVF3XeS8M.
[26] Abigail Freeman, "Taylor Swift Is 'Free' Again, But Just How Much Is Her 'Fearless' Strategy Worth?" *Forbes*, April 09, 2021, *available at*: https://www.forbes.com/sites/abigailfreeman/2021/04/09/taylor-swift-is-free-again-but-just-how-much-is-her-fearless-strategy-worth/ (last visited on August 10, 2024).
[27] *Supra* note 13, s. 101.
[28] *Supra* note 14.

essentially the mainstream source of profits, that includes the right to use the actual recording of the songs on online platforms and in different modes. Thus, master recordings are essentially the original recordings of the music.[29] They became the centre of this dispute between Taylor and Mr. Braun as they are the main revenue source for the owner of the masters.[30]

Prima facie, it may look like the owners of the masters right have an upper hand, and in many circumstances they actually do. However despite this, the masters right of record labels cannot possibly go beyond the fixed sounds in the recordings[31] and thus have lesser options to protect their copyright when someone else owns the publishing rights of the song. This matrix leads to the profits of the record labels being undercut. Thus as a last resort mechanism, they use water tight contracts to restrict the artist or the owner of the musical work copyright from re-recording. This is precisely what happened in the case of Swift wherein Big Machine Records in the 2005 agreement barred her from re-recording. This agreement had a barring clause which stipulated that she was barred from "re-recording her albums until two years after the end of the contract or five years after the commercial release of the record".[32] This contractual measure employed by BMLG was to prevent an alternative that Swift could possibly adopt in owning the masters right which could have further led to their profits being shared but their intention to exploit exclusive rights had an end, given that this clause expired in 2018.[33] Thus when the statute of limitations[34] for the re-recording bar expired, it allowed Swift to begin the process of re-recording with no legal bar, neither contractual nor statutory from after the expiry. Thus, Taylor was free to record her first five recordings in 2020, and her sixth album in 2002.[35]

By the mechanism of re-recording her six albums, there will be a new form of art in a different medium over which Swift will have a complete ownership on both the master ownership and the publishing rights copyright. Thus, there will be two different sets of songs and masters right over the similar versions. One on the original songs,

[29] *Supra* note 17.
[30] *Supra* note 3.
[31] *Supra* note 13, s. 114(b).
[32] *Supra* note 3.
[33] *Ibid.*
[34] Ally Kalishman, "This Is Why We Can't Have Nice Things: The Legality behind Taylor Swifts Re-recordings" *Penn Undergraduate Law Journal* (2021).
[35] *Supra* note 3.

previously owned by Big Machine Records but currently owned by Shamrock Holdings and second, the re-recorded versions, called Taylor's Versions, owned by Taylor Swift herself. The separation of masters right will ensure Swift having complete autonomy over her life's work. This control, made possible by copyright laws, will allow her to have a say in licensing and publishing her work. It will also ensure that Swift receives a larger share of the profits generated. To quote her directly from an interview conducted by ABC News[36], "My contract says that starting November 2020, so next year, I can record albums one through five all over again. I'm very excited about it. I just think that artists deserve to own their work. I just feel very passionately about that."

5. Implications of Two Slightly Different Versions

Even though, its undeniable that the re-recordings of the originals are a legal bypass for Taylor to own the masters, but the story does not end there. What we as customers have, two very similar versions of the same song. By customers, the author means everyone, from the fans (swifties) to the movie-makers who want to purchase the song or simply play it. This plainly and simply leads to a confusion between the two very similar versions. One may argue that prima facie the difference that is visible to a common man is only the addition of the words, 'Taylor's Version' in brackets to help differentiate between which song is being played.

To put it simply, with the existence of the original versions and the introduction of the new versions, an average listener is simply confused.[37] While at the same time, the ones who want to license the music have two options and with options comes the bargaining power as a simple rule of economics. The prospective licensee can approach Shamrock Holdings and Taylor Swift to crack a better deal given that now both the parties will be desperate to sell their music. This licensee will be the ultimate winner because they would assume that both versions have so much similarity thus will purchase the song from the owner who is giving them a better deal. The money spent by the licensee would be immensely less from what could have been the actual price if there was a single version.

One may point that this may not be a favourable outcome for Swift, but at the same time, the chances of Taylor's Version being sold are higher for more than one

[36] *Supra* note 2.
[37] *Supra* note 3.

reason. Its new in the market and the swifties and listeners want to listen it more than the older versions given the small intricate changes that are a game changer. Many US radio stations have declared their willingness to only play the new versions.[38] Further, the fact remains that while Taylor holds complete autonomy over the new versions, she also has the synchronizations rights over the provisions versions which puts her in a position to refuse the same. In 2019, when Taylor had announced her re-recording plan, scholars had argued that the new versions will lead to a complete backfire as the new versions will lead to an undervaluation of Taylor's lifetime's creation. Some wrote, "Was Swift really willing to inconvenience herself and recreate thirteen years of music, note-for-note, to devalue the records?."[39] On the other hand, her fanbase ensured that the newer versions broke records with mind blowing streaming numbers thus charting high on the Billboard Charts.

6. Can Record Labels Sue Taylor

With the re-recorded versions in place, its needless to point out that the record labels will not be happy. So, the question is can the record labels sue Swift for their copyright infringement for producing similar versions? Under the US copyright jurisprudence, the owners of the master's rights have certain limitations and the protections under Title 17 are not absolute.[40] These rights do not cover the reproduction (or in this case, re-recording) of another musical composition by an independent fixation of sounds, regardless of how the final song recording sounds.[41] So even if assuming (which is not a good assumption as will be shown in the next chapter) that there are zero differences in the original versions and the new Taylor's Versions, still this part shows how Shamrock Holdings (current record label) will not have a case against her and it also explains why Big Machine record label had decided to put in an Original Production Clause barring her from re-recording the songs. Unluckily for them, the clauses have expired.

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38 *Ibid.*

39 Celia Almeida, "I was sceptical about Taylor's Versions – but now I'm fully invested" *The Forty-Five*, July 10, 2023, *available at:* https://thefortyfive.com/opinion/a-sceptics-case-for-taylors-versions/ (last visited on August 12, 2024).

40 *Supra* note 13, s. 114(b).

41 Caitlin Hadlee, "Sound Recording Ownership (Taylor's Version)" *Hudson Gavin Martin*, January 25, 2022, *available at:* https://www.hgmlegal.com/insights/sound-recording-ownership-taylors-version (last visited on August 12, 2024).

Let's now look at the original contract of Taylor with Big Machine. There was an original production clause, which prohibited Swift from producing the same song, with the same composition of lyrics, background effects etc. as an expression.[42] This original production clause is a re-recording restriction which is a standard clause to prevent the artist at even attempting at owning the masters.[43] If the clause did not expire, the legal remedy to this for Swift would have been to ensure that Taylor's Versions are just slightly different from the originals, to pass the test of not infringing the rights of the Record Labels owning the original versions. Further, as experts say, it depends on the new versions, if there can be a claim for infringement or not to be filled by the record labels.[44] This slight deviation[45] from the new version will be required to ensure a water tight case for Swift. Apart from this legal block of the original production cause in the original contract, there seems to be no other claim that the record labels can bring forth. So, the question is, are the new versions a plain and simple copy or do they differ by a mile? The answer is yes as Swift left no room for a legal error. The ultimate point was to make the newer versions similar to the originals for them to have notable differences ensuring that there is no infringement of the copyright protection that the record labels have and leaving no scope for a legal battle, Swift has swiftly found a middle ground by getting the best of both worlds.

As per Wall Street Journal, Dr. Paula Clare Harper (an Assistant Professor of Musicology at the University of Nebraska-Lincoln's Glenn Korff School of Music) studied the differences between the original songs owned by BMLG and the new Taylor's Versions.[46] As per Dr. Paula, "Swift is bringing in the breathy, more chest-driven singing evident in her later albums". Her conclusions are that Swift's voice is reflective of the most obvious differences in the original versions and the newer versions. She used the method of separating the vocal tracks using machine learning tools to hear Swift's voice as a separate from the entire song. The close observation of the lyrics and her vocal

42 *Supra* note 34.
43 Kyle Kim, "We Compared Taylor's Version songs with the Original Taylor Swift Albums" *The Wall Street Journal* (2021).
44 Starr Bowenbank, "QQ: Exactly How Can Taylor Swift Rerecord All Six of Her Old Albums?" *Cosmopolitan* (2021).
45 TMZ, "Taylor Swift - I'll Rerecord Hits to Spite Scooter- But He May Benefit", *TMZ*, 22.08.2019, *available at*: https://www.tmz.com/2019/08/21/taylor-swift-plans-rerecord-masters-scooter-braun-purchase-big-machine/#:~:text=As%20you%20know%20...,in%20its%20contracts%20with%20artists (last visited on July 15, 2024).
46 *Supra* note 43.

performance as separated from the texture of the music, proves that Swift did indeed meet the threshold of re-making the songs. After the release of 3 re-made albums, it is pertinent to note that the new versions have not only shut the critics who were predicting undervaluation of her music, but also have cemented her legacy as a "generation-defining chart-topper and monocultural force"[47]. Further, as Swift's voice has undergone a substantive change from her young teens to the present, it is very noticeable for the listeners to pin point her more chest driven voice.

If the re-recording clause had not expired then to determine the infringement of publishing rights (that is copyright over the melodies and the lyrics), the court needed to test to determine any substantial similarity, as held in *Clayton* v. *UMG Recordings*.[48] To build upon this, the Court in *Watt* v. *Butler*[49] held that this test of substantial similarity needs to be from the point of view of an average lay observer. But given that Swift already owns these rights, there is no question of infringement in the Taylor's Versions. For the masters rights (that is the copyright protection on the actual recording of the song), the owners not only have a right on the affirmative rights but also have protection of the negative rights.[50] These negative rights ensure that no one, including the artist cannot make unauthorised use of the recorded fixed versions of the music composition. This has also been upheld in *Bridgeport Music, Inc.* v. *Dimension Films*[51] wherein unsanctioned use of master rights consequence in the infringement of the owners' rights. The same case also provided a caveat to the infringement of this right. The Court held that this protection of master rights in not absolute and does not extend to the duplication of another sound recording which consists of an entirely independent fixation of other sounds. The Court further extended this caveat that even though it may sound like an exact imitation or simulation, still if there is an independent fixation of sounds, the duplicated version will pass the liability.

Now, it is also pertinent to note the question of originality. The law regards to this question of originality has been established by a series of judicial precedents. The Court in *Feist Publications, Inc.* v. *Rural Tel. Service Co.*[52] held that the ultimate gateway

[47] *Supra* note 39.
[48] 556 F. Supp. 3d 322 (S.D.N.Y. 2021).
[49] 1315, 1322 (N.D. Ga. 2010).
[50] *Supra* note 13, s. 106.
[51] 410 F.3d 792, 800-01 (6th Cir. 2005).
[52] 499 U.S. 340, 111 S. Ct. 1282 (1991).

to copyright protection is originality. To explore how the question of originality is addressed, there are a series of cases that set important precedents. The Supreme Court in the case of *Luck's Music Library, Inc.* v. *Ashcroft*[53] held that only a modicum of creativity needs to exist and the threshold is to check whether the author created the work independently. The threshold in this case had been reduced to just a scintilla of creativity especially for copyrights. Further, in a recent 2021 case of *Clanton* v. *UMG Recordings, Inc.*,[54] the court drew a difference between originality and novelty. The Court essentially said that a work may be original and not novel at the same time to meet the threshold, essentially holding that the threshold of originality has little to do with novelty. Thus, Swift's work in Taylor's Version meets this threshold by a margin.

The best case scenario for Shamrock Holdings was to prove that they have given no authority and that there is substantial similarity of the new versions (that Swift owns) with the originals (that Shamrock owns) but given the expiry of the re-recording clause clubbed with the threshold of originality under the US Laws, Taylor's Version's is a good to go not only on the billboards but also legally.

7. Can Taylor Sue the Record Labels?

An interesting take on this legal paradox also wonders that in a scenario if Swift does not have the option to re-record her entire catalogue, then does she have any claim against Shamrock Holdings? This is a tricky question to answer given that there was a valid contract between the two parties but analysing the context, the author believes that Swift could have made the case by arguing the contract to be void given that the same is an unconscionable contract. As per sources, there is a propaganda or a belief that the contracts between artists and record labels wherein the later gets the rights to all music produced under such legal agreements are unconscionable contracts.[55] Such contracts are a product of unequal parties having unequal terms and bargaining power thus leading to unfair and one-sided terms and conditions. Giving that Taylor was not given a chance to purchase the master rights of the originals and that the contract was signed when she was an amateur with zero experience of how the industry works, it's safe to conclude that the

[53] 321 F. Supp. 2d 107, 118 (D.D.C. 2004).
[54] 556 F. Supp. 3d 322 (S.D.N.Y. 2021).
[55] Kristen Johnson, "The path to ownership: How Taylor Swift revived the masters' rights discussion" *Belmont University Law Journal* (2022), *available at*: https://www.belmontentertainmentlaw.com/2022/01/18/the-path-to-ownership-how-taylor-swift-revived-the-masters-rights-discussion/ (last visited on July 31, 2024).

contractual terms could not have been a fair play. Swift can argue that these contracts starting with Big Machine, then with Mr. Braun and now with Shamrock are plainly and simply unconscionable and meet the criteria of shocking the conscience and thus must be declared void.

As per the theory of labor given by John Locke, the private property always belongs to the one who had invested labor and inputs to produce that property.[56] To quote Locke's interpretation from the natural law doctrine, "since one's labor is part of one's person, a man is exclusively proprietor of his acts of labor". [57] The application of this theory has made its way in the US copyright jurisprudence in a series of cases. The Supreme Court in *Mazer* v. *Stein*[58] held that the economic intent behind the copyright clause is to ensure that individual efforts are being incentivised by ensuring that they are returning in the form of personal gain for the artists and thus there is an advancement in the public welfare.

The court again in the case of *Int'l, Inc.* v. *Altai, Inc.*[59] ruled against the grant of monopoly and reasoned as to how the same would stifle public welfare. The case of *Graham* v. *Scissor-Tail Inc*.[60] broadened the threshold for analysing a breach of contract under unconscionability. This case is very similarly situated like Swift's case wherein there were unfair bargaining terms and the contract had oppressive terms. Based on the record labels ownership of the masters, the court analysed the contract as unconscionable. Thus, Swift has a valid ground against the record labels and can fund a breach of contract claim based on unconscionability.[61] The masters are owned by Shamrock and without this ownership, Swift would never be able to reap the benefits of her labor (never will be able to gain profits) for which she has invested for more than 13 years of her life. Thus, legal

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56 Henry Moulds, "Private Property in John Locke's State of Nature" 23 *The American Journal of Economics and Sociology* 179 (1964).

57 *Ibid.*

58 347 U.S. 201, 219 (1954).

59 982 F.2d 693, 711 (2d Cir. 1992).

60 171 Cal. Rptr. 604 (1981).

61 Ellen Ray, "Proving a Point or Paving the Way: Will Taylor Swift Rerecording Her Masters Bring Needed Change to the Music Industry's Unconscionable Contracting?" *Kentucky Law Journal* (2019), *available at:* https://www.kentuckylawjournal.org/blog/proving-a-point-or-paving-the-way-will-taylor-swift-rerecording-her-masters-bring-needed-change-to-the-music-industrys-unconscionable-contractingnbsp (last visited on August 05, 2024).

scholars also argue and believe that the terms of the contract between Swift and the record labels are one-sided and thus could be proved to be unconscionable as a matter of law.[62]

Further, there are series of instances wherein the courts have voided such one-sided contractual agreements or provisions when they were against public policy[63]. A few of them being, *Saint-Jean* v. *Emigrant Mortg. Co.*[64], *In re Village Homes of Colo., Inc.*[65] and *Rullan* v. *Goden*[66] wherein the courts reasoned that because the relevant provisions or the agreements were against public policy, they were void in effect. A test called "Balancing Test" was established in *Sylver* v. *Regents Bank, Nat'l Ass'n*[67] to determine whether such contracts are against public policy. This test is used to weigh the enforcement of the contract against the interest in honouring the contract. Further, the case of *Walker* v. *Am. Fam. Mut. Ins. Co.*[68] held that this test broadens the scope of all possible claims that could fit in as this test ensures all such contracts which violate any established interest of society are voided. Scholars also argue that given the history of the society, the ultimate benefit is when the creators not only have a space and environment to create but also have the control on their creations.[69] In furtherance of this, the case of *Comput. Assocs. Int'l, Inc.* v. *Altai, Inc.*[70] held that preventing the creator from owning their own creation is simply against public interest. Thus, Swift can apply this legal stance to argue that the re-recording clauses (assuming that they were not expired in November of the year 2020) were simply violating the interests of the society and were blocking the artist from benefiting from her lifetime's work thereby standing against public policy.[71] Thus, given the public policy interest and the nature of the one-sided contract, Swift does have a concrete case against the record labels given the extreme nature of the re-recording bar clause in her contracts.

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62 *Ibid.*
63 *Supra* note 4.
64 337 F. Supp. 3d 186, 203 (E.D.N.Y. 2018).
65 405 B.R. 479 (Bkrtcy. D. Colo. 2009).
66 134 F. Supp. 3d 926, 945 (D. Md. 2015).
67 300 P.3d 718, 723 (Nev. 2013).
68 340 N.W.2d 599, 601.
69 *Supra* note 4.
70 982 F.2d 693, 711 (2d Cir. 1992).
71 *Ibid.*

8. Monetary Implications for Ms. Swift

For a global popstar always on the billboard, it is not a major issue for Swift to fund the reproduction of the newer versions. To quote a music lawyer, James Sammataro, "While an aggressive rerecording effort would be driven by principle, not money, there are nonetheless still economic considerations. There is the cost of production—admittedly, a drop in the bucket."[72] Even though a lot of critiques have pointed out the cost of financing the reproduction and the fees associated, such as licensing fee etc., it really should not be a concern for multimillionaire Taylor Swift. Nevertheless, to view this from a different angle, there could be clash of both the versions from a monetary and a business angle given that Swift has a lot of control on the songs that Shamrock Holdings owns. There could possibly be a "race to the bottom"[73] wherein the record labels could reduce the price of the original versions to beat the newer versions in the music market. This could lead to either Swift reducing the price of the Taylor's Versions as well or losing the game in the competitive market.

Experts opinion on re-recording is that artists should consider all the contingencies and uncertainties before starting with the re-production of the entire catalogue taking into consideration the large investments and the risk of having two very similar songs of so many albums out for music consumers and producers.[74] This risk does not work in a traditional sense in the case of Swift as wherever Swift will have an opportunity to deny the licensing of the originals, she will go ahead and do so excursing the synchronization rights of the originals that she still owns. Further, for the songs for which she would not be able to deny, she will still get her cut of Royalties. The options for the TV channels and the movie makers will only be to knock Swift's door for the access. Further, from radio stations to movie makers, everyone seems convinced to use the new music to maintain relations with a popstar.

Taylor's decision to re-record is seen as an inspiration for the young artists as this stance taken by her has undoubtedly brought attention[75] as to how the record labels

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[72] Starr Bowenbank, "QQ: Exactly How Can Taylor Swift Rerecord All Six of Her Old Albums?" *Cosmopolitan* (2021), *available at:* https://www.cosmopolitan.com/entertainment/music/a35491914/how-taylor-swift-will-rerecord-old-albums-explained/ (last visited on August 03, 2024).

[73] *Supra* note 4.

[74] *Ibid.*

[75] *Supra* note 20.

can manipulate artists into signing unfair deals. There is awareness and conversation about the importance of ownership of a creation by an artist. Moving forward, there is an expectation from the record labels to ensure equitable deals especially with those new in the industry. To quote a journalist from Entertainment, "Long story short, Swift's re-recordings mark the fortification of a recurring message that she has advocated to young artists throughout her incredible music career, "You deserve to own the art you make."[76]

9. Conclusion

As artists deserve to own their work,[77] this paper attempted to answer a legal question, whether the process of re-recording is a plain and simple violation of US Copyright laws or a masterplan to own her work? The reason why this question arose was because of the similarity between the revised versions that Taylor herself owns and the original versions which she doesn't own.

The author has analysed arguments from both sides to come to a conclusion. Assumed that Swift has written the lyrics and the melody of every song released in the first six albums, she thus owns these synchronization rights even today and earns the synchronization fees for allowing the syncing of the song to a film or television by a third party. Thus, holding this copyright over the musical works allows her to legally re-record her initial albums as per Section 114(b) of the US Copyright Act.

The author also analysed the implications of two 'slightly' different versions and two 'very' different owners and concluded that today, the chances of Taylor's Version being sold are higher than those versions owned by the record labels.

To answer the question if the record labels can sue Swift for a copyright infringement, the author thoroughly analysed the US copyright jurisprudence, under which the owners of the master's rights have certain limitations and these protections under Chapter 17 are not absolute. So even if we assumed that there are zero differences in the original versions and the new Taylor's Versions, still Shamrock Holdings will not have a case against her.

The paper also delved into the question of originality, which a cornerstone in copyright laws and concluded that Taylor's Version will easily meet the threshold of

[76] *Ibid.*
[77] *Supra* note 2.

originality. Thus, the best case scenario for Shamrock holdings was to prove that they have given no authority and that there is substantial similarity of the new versions (that Swift owns) with the originals (that Shamrock owns). However, taking into effect the expiry of the re-recording clause bar clubbed with the originality stance of the US Laws, Taylor's Version's is a good to go, on the billboards and also legally.

Another point taken into consideration in this paper was whether Taylor has a claim against her record labels or not. The masters are owned by Shamrock and without this ownership, Swift would never be able to reap the benefits of her labor (never will be able to gain profits) for which she has invested for more than 13 years of her life. Thus legal scholars hold that the terms of the contract between Swift and the record labels are one-sided and thus could be proved to be unconscionable. Consequently, Swift can apply this legal stance to argue that the re-recording clauses were simply violating the interests of the society and is blocking the artists from benefiting from their lifetime's work which is considered to be against public policy.

To conclude, Taylor's decision to re-record is seen as an inspiration for the young artists as this stance taken by her has undoubtedly brought attention, especially now that one can confidently say that the re-recordings are legal with no possible claims against her step.