Termination of Transfers under U.S. Copyright Law

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- Article 1, Section 8, Clause 8 of the U.S. Constitution: Congress shall have 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. Copyright Duration: Bifurcated System
  - Pre-1978:

    28 year initial term
    + 67 year renewal term
    95 year fixed term
  - January 1, 1978 and after:
    - Life of the author plus 70 years
      - If 2 or more authors, the life of the last author to die plus 70 years
    - Works Made for Hire: shorter of 95 years from first publication or 120 years from creation
- Copyright Ownership
  - Vests in author upon creation
  - Copyright may transfer through assignments and contracts
  - Transfers may endure for a term of years or in perpetuity
- Ownership of Renewal Term Rights
  - Intent of 2 terms: protect authors from assigning rights in perpetuity
  - If author dies in initial term, renewal term rights vest in statutory heirs
  - No "renewal term" for works created on or after January 1, 1978
- Contractual Termination of Transfers
  - Some Contracts Automatically Terminate After a Period of Years
  - Some Contracts Are Terminable if Certain Conditions Are or Are Not Met
  - Some Pre-1978 Contracts May Terminate After the Initial 28 Year Term of U.S. Copyright
- Statutory Termination of Transfers
  - Pre-1978 Grants of Renewal Term Rights by Author or Statutory Heirs
  - Post-1977 Grants by the Author
  - 3 Statutory Termination Provisions:
    - 17 U.S.C. §§ 304(c), 304(d) and 203
  - No termination for Works Made for Hire or Testamentary Grants
  - Statutory Termination Rights Supersede the Contract
- Who Is Entitled to Terminate?
  - Author or Statutory Heirs of a Deceased Author
  - Statutory Heirs:
    - Spouse
    - Children and/or Grandchildren
    - Executor, Administrator, Personal Representative or Trustee
  - A majority of the statutory heirs must sign the notice of termination
    - Termination by majority of statutory heirs effects termination of interests of all statutory heirs

- Termination Formalities
  - Notice of termination must be in writing and must include:
    - Applicable section of statute
    - The name of each grantee whose rights are being terminated
    - Identification of grant terminated
    - The title of the work(s)
  - Record in the Copyright Office before effective date of termination
  - Notice must be served no more than 10 nor less than 2 years before the effective date of termination
- §304(c) Termination
  - Applicable Grants: Grants or licenses of pre-1978 copyrights executed before January 1, 1978, by the author or his/her heirs
  - Termination Window: 5-year period beginning 56 years after the earlier of copyright registration or publication
  - Standing to Terminate:
    - Grants by Authors: Author or majority of statutory heirs
    - Grants by Heirs: All living signatories to grant
- §203 Termination
  - Limited to grants **executed by the author on or after 1/1/1978**
  - May be terminated:
    - During a 5-year period beginning 35 years after the date the grant was made; or,
    - If the grant includes the right of publication, during the 5-year period beginning on the **earlier** of
      - 35 years after the date of publication under the grant, or
      - 40 years after the date of the grant
  - §203 Termination: Service of Notice
    - Notice procedures are the same as for §304(c) except:
      - If the grant was executed by two or more authors, then the termination must be effected by a majority of the authors who executed the grant
    - Based on the date of the grant or date of publication rather than the date of copyright
- §304(d) Termination
  - Limited to the following circumstances:
    - The work was originally registered or published on or before October 26, 1939; and
    - The author or heirs failed to exercise termination rights under Section 304(c)
  - Termination Window: 5-year period beginning 75 years after the original copyright date
  - Must specify that notice of termination was not served pursuant to §304(c)
  - Only available for works copyrighted between November 18, 1938 and October 26, 1939
- Complicated by Design?
  - Need to take into consideration information about:
    - All authors;
    - All deceased authors (including dates of death);
    - All statutory heirs;
    - All contracts (including parties, dates and scope of grants);
    - All copyright information; and
    - Any pre-termination revocation and reassignments
  - Poses challenges for both authors and publishers

- Post-Termination Protections for Original Grantee
  - Exclusive negotiation period for original grantee prior to effective date of termination
  - Original grantee can continue to exploit derivative works prepared prior to termination but cannot create or exploit new derivative works post-termination
- Holes in the Termination Provisions
  - **Gap Issue**: Works assigned pursuant to agreements executed prior to January 1, 1978 but created after January 1, 1978 fall between the "gap" in the copyright termination provisions 17 U.S.C. §304(c) and 17 U.S.C. §203
  - Works created and assigned pre-1978 but not published or registered for copyright until 1978 or later
  - Sound Recordings created and published prior to 1972
- Revocation vs. Termination
  - Milne v. Stephen Slesinger, Inc., 430 F.3d 1036 (9th Cir. 2005)
  - Penguin Group (USA), Inc. v. Steinbeck, 537 F.3d 193 (2nd Cir. 2008)
- Pre-termination Revocation and Re-assignment May Cut Off Rights of Statutory Heirs
  - Recent case law has held that where testamentary heirs revoke a prior grant by the author and enter into a new agreement with the grantee, that grant is not subject to statutory termination
  - Result defeats congressional intent in enacting termination provisions
- Agreements Not Subject to Termination
  - Grants Made By Will Are Not Subject to Termination
    - If author dies owning his/her copyrights, statutory heirs may be cut off
  - Works Made for Hire
    - Under the 1976 Copyright Act the definition of a work made for hire includes a two a prong test

      1. A work prepared by an employee within the scope of his or her employment

      OR

      2. A work specially commissioned for one of nine enumerated categories
- Works Prepared By an Employee
  - A work prepared by an employee within the scope of his or her employment:
  - Courts will look to "the hiring party's right to *control the manner and means* by which the product is accomplished" (CCNV v. Reid)
    - Agency criteria cited in CCNV v. Reid:
      - The skill required;
      - The source of the instrumentalities and tools;
      - The location of the work;
      - The duration of the relationship between the parties;
      - Whether the hiring party has the right to assign additional projects to the hired party;
      - The extent of the hired party's discretion over when and how long to work;
      - The method of payment;
      - The hired party's role in hiring and paying assistants;
      - Whether the work is part of the regular business of the hiring party;
      - Whether the hiring party is in business;
      - The provision of employee benefits; and
      - The tax treatment of the hired party

- Works Specially Ordered or Commissioned
  - A work specially ordered or commissioned
    - For use as a contribution to a collective work;
    - As part of a motion picture or other audiovisual work;
    - As a translation;
    - As a supplementary work;
    - As a compilation;
    - As an instructional text;
    - As a test;
    - As answer material for a test; or
    - As an atlas
  - Parties must expressly agree that the work shall be a work made for hire
- Termination Rights and Sound Recordings
  - Pre-1972 Sound Recordings
    - Pre-1972 Sound Recordings are subject to state common law protection rather than federal copyright protection
    - Pre-1972 Sound Recordings are not subject to statutory termination
  - Post-1972 Sound Recordings
    - Sound recordings created from 1972-1977
      - To the extent these sound recordings are subject to termination § 304(c) would apply
    - Sound recordings created on or after 1/1/1978
      - To the extent these sound recordings are subject to termination § 203 would apply
- Who has standing to terminate a grant of rights in a Sound Recording?
  - "Author" of sound recording not defined in the statute:
    - Featured Artist?
    - Session Musician?
    - Record Producer?
    - Mixer?
- Are Sound Recordings Works Made For Hire?
  - Employer-Employee Relationship?
    - Typical Artist-Record Label relationship does not create employer-employee relationship
    - Fact that contract state that artist is rendering services as an employee for hire is not dispositive
    - Agreement between artist and loan out corporation may create employer-employee relationship and preclude termination
  - Specially Commissioned Works?
    - Sound recordings NOT specifically included in 9 categories of commissioned works enumerated in U.S. Copyright Act
    - Potential Categories for Sound Recordings:
      - Compilation?
      - Contribution to a Collective Work?
- Statutory Termination and the Music Industry
  - Are Authors and Heirs Actually Exercising U.S. Copyright Termination Rights?
    - Yes!

- Based on U.S. Copyright Office data, since the year 2003 approximately:
  - **3,500** Notices of Termination have been served
    - 1,000 under § 203
    - 2,500 under § 304
  - **27,000** individual music titles are included in these Notices of Termination
  - **700** authors' (songwriters and artists) represented in these Notices of Termination
- Compare – 1977-2002: **7,000** Notices of Termination were served

➢ Are Notices of Termination Being Served on Sound Recording Copyright Owners?
- Yes!
- Approximately **300** of the Notices of Termination that have been served under § 203 relate to sound recordings

❖ U.S. Copyright Termination Matters

➢ Notice of Termination may currently be served for:
- Works copyrighted between **18 November 1957 – 18 November 1970**
- Works published between **18 November 1978 – 18 November 1991**
- Masters fixed between **18 November 1978 – 18 November 1991**

➢ If Notice of Termination is validly served, rights will be recaptured in the US between 2018 and 2026

Termination of Transfers Under the US Copyright Act

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The United States Copyright Act (the "Act") contains three (3) provisions pursuant to which authors, or the heirs of deceased authors, may be able to terminate a grant of copyright and recapture rights in their works for the territory of the US.[1] The statutory termination provisions are founded on the premise that copyright is meant to protect the interests of authors. While clearly the Act also affords significant support for grantees – the music publishers, record labels, book publishers, motion picture studios, and other entities who acquire rights from creators – Congress's intent in enacting the statutory termination provisions was to safeguard authors against unremunerative transfers.[2]

Historical Background, Legislative Intent and Significance of the Statutory Termination Right

Under the law in effect prior to the passage of the 1976 revision of the Act, works of original authorship were afforded two (2) separate twenty-eight (28) year terms of copyright protection in the US. This two (2) term system is preserved under the current Act with respect to works registered for copyright or published prior to January 1, 1978.[3] Such pre-1978 works are protected under the Act for an initial term of twenty-eight (28) years.[4] Upon the expiration of the initial term of copyright, the author is entitled to renew the copyright for a second term, which was extended under the 1976 revision of the Act to forty-seven (47) years.[5] The renewal term was further extended by an additional twenty (20) years under the Sonny Bono Copyright Term Extension Act of 1998, bringing the term of protection for pre-1978 works to a total of ninety-five (95) years, divided into an initial term of twenty-eight (28) years and a renewal term of sixty-seven (67) years.[6] Though the original purpose of providing for a renewal term was to allow authors an opportunity to renegotiate grants of their copyrights upon the work entering the renewal term, it became common practice for publishers to require authors to assign both their initial and renewal rights in a work at the same time, thwarting legislative intent. This practice was upheld by the Supreme Court in its 1943 decision in the case of *Fred Fisher Music Co. v. M. Witmark & Sons*.[7]

The legislative history surrounding the 1976 revision of the Act evidences that in enacting the copyright termination provisions, Congress sought to put an end to the practice of third parties buying up an author's "contingent future interests [in a work] as a form of speculation."[8] Indeed, the Act explicitly stipulates that termination of applicable grants may be effected "notwithstanding any agreement to the contrary" including any agreement to make a future grant.[9] The US Supreme Court has opined that the right to terminate transfers of copyright is an "inalienable" right.[10]

Congress deemed the copyright termination provisions necessary "because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been

[1] *See* 17 U.S.C. §§ 203, 304(c), and 304(d).
[2] H.R. Rep. No. 94-1476 at 124 (1976).
[3] 17 U.S.C. § 304(a).
[4] *Id*.
[5] H.R. Rep. No. 94-1476 at 139 (1976).
[6] *See* S. Rep. No. 104–315 at 22 (1996).
[7] Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943).
[8] H.R. Rep. No. 94-1476 at 127 (1976).
[9] 17 U.S.C. §§ 203(a)(5), and 304(c)(5).
[10] Stewart v. Abend, 495 U.S. 207, 230 (1990).

exploited."[11] However, as a result of the lobbying efforts of book and music publishers anxious to hold on to their copyrights, the mechanism that Congress put in place in order to allow authors and their heirs to terminate grants of copyright under the Act is highly complex. Congress itself characterized the legislation as a "practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved."[12] Arguably, this compromise has spawned certain inconsistencies in the statute that may necessitate judicial interpretation and/or a legislative "fix."

As the legislative history and relatively limited case law in this area highlights, the opportunity to terminate grants under copyright is an important protection afforded to authors under the Act. Indeed, the disposition or exploitation of post-termination rights in a work by an author or heirs can often prove to be quite lucrative. However, the termination provisions and the US Copyright Office regulations that complement them are sufficiently confusing so that it is difficult for a creator to reclaim his or her rights without consulting with a lawyer specifically working in the copyright area.

Termination of Pre-1978 Grants

Pursuant to Section 304(c) of the Act, grants or licenses of pre-1978 copyrights executed by the author or the author's heirs before January 1, 1978 may be terminated by the author or the author's statutory heirs during a five (5) year period beginning fifty-six (56) years after the date of copyright.[13] Any exclusive or non-exclusive grant may be terminated, with the exception of grants of rights in works made for hire or grants made by will.[14] A grant may be terminated even if the original contract states that the grantee shall be entitled to retain its rights for the entire term of copyright, including renewals and extended terms, because the statutory termination right supersedes the contract.

If the author dies before exercising the termination right, the termination interest vests in the author's statutory heirs.[15] In the case of a deceased author, notice of termination under Section 304(c) must be served by a minimum of fifty-one percent (51%) of the statutory heirs.[16]

Notice of termination must be served on the grantee or the grantee's successor in title no more than ten (10) nor less than two (2) years before the effective date of termination.[17] Accordingly, notice may be served anytime during the period beginning forty-six (46) years after the date copyright was initially secured and continuing until fifty-nine (59) years after such date. Pursuant to US law, with respect to works created prior to January 1, 1978, the date that copyright is initially secured is deemed to be the

[11] *See supra* note 2.
[12] *Id.*
[13] 17 U.S.C. § 304(c)(1), and (3).
[14] 17 U.S.C. § 304(c).
[15] 17 U.S.C. § 304(c)(2). For purposes of the termination provisions of the Act, where an author is dead, his or her termination interest is owned, and may be exercised, by his or her statutory heirs, which are set forth as follows: "(A) The widow or widower owns the author's entire termination interest unless there are surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest. (B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them. (C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them. (D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest." *Id.*
[16] 17 U.S.C. § 304(c)(1).
[17] 17 U.S.C. § 304(c)(4)(A).

earlier of (i) the date of registration of the work in the US Copyright Office, or (ii) the date of publication of the work. The notice and termination windows that apply to grants of pre-1978 works are keyed to the actual date of registration or publication, as the case may be. For example, if a work is initially registered for copyright (prior to publication) on February 14, 1970, notice of termination may be served between February 14, 2016 and February 14, 2029. Termination may be effected, with proper notice, between February 14, 2026 and February 14, 2031. If, on the other hand, the work was published prior to registration then the period for serving notice of termination would be calculated based on the earlier publication date.

Section 304(d) of the Act affords authors and heirs another opportunity to terminate pre-1978 grants of copyright in the following limited circumstances: (i) the work was originally registered or published on or before October 26, 1939; and (ii) the author or heirs failed to exercise termination rights under Section 304(c).[18] Any exclusive or non-exclusive grant that meets the foregoing criteria may be terminated with the exception of grants of rights in works made for hire or grants made by will.[19] Termination under Section 304(d) may be effected at any time during the five (5) year period beginning seventy-five (75) years after the original copyright date.[20] The same conditions provided under Section 304(c) of the Act with respect to termination by an author's statutory heirs and the service of notice no more than ten (10) nor less than two (2) years before the effective date of termination apply to terminations pursuant to Section 304(d).[21] However, Section 304(d) will soon be obsolete. As of January, 2016, only works originally registered or published from January 1938 to October 27, 1939 are potentially eligible for recapture under Section 304(d).

Termination of Post-1977 Grants

Pursuant to Section 203 of the Act, grants executed by the author on or after January 1, 1978 may be terminated by the author or the author's statutory heirs[22] during a five (5) year period beginning thirty-five (35) years after the date of the grant; or, if the grant includes the right of publication of the work, during the five (5) year period beginning on the earlier of (i) thirty-five (35) years after publication under the grant, or (ii) forty (40) years after the date of the grant.[23] Any exclusive or non-exclusive grant by the author may be terminated, with the exception of grants of rights in works made for hire or grants made by will.[24] A grant may be terminated even if the contract states that the grantee shall be entitled to retain its rights for the entire term of copyright because, as with terminations under Section 304(c), the statutory termination right supersedes the contract.

Notice of termination pursuant to Section 203 must be served on the grantee or the grantee's successor in title no more than ten (10) nor less than two (2) years before the effective date of termination.[25] Accordingly, notice may be served at any time during the period beginning twenty-five (25) years after the date of the grant by the author and continuing until thirty-eight (38) years after the date of the grant by the author; provided, if the grant includes the right of publication of the work, notice must be served during the earlier to occur of (i) the period beginning twenty-five (25) years after the date of publication and continuing until thirty-eight (38) years after the date of publication, or (ii) the period beginning thirty

[18] 17 U.S.C. § 304(d).
[19] *Id.*
[20] 17 U.S.C. § 304(d)(2).
[21] *See supra* note 15; note 17.
[22] For purposes of Section 203 of the Act, statutory heirs are defined in the same manner as in Section 304(c). *See supra* note 15.
[23] 17 U.S.C. § 203(a)(3).
[24] 17 U.S.C. § 203.
[25] 17 U.S.C. § 203(a)(4)(A).

(30) years after the date of the grant and continuing until forty-three (43) years after the date of the grant. For example, if a composition, including the publication rights thereto, is granted by an author to a music publisher in an agreement dated October 4, 1980 and the composition is first published on April 1, 1981, notice of termination may be served between April 1, 2006 and April 1, 2019. Termination may be effected, with proper notice, between April 1, 2016 and April 1, 2021.

If the work subject to termination under Section 203 is a joint work and the grant was executed by two (2) or more authors, then the termination must be effected by a majority of the authors who executed the grant.[26] Thus, if a post-1977 grant is executed by two (2) authors of a work, both of those authors must sign the notice of termination. In the event that any author is deceased, that author's termination interest vests in his or her statutory heirs and may be exercised by a minimum of fifty-one percent (51%) of them.[27]

Termination Rights Are Time Sensitive

The termination rights provided under Sections 203, 304(c) and 304(d) of the Act are time sensitive. If notice is not properly served during the applicable notice window then the rights will stay with the grantee for the duration of US copyright.

Termination Relates Only to Rights in the US

Regardless of whether the grant subject to termination conveys rights throughout the entire world, it is clear from the language of the Act that the termination will only govern rights in the US.[28] Thus, even if a worldwide grant of rights is terminated in the US, absent specific contractual language to the contrary, the grantee will continue to hold rights in the work subject to the grant outside of the US for the full term of copyright (subject to any applicable reversionary rights afforded under the laws of such territories).

The Pre-1978 Agreement/Post-1977 Creation "Gap" Issue

As discussed above, Section 304(c) of the Act provides for terminations of grants of rights under copyright in pre-1978 works provided that the grant was executed prior to January 1, 1978. Section 203 of the Act governs terminations of grants of rights under copyright where the grant was made by the author on or after January 1, 1978.[29] However, in the event that an agreement executed prior to 1978 applies to works created on or after January 1, 1978 these post-1977 works seem to fall into a "gap" between the two termination provisions. An example of a "gap" grant is a term songwriter agreement pursuant to which a songwriter agrees to write and deliver compositions to a music publisher over a period of years that begins prior to 1978 but continues after 1977 (such as a five (5) year agreement beginning in 1975). It is clear that works created, delivered and either registered or published prior to January 1, 1978 would be subject to termination during the five (5) year window beginning fifty-six (56) years after the initial registration or publication, in accordance with Section 304(c) of the Act. The situation is less clear with respect to a work created and delivered after 1977. Since such a work was not registered or published prior to January 1, 1978, the Section 304(c) termination right would not be available. The agreement was executed by the author prior to January 1, 1978, so an argument might be made that the author similarly does not have the right to terminate the grant under Section 203. However,

[26] 17 U.S.C. § 203(a)(1).
[27] 17 U.S.C. § 203(a)(2).
[28] *See* 17 U.S.C. §§ 203(b)(5), and 304(c)(6)(E) (expressly providing that statutory termination "in no way affects rights arising under . . . foreign laws").
[29] Note that Section 203 covers grants of rights in works created on or after January 1, 1978 as well as works subsisting as of that date, provided that the grant was entered into by the author on or after January 1, 1978.

the better result is to find that the date of the applicable grant is not the date of the contract, but rather the date that the work was created. It is clearly not possible to grant a right under copyright in a work that does not exist. While the Act has not yet been amended to codify this conclusion, the US Copyright Office has amended its regulations to provide that "[i]n any case where an author agreed, prior to January 1, 1978, to a grant of a transfer or license of rights in a work that was not created until on or after January 1, 1978, a notice of termination of a grant under [S]ection 203 of title 17 may be recorded if it recites, as the date of execution, the date on which the work was created."[30]

Other Ambiguities in the Termination Provisions

i. The Pre-1978 Creation and Agreement/Post-1977 Copyright "Gap" Issue

The US Copyright Office has yet to address the potential gap in the termination provisions as they apply to works created and assigned, but neither registered nor published, prior to 1978. According to the statute, the copyright in these works subsists from January 1, 1978.[31] The copyright in these works will endure until seventy (70) years after the death of the last author to die (and if published on or before December 31, 2002, will not expire before December 31, 2047).[32] However, grants of rights in such works made prior to January 1, 1978 may not to be eligible for statutory termination. Since the Section 203 termination is only available for grants made by the author on or after January 1, 1978, this termination provision does not, on its face, apply. It is arguable that the Section 304(c) termination right may be available, allowing the author or his or her statutory heirs to terminate the grant during the five (5) year period beginning on January 1, 2034 (fifty-six (56) years after January 1, 1978 – the date that copyright is secured in the work). However, the reference in Section 304(c)(3) to "any copyright subsisting in its first or renewal term on January 1, 1978" may be cited as evidence that the Section 304(c) termination right is limited to works where copyright was secured prior to 1978 as there is no concept of a dual-term of copyright for works protected from 1978 on.[33]

ii. The Calculation of the Section 203 Termination Period Where A Work Was Published Prior to the Date of the Applicable Grant

An inherent ambiguity exists with respect to the notion of publication as it relates to calculating the commencement of the Section 203 termination window. As discussed above, where a grant includes the right of publication the statute provides for a two-prong test for determining when termination may be effected. In this case, termination may be effected on the earlier of thirty-five (35) years following publication under the grant, or forty (40) years from the date of the grant.[34] While there is a clear distinction between these dates where a work is not created until after the date of the grant, the question arises as to whether the two-prong test should be applied to situations in which a work was initially published prior to the date of the grant. This question was addressed, in part, by the Second Circuit in *Baldwin v. EMI Feist Catalog, Inc.*[35] (discussed in detail below). The *Baldwin* court concluded that the two-prong test should not be applied where a work was initially published prior to the date of the grant. In this case, termination may be effected thirty five (35) years after the date of the grant.[36]

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[30] 37 CFR § 201.10(f)(5). This raises an additional issue about how the date of creation is established, which issue may eventually be resolved by legislation or litigation.
[31] 17 U.S.C. § 303(a).
[32] *Id.*
[33] 17 U.S.C. § 304(c)(3).
[34] *See supra* note 23.
[35] Baldwin v. EMI Feist Catalog, Inc., 805 F.3d 18 (2d Cir. 2015).
[36] *Id*. at 34.

iii. Identifying The Date of A Subsequent Grant by the Author

Where an author makes a subsequent grant of rights in a work to the original grantee (or that grantee's successor in interest), such as a grant of renewal term rights or a grant that extends the duration of the transfer of rights beyond that set forth in the original agreement, and the subsequent grant is entered into prior to the expiration of the term if the original agreement (either pursuant to the terms of the contract or on the effective date of termination set forth in a termination notice), when will the subsequent grant be deemed to take effect? Clearly, if the subsequent grant by its terms provides for an effective date that is later than the date of execution, there should be no ambiguity. But if the subsequent grant takes effect immediately will it simply replace the original grant upon the date of execution? The answer to this question will inform the calculation of the Section 203 termination window. As discussed below, the result may depend on whether the parties implicitly entered into a new (and substitute) agreement when they executed the subsequent document.[37]

iv. Standing To Challenge a Termination Notice and a Purported New Grant of Rights in the Terminated Interest

While the statute clearly identifies the parties with standing to serve notice of termination under Section 304 and Section 203 (the author or, in the case of a deceased author, the statutory heirs) it does not identify the parties entitled to challenge a notice of termination. It is clear that the recipient of the notice of termination would have standing to challenge its effectiveness. Others who might have an interest in challenging the notice of termination include parties entitled to receive royalties under the terminated grant, yet it is uncertain whether those parties would have standing to institute a claim. Similarly, if an author or heirs purport to enter into a new grant with a third party prior to the effective date of termination, in contravention of Section 304(c)(6)(D) or Section 203(b)(4), as the case may be, the author himself or the heirs of a deceased author would clearly have standing to claim that such agreement is void. However, it is not clear whether the existing grantee would also have standing to challenge the purported grant. The recent Ninth Circuit ruling in *Ray Charles Found. v. Robinson et al.*[38] supports a finding that income participants, as well as, perhaps, existing grantees, have standing to challenge termination notices.

Grants of Rights in Works Made for Hire Are Not Subject to Termination

As explained above, grants of rights in works made for hire are not subject to statutory termination in the US. Under the Act, a work is deemed a "work made for hire" if it is either (i) a work prepared by an employee within the scope of his or her employment, or (ii) a work expressly commissioned as a work made for hire for inclusion in any of nine (9) enumerated categories of works.[39]

Termination Provisions and Sound Recordings

Since the enactment of the Act, many songwriters, composers and heirs have successfully invoked the statutory termination provisions. However, due to the fact that sound recordings did not come within the

[37] *Id*. at 29.
[38] Ray Charles Found. v. Robinson et al., 795 F.3d 1109 (9th Cir. 2015).
[39] The nine enumerated categories of works under the second prong include a work specially ordered or commissioned (1) for use as a contribution to a collective work, (2) as part of a motion picture or other audiovisual work, (3) as a translation, (4) as a supplementary work, (5) as a compilation, (6) as an instructional text, (7) as a test, (8) as answer material to a test, or (9) as an atlas. 17 U.S.C. § 101.

scope of federal copyright laws until February 15, 1972, until recently there has been little consideration of the application of the termination provisions to grants of rights in sound recordings.

i. Which Termination Provisions are Available for Sound Recordings?

Pre-1978 grants of rights in sound recordings fixed on or after February 15, 1972, but before January 1, 1978, may be subject to termination under Section 304(c), provided the sound recording was not created as a work made for hire. Post-1977 grants of rights in sound recordings fixed on or after February 15, 1972 may be subject to termination under Section 203 provided (i) the grant was executed by the author of the sound recording and (ii) the author did not create the sound recording as a work made for hire.

ii. Who Is Entitled to Terminate A Grant of Rights in a Sound Recording?

As discussed above, the termination right is owned by the author of a work, or the statutory heirs of a deceased author. However, the identity of the author of a sound recording is not defined in the Act. Several different approaches have been posed for identifying the author(s) of a sound recording. One position is that the "author" of a sound recording is the artist or artists whose performance is featured thereon and/or the producer of the sound recording. This position has been espoused by the US Copyright Office, which has stated that "[t]he author of a sound recording is the performer(s) whose performance is fixed, or the record producer who processes the sounds and fixes them in the final recording, or both."[40] Others have asserted that the author(s) of a sound recording include every person (and possibly entity) that had anything to do with the creation of that sound recording, which would include mixers, background singers and session musicians in addition to featured artists and producers. Note that attributing authorship to every person connected to the creation of a sound recording would make it virtually impossible to determine the duration of copyright protection for post-1977 sound recordings because it would necessitate tracking the dates of death of the entire class of potential authors. Further, this position would make it difficult, if not impossible, to determine all potential claimants of termination rights and could ultimately result in numerous "owners" of non-exclusive rights in the sound recording. This expanded class of authors is inconsistent with general notions of authorship (the author of a book is generally understood to be the person(s) who wrote the book – and not the editor, publisher, fact-checker and book binder). It is telling that the proponents of this argument are primarily the record label representatives who are interested in proving that a termination right for sound recordings is untenable.

iii. Are Sound Recordings Works Made For Hire?

The grantees of rights in sound recordings (typically, record labels) frequently take the position that performing artists render their services as employees for hire of the record label and that the applicable grants are outside the scope of the statutory termination provisions. Indeed, the agreements entered into by performing artists and record labels often expressly state that the artist is rendering services as an employee for hire. However, this statement alone is not dispositive. Both the agreements and the artist-record label relationship must be analyzed in order to determine if the artist rendered services as an employee for hire.

Under such an analysis, a pre-1978 recording agreement will constitute a work made for hire agreement only if it is found that the artist rendered services as an employee within the scope of his or her employment. Post-1977 recording agreements must be evaluated under the two-prong work made for hire test proscribed in the Act: (i) Did the artist render services as an employee within the scope of

[40] U.S. Copyright Office, Circular 56A, *Copyright Registration of Musical Compositions and Sound Recordings.*

his/her employment or (ii) were the artist's services specially commissioned as a work for hire for inclusion in one (1) of the nine (9) categories of works enumerated in the Act?

a. Did the Artist Render Services as an Employee Within the Scope of His or Her Employment?

Each performing artist-record label relationship must be examined through the lens of agency criteria to determine whether the artist was in fact the employee of the label at the time the sound recording was made.[41] In most cases, the artist-record label relationship will not be found to create an employee-employer relationship.[42] Importantly, it is rare that a record label will withhold taxes from the monies paid to the artist, or provide the artist with health insurance or other benefits. Note, however, that in cases in which an artist renders services through his or her loan-out corporation, the relationship between the artist and the loan-out company may indeed be deemed to be an employer-employee relationship. In these cases, the loan-out agreement may be enough to prevent the artist from successfully terminating the grant of rights to the record label (as successor in interest to the loan-out).

b. Were the Artist's Services Expressly Ordered or Commissioned as a Work Made for Hire for Inclusion in Any of the Statutorily Designated Categories of Works?

At the outset, it is important to note that sound recordings are not specifically included in the nine (9) categories of commissioned works enumerated in the Act. In 1999, Congress amended the Act to add sound recordings as a category of commissioned works as part of an unrelated bill and after virtually no debate.[43] The amendment was repealed the following year "without prejudice" to the question of whether sound recordings may or may not be deemed works made for hire.[44] Courts have rejected the argument that a sound recording falls within the category of a motion picture or other audiovisual work, thus ruling out one (1) of the nine (9) categories.[45] Services rendered by a performing artist are clearly not commissioned for use in any of the six (6) other categories – translation, supplementary work, instructional text,

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[41] Note that in determining whether a pre-1978 work is made within an employee's scope of employment, the Second Circuit has applied the "instance and expense" test. Under this test, "[a] work is made at the hiring party's 'instance and expense' when the employer induces the creation of the work and has the right to direct and supervise the manner in which the work is carried out . . . The right to direct and supervise the manner in which work is created need never be exercised." Fifty-Six Hope Rd. Music Ltd. v. UMG Recordings, Inc., 2010 U.S. Dist. LEXIS 94500, *22-23 (S.D.N.Y. 2010) *citing* Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc., 380 F.3d 624, 635 (2d Cir. 2004). With respect to post-1977 works, on the other hand, the US Supreme Court has stated that "[i]n determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished." Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989).

[42] "Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party." Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-2 (1989).

[43] Intellectual Property and Communication Omnibus Reform Act of 1999, Pub. L. 106-113 § 1000(a)(9), 113 Stat. 1501 (repealed 2000).

[44] 146 Cong. Rec. 7,771 (2000); Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. No. 106-379, 114 Stat. 1444 (codified as amended at 17 U.S.C. § 101 (2000)).

[45] *See, e.g.*, Lulirama Ltd. v. Axcess Broadcast Services, Inc., 128 F.3d 872 (5th Cir. 1997).

test, answer material for a test, or an atlas. That leaves two (2) possible applicable categories: contributions to collective works and compilations.

c. Do the Artist's Services Constitute A Contribution to a Collective Work or a Compilation?

The Act defines a collective work as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."[46] A compilation is defined as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship . . . [including] collective works."[47]

One can certainly envision situations in which a sound recording will fall within the definition of a compilation (for example, a holiday album comprised of pre-existing master recordings of individual compositions by different artists). However, the claim that ALL sound recordings are collective works or compilations goes outside the plain meaning of the statute. While multiple people may work on the creation of a sound recording, the contributions that they provide do not necessarily rise to the level of an original work of authorship. The fact that the record label may rearrange the order of compositions on a recording, or even choose to eliminate compositions, no more renders the sound recording a compilation than does the fact that a book publisher edits an author's novel or rearranges chapters in a book. Finally, with the growing trend toward the digital release of single-song sound recordings, it will be increasingly more difficult to find that a compilation exists.

iv. Concluding Thoughts on Sound Recordings

Whether or not an artist's grant of rights in a sound recording is subject to termination was the subject of much initial debate. Opinion remains divided both as to who is entitled to claim authorship of a sound recording, and as to whether an artist's contribution to a sound recording constitutes that of an employee for hire. However, as a practical matter, notices of termination are being served in increasing numbers by both artists and producers. While in most cases recording agreements are being renegotiated so that the masters remain with the label on mutually acceptable terms, in some instances artists have reclaimed their masters on the effective dates of termination.

Recent Case Law

Recent decisions in the Second and the Ninth Circuit have implications for the future application of the termination provisions.

Baldwin v. EMI Feist Catalog, Inc.

In *Baldwin v. EMI Feist Catalog, Inc.*, 805 F.3d 18 (2d Cir. 2015), the Second Circuit held that plaintiffs, heirs of the author J. Fred Coots ("Coots"), were entitled to terminate Coots' renewal term grant to EMI Feist Catalog, Inc. ("EMI") in the iconic Christmas composition "Santa Claus is Comin' to Town" (the "Song") in accordance with Section 203 of the Act.[48]

[46] 17 U.S.C. § 101.
[47] *Id*.
[48] Baldwin, 805 F.3d at 19.

Coots, along with his co-author Haven Gillespie, granted rights in the Song to Leo Feist, Inc. ("Feist"), EMI's predecessor in interest, pursuant to an agreement dated September 5, 1934 (the "1934 Agreement").[49] The 1934 agreement did not expressly convey rights for the renewal term of copyright, and in 1951 Coots and Feist entered into a new agreement (the "1951 Agreement") pursuant to which Coots granted renewal term rights to Feist.[50] On September 24, 1981, Coots served a notice of termination of the 1951 Agreement on Feist's successor, Robbins Music Corporation ("Robbins") pursuant to Section 304(c) of the Act (the "1981 Notice").[51] The effective date of termination set forth in the 1981 Notice was October 23, 1990.[52] On December 15, 1981, Coots and Robbins entered into an agreement (the "1981 Agreement"), pursuant to which Coots conveyed to Robbins all rights in the Song for the full term of copyright and any renewals and extensions thereof.[53] Coots represented in the 1981 Agreement that he had served notice of termination on Robbins and that the notice was recorded in the US Copyright Office.[54] In consideration of the grant of rights by Coots pursuant to the 1981 Agreement, Robbins paid a non-recoupable bonus of One Hundred Thousand Dollars ($100,000), which Coots directed to be paid to his children, and agreed that it would continue to pay royalties to Coots "as specified in the [1951 Agreement]."[55] In addition to Coots and Robbins, Coots' four (4) children were signatories to the 1981 Agreement. While the 1981 Notice was submitted to the US Copyright Office for recordation, it was subsequently withdrawn and was never properly recorded.[56] Coots died in 1985.[57]

On March 30, 2007, Coots' statutory heirs served notice of termination on EMI pursuant to Section 203 of the Act (the "2007 Notice").[58] The effective date identified in the 2007 Notice was December 15, 2016, thirty-five (35) years after the date of the 1981 Agreement.[59] Following negotiations, the Coots heirs rejected EMI's offer of two million seven hundred fifty thousand dollars ($2,750,000) to re-acquire rights in the Song. On March 13, 2012, the Coots heirs filed an additional notice of termination under Section 203 (the "2012 Notice") as a precautionary measure in the event that the 2007 Notice was deemed to be premature; that is, if the Coots heirs incorrectly applied what the court referred to as the "alternative calculation method" – calculating the termination window based on the earlier of thirty-five (35) years following publication or forty (40) years from the date of the grant – in the event publication under the 1981 Agreement was not deemed to occur until the effective date of termination set forth in the 1981 Notice. Accordingly, the 2012 Notice provided that termination would be effective on December 15, 2021 – forty (40) years after the date of the 1981 Agreement.[60]

EMI alleged that the 1981 Agreement was not subject to termination on one or more of the following grounds:

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[49] *Id*. at 19-20.
[50] *Id*. at 20.
[51] *Id*. at 22.
[52] *Id*.
[53] *Id*.
[54] *Id*.
[55] *Id*. at 23.
[56] *Id*.
[57] *Id*. at FN 2.
[58] Coots' statutory heirs had previously served notice of termination on EMI pursuant to Section 304(d) of the Act, but since neither party to the litigation maintained that Section 304(d) was applicable in this matter, that notice will not be addressed in this paper.
[59] Baldwin, 805 F.3d at 24.
[60] The date forty (40) years after the date of the 1981 Agreement is earlier than the date thirty-five (35) years after the effective date of the 1981 Notice.

1. Since the 1981 Notice was never recorded in the US Copyright Office, the 1951 Agreement was never terminated and remained the applicable document. The 1951 Agreement was executed prior to 1978 and, accordingly, was not subject to termination under Section 203. Conversely, since the 1981 Agreement did not constitute a new agreement, it was not subject to statutory termination.

2. If the 1981 Agreement constituted a new grant, that grant would not commence until the effective date of termination of the 1951 Agreement. Accordingly, the effective date of the 1981 Agreement should be deemed to be October 23, 1990 and the 2007 Notice was premature.

3. Because the Coots statutory heirs were signatory to the 1981 Agreement, they could not subsequently take advantage of the statutory termination right.

4. If the 1981 Agreement is subject to termination, the alternative calculation method requires that the effective date of termination be calculated as the earlier of thirty-five (35) years from publication under the grant – with publication under the grant occurring on the effective date of termination set forth in the 1981 Notice, or forty (40) years from the date of the 1981 Agreement.

The Second Circuit rejected each of EMI's claims holding:

1. The 1981 Agreement was the operative agreement. According to the Second Circuit, it was not necessary to address the issue of whether the failure to record the 1981 Notice rendered it defective where the parties clearly evidenced their intent to enter into a new agreement.[61] Moreover, the court found that since Coots' future interest in the Song vested when he served the 1981 Notice, "[t]he 1981 Agreement not only granted EMI the future interest scheduled to revert to Coots upon termination, it also replaced the 1951 Agreement as the source of EMI's existing rights in the Song."[62] In reaching this conclusion, the *Baldwin* court went beyond the Second Circuit decision in *Penguin Group (USA) Inc. v. Steinbeck* (which held that "parties to an agreement can mutually agree to terminate it by expressly assenting to its rescission while simultaneously entering into a new agreement")[63] holding that "an intention to enter into a substitute agreement may be express or implied."[64] Here, the court found that both EMI and Coots implicitly intended to enter into a new agreement "[b]y granting EMI the same rights that it already owned under the 1951 Agreement in addition to the new interest that vested in Coots upon service of the 1981 Termination Notice, the 1981 Agreement made it sufficiently clear that the parties intended to replace the earlier contract."[65] While the *Baldwin* court did not find it necessary to address the implications of the fact that the 1981 Notice was not recorded in the US Copyright Office,[66] the effect of its ruling on this point seems to obviate the need to record a notice of termination where the author or statutory heirs serve that notice then enter into a new agreement with the existing grantee.

[61] Baldwin, 805 F.3d at 30-1.
[62] *Id*. at 27.
[63] Penguin Group (USA) Inc. v. Steinbeck, 537 F.3d 193, 200 (2d Cir. 2008).
[64] Baldwin, 805 F.3d at 29.
[65] *Id*.
[66] *Id*. at 31.

2. The 1981 Agreement commenced on execution. The *Baldwin* court rejected EMI's claim that, even if the 1981 Notice was valid, the 1951 Agreement continued in effect until the effective date of termination provided for in the 1981 Notice.[67] According to the *Baldwin* court, rights vested in Coots on the date of the 1981 Notice and the 1981 Agreement commenced on the date it was signed. The *Baldwin* court further stated that the reference to the "Extended Renewal Term of Copyright" in the 1981 Agreement applied to the entire (now sixty-seven (67) year) renewal term, not the term of copyright remaining following the initial fifty-six (56) years of copyright.

3. The fact that the Coots heirs signed the 1981 Agreement does not preclude them from asserting the Section 203 termination right. Since Coots was alive in 1981, he was the sole holder of the future interest in the Song. The only rights held by the Coots heirs were the rights to assert a future termination right in the event that their father was not alive when the Section 203 notice window opened. Since the termination right is indefeasible, any attempt to contract those rights away (e.g., by requiring the Coots heirs to sign the 1981 Agreement) is void.[68]

4. The alternative calculation method does not apply where a work was previously published. The *Baldwin* court found that the Song was published when it was first "sold or otherwise distributed to the public" – in or about 1934.[69] In such a case, the alternative calculation method is not applicable. Rather, the period for effecting termination of the 1981 Agreement would begin thirty-five (35) years after the date of that grant (December 15, 2015). The court concluded that the 1981 Agreement would terminate on December 15, 2016 in accordance with the 2007 Notice.[70]

Ray Charles Foundation v. Robinson et al.

In *Ray Charles Found. v. Robinson et al.*, 795 F.3d 1109 (9th Cir. 2015)., the Ninth Circuit found that The Ray Charles Foundation (the "Foundation"), the sole testamentary beneficiary of the legendary composer Ray Charles Robinson ("Ray Charles"), had standing to challenge notices of termination served on Warner/Chappell Music ("Warner/Chappell") by Ray Charles' statutory heirs. During the 1950's, Ray Charles had conveyed the copyrights in his musical compositions to Warner/Chappell's predecessor in interest, which grants were renegotiated in the 1980's. In 2002, Ray Charles set up irrevocable trusts of Five Hundred Thousand Dollars ($500,000) (the "Trusts") for each of his twelve (12) children (the "Charles Children"). Coincident with the establishment of the Trusts, each of the Charles Children signed an acknowledgement that the funding of the Trust constituted his or her entire inheritance from Ray Charles. The Charles Children warranted that they would waive any right to make a claim against the estate.[71] When Ray Charles passed away in 2004, he left a will naming the Foundation as his sole beneficiary. Pursuant to his will, Ray Charles expressly "devised 'all of [his] rights in his works and rights under contracts, including [his] compositions to [t]he Foundation.'"[72] Ray Charles left no surviving spouse. Accordingly, his statutory heirs were the twelve (12) Charles Children.

[67] *Id*. at 24.
[68] *Id*. at 32.
[69] *Id*. at 33.
[70] *Id*. at 34.
[71] Ray Charles Found., 795 F.3d at 1112.
[72] *Id*.

In March of 2010, seven (7) of the Charles Children, comprising a majority of Ray Charles' statutory heirs, served a series of termination notices on Warner/Chappell pursuant to Sections 304(c) and 203 of the Act, and recorded the notices in the US Copyright Office.[73] The Foundation brought an action to challenge the termination notices seeking, "a judicial determination of the validity and effectiveness of the termination notices and its rights and obligations" as well as declaratory relief.[74] According to the Foundation, the termination notices were invalid because the subject compositions were works made for hire. Alternatively, the Foundation claimed that the grants subject to termination were made in the 1980's and therefore the Section 304(c) termination notices should be rejected.

The Charles Children moved to dismiss the action on the ground that the Foundation lacked standing to bring the claim. According to the Charles Children, Warner/Chappell, and not the Foundation, was the only party with standing to challenge the termination notices. The Foundation maintained that as a beneficial owner of the copyrights it had standing to sue for copyright infringement of the copyrights and that it therefore had standing to challenge the termination notices.[75]

After finding that the action met the requirements of constitutional standing and ripeness, the *Charles* court found that the fact that the Foundation might be a beneficial owner for purposes of an infringement action had no bearing on its claim that it had standing to challenge the termination notices. However, applying the zone-of-interests test, the court held that "[a]s the holder of legal rights and interests that will be truncated if the termination notices are valid, the Foundation has standing to challenge whether the underlying works are subject to the termination provisions."[76]

Moreover, the *Charles* court held that, while there is no express provision for a private right of action under Section 304(c) or 203, "an implied private cause of action exists under the termination provisions."[77] According to the court, the injuries that the Foundation alleged that it would sustain if the termination notices were upheld – the interruption of its right to receive royalties from Ray Charles' compositions – was "the [interest] Congress contemplated, regulated, and protected in enacting the termination provisions."[78]

Finally, the *Charles* court ruled that the Foundation was entitled to a declaration as to when the terminations would come into effect for each of the subject compositions.[79]

The *Charles* court concluded that the Foundation "properly asserts its own claims, which fall within the statutory zone of interest."[80]

Conclusion

The termination right offers a valuable opportunity for authors and the heirs of deceased authors to terminate grants made under copyright (even if such transfers were made "in perpetuity") and recapture

[73] *Id*. at 1114.
[74] *Id*. (internal citations and quotations omitted).
[75] *Id*. at 1115.
[76] *Id*. at 1120.
[77] *Id*. at 1122.
[78] *Id*. at 1123.
[79] *Id*.
[80] *Id*. at 1124.

rights to their works. Despite the complexities of the law, thousands of songs, books and other original works of authorship have effectively been reclaimed over the past thirty (30) years. However, the statutory construct is complicated and it is important for both authors and grantees to carefully navigate the termination waters.

Chapter 2

Copyright Ownership and Transfer

§ 201 · Ownership of copyright[1]

(a) Initial Ownership. — Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) Works Made for Hire. — In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) Contributions to Collective Works. — Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) Transfer of Ownership. —

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) Involuntary Transfer. — When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.[2]

§ 202 · Ownership of copyright as distinct from ownership of material object

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord

in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

§ 203 · Termination of transfers and licenses granted by the author[3]

(a) Conditions for Termination.—In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest. In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, the termination interest of any such author may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:

(A) The widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest.

(B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them.

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution

of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.

(4) The termination shall be effected by serving an advance notice in writing, signed by the number and proportion of owners of termination interests required under clauses (1) and (2) of this subsection, or by their duly authorized agents, upon the grantee or the grantee's successor in title.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) Effect of Termination.—Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests under clauses (1) and (2) of subsection (a), including those owners who did not join in signing the notice of termination under clause (4) of subsection (a), but with the following limitations:

(1) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(2) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of subsection (a). The rights vest in the author, authors, and other persons named in, and in the proportionate shares provided by, clauses (1) and (2) of subsection (a).

(3) Subject to the provisions of clause (4) of this subsection, a further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under clause (2) of this subsection, as are required to terminate the grant under clauses (1) and (2) of subsection (a). Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under clause (2) of this subsection, including those who did not join in signing it. If any person dies after rights under a

terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this clause.

(4) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the persons provided by clause (3) of this subsection and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of subsection (a).

(5) Termination of a grant under this section affects only those rights covered by the grants that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(6) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the term of copyright provided by this title.

§ 204 · Execution of transfers of copyright ownership

(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent.

(b) A certificate of acknowledgment is not required for the validity of a transfer, but is prima facie evidence of the execution of the transfer if—

(1) in the case of a transfer executed in the United States, the certificate is issued by a person authorized to administer oaths within the United States; or

(2) in the case of a transfer executed in a foreign country, the certificate is issued by a diplomatic or consular officer of the United States, or by a person authorized to administer oaths whose authority is proved by a certificate of such an officer.

§ 205 · Recordation of transfers and other documents[4]

(a) Conditions for Recordation. — Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office if the document filed for recordation bears the actual signature of the person who executed it, or if it is accompanied by a sworn or official certification that it is a true copy of the original, signed document. A sworn or official certification may be submitted to the Copyright Office electronically, pursuant to regulations established by the Register of Copyrights.

(b) Certificate of Recordation. — The Register of Copyrights shall, upon receipt of a document as provided by subsection (a) and of the fee provided by section 708, record the document and return it with a certificate of recordation.

(c) Recordation as Constructive Notice. — Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document, but only if—

(1) the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and

(2) registration has been made for the work.

(d) Priority between Conflicting Transfers. — As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c), within one month after its execution in the United States or within two months after its execution outside the United States, or at any time before recordation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer.

(e) Priority between Conflicting Transfer of Ownership and Nonexclusive License. — A nonexclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or such owner's duly authorized agent, and if

(1) the license was taken before execution of the transfer; or

(2) the license was taken in good faith before recordation of the transfer and without notice of it.

Chapter 2 · Notes

1. In 1978, section 201(e) was amended by deleting the period at the end and adding ", except as provided under title 11." See note 2, *infra*.

2. Title 11 of the *United States Code* is entitled "Bankruptcy."

3. In 1998, the Sonny Bono Copyright Term Extension Act amended section 203 by deleting "by his widow or her widower and his or her grandchildren" from the first sentence in paragraph (2) of subsection (a) and by adding subparagraph (D) to paragraph (2). Pub. L. No. 105-298, 112 Stat. 2827, 2829.

4. The Berne Convention Implementation Act of 1988 amended section 205 by deleting subsection (d) and redesignating subsections (e) and (f) as subsections (d) and (e), respectively. Pub. L. No. 100-568, 102 Stat. 2853, 2857. The Copyright Cleanup, Clarification, and Corrections Act of 2010 amended section 205(a) to add the last sentence. Pub. L. No. 111-295, 124 Stat. 3180.

Chapter 3[1]

Duration of Copyright

§ 301 · Preemption with respect to other laws[2]

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978;

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106; or

(4) State and local landmarks, historic preservation, zoning, or building codes, relating to architectural works protected under section 102(a)(8).

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

(e) The scope of Federal preemption under this section is not affected by the adherence of the United States to the Berne Convention or the satisfaction of obligations of the United States thereunder.

(f)(1) On or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, all legal or equitable rights that are equivalent to any of the rights conferred by section 106A with respect to works of visual art to which the rights conferred by section 106A apply are governed exclusively by section 106A and section 113(d) and the provisions of this title relating to such sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any State.[3]

(2) Nothing in paragraph (1) annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(A) any cause of action from undertakings commenced before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990;

(B) activities violating legal or equitable rights that are not equivalent to any of the rights conferred by section 106A with respect to works of visual art; or

(C) activities violating legal or equitable rights which extend beyond the life of the author.

§302 · Duration of copyright: Works created on or after January 1, 1978[4]

(a) In General.—Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.

(b) Joint Works.—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death.

(c) Anonymous Works, Pseudonymous Works, and Works Made for Hire.—In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

(d) Records Relating to Death of Authors.—Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of that person's interest, and the source of the

information recorded, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent the Register considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.

(e) Presumption as to Author's Death.—After a period of 95 years from the year of first publication of a work, or a period of 120 years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than 70 years before, is entitled to the benefit of a presumption that the author has been dead for at least 70 years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title.

§303 · Duration of copyright: Works created but not published or copyrighted before January 1, 1978[5]

(a) Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2047.

(b) The distribution before January 1, 1978, of a phonorecord shall not for any purpose constitute a publication of any musical work, dramatic work, or literary work embodied therein.

§304 · Duration of copyright: Subsisting copyrights[6]

(a) Copyrights in Their First Term on January 1, 1978.—

(1)(A) Any copyright, in the first term of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

(B) In the case of—

(i) any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or

(ii) any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire,

the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 67 years.

(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work—

(i) the author of such work, if the author is still living,

(ii) the widow, widower, or children of the author, if the author is not living,

(iii) the author's executors, if such author, widow, widower, or children are not living, or

(iv) the author's next of kin, in the absence of a will of the author,

shall be entitled to a renewal and extension of the copyright in such work for a further term of 67 years.

(2)(A) At the expiration of the original term of copyright in a work specified in paragraph (1)(B) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which—

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in the proprietor of the copyright who is entitled to claim the renewal of copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in the person or entity that was the proprietor of the copyright as of the last day of the original term of copyright.

(B) At the expiration of the original term of copyright in a work specified in paragraph (1)(C) of this subsection, the copyright shall endure for a renewed and extended further term of 67 years, which—

(i) if an application to register a claim to such further term has been made to the Copyright Office within 1 year before the expiration of the original term of copyright, and the claim is registered, shall vest, upon the beginning of such further term, in any person who is entitled under paragraph (1)(C) to the renewal and extension of the copyright at the time the application is made; or

(ii) if no such application is made or the claim pursuant to such application is not registered, shall vest, upon the beginning of such further term, in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to the renewal and extension of the copyright.

(3)(A) An application to register a claim to the renewed and extended term of copyright in a work may be made to the Copyright Office—

(i) within 1 year before the expiration of the original term of copyright by any person entitled under paragraph (1)(B) or (C) to such further term of 67 years; and

(ii) at any time during the renewed and extended term by any person in whom such further term vested, under paragraph (2)(A) or (B), or by any successor or assign of such person, if the application is made in the name of such person.

(B) Such an application is not a condition of the renewal and extension of the copyright in a work for a further term of 67 years.

(4)(A) If an application to register a claim to the renewed and extended term of copyright in a work is not made within 1 year before the expiration of the original term of copyright in a work, or if the claim pursuant to such application is not registered, then a derivative work prepared under authority of a grant of a transfer or license of the copyright that is made before the expiration of the original term of copyright may continue to be used under the terms of the grant during the renewed and extended term of copyright without infringing the copyright, except that such use does not extend to the preparation during such renewed and extended term of other derivative works based upon the copyrighted work covered by such grant.

(B) If an application to register a claim to the renewed and extended term of copyright in a work is made within 1 year before its expiration, and the claim is registered, the certificate of such registration shall constitute prima facie evidence as to the validity of the copyright during its renewed and extended term and of the facts stated in the certificate. The evidentiary weight to be accorded the certificates of a registration of a renewed and extended term of copyright made after the end of that 1-year period shall be within the discretion of the court.

(b) Copyrights in Their Renewal Term at the Time of the Effective Date of the Sonny Bono Copyright Term Extension Act[7]—Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.[8]

(c) Termination of Transfers and Licenses Covering Extended Renewal Term.—In the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by subsection (a)(1)(C) of this section, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the

authors of the work, termination of the grant may be effected, to the extent of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:

(A) The widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest.

(B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them.

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee's successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to terminate the grant under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by that author or his or her duly authorized agent or, if that author is dead, by the number and proportion of the owners of his or her termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, or, in the case of a termination under subsection (d), within the five-year period specified by subsection (d)(2), and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In the case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if that author is dead, to the persons owning his or her termination interest under clause (2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this subsection. In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where the author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause, as are required to terminate the grant under clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under this subclause, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this subclause.

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons

provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

(d) Termination Rights Provided in Subsection (c) Which Have Expired on or before the Effective Date of the Sonny Bono Copyright Term Extension Act. — In the case of any copyright other than a work made for hire, subsisting in its renewal term on the effective date of the Sonny Bono Copyright Term Extension Act[9] for which the termination right provided in subsection (c) has expired by such date, where the author or owner of the termination right has not previously exercised such termination right, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated in subsection (a)(1)(C) of this section, other than by will, is subject to termination under the following conditions:

(1) The conditions specified in subsections (c) (1), (2), (4), (5), and (6) of this section apply to terminations of the last 20 years of copyright term as provided by the amendments made by the Sonny Bono Copyright Term Extension Act.

(2) Termination of the grant may be effected at any time during a period of 5 years beginning at the end of 75 years from the date copyright was originally secured.

§ 305 · Duration of copyright: Terminal date

All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.

Chapter 3 · Notes

1. Private Law 92-60, 85 Stat. 857, effective December 15, 1971, states that:

[A]ny provision of law to the contrary notwithstanding, copyright is hereby granted to the trustees under the will of Mary Baker Eddy, their successors, and assigns, in the work "Science and Health with Key to the Scriptures" (entitled also in some editions "Science and Health" or "Science and Health; with a Key to the Scriptures"), by Mary Baker Eddy, including

all editions thereof in English and translation heretofore published, or hereafter published by or on behalf of said trustees, their successors or assigns, for a term of seventy-five years from the effective date of this Act or from the date of first publication, whichever is later.

But *cf. United Christian Scientists* v. *Christian Science Board of Directors, First Church of Christ, Scientist*, 829 F.2d 1152, 4 USPQ2d 1177 (D.C. Cir. 1987) (holding Priv. L. 92-60, 85 Stat. 857, to be unconstitutional because it violates the Establishment Clause).

2. The Berne Convention Implementation Act of 1988 amended section 301 by adding at the end thereof subsection (e). Pub. L. No. 100-568, 102 Stat. 2853, 2857. In 1990, the Architectural Works Copyright Protection Act amended section 301(b) by adding at the end thereof paragraph (4). Pub. L. No. 101-650, 104 Stat. 5133, 5134. The Visual Artists Rights Act of 1990 amended section 301 by adding at the end thereof subsection (f). Pub. L. No. 101-650, 104 Stat. 5089, 5131. In 1998, the Sonny Bono Copyright Term Extension Act amended section 301 by changing "February 15, 2047" to "February 15, 2067" each place it appeared in subsection (c). Pub. L. No. 105-298, 112 Stat. 2827.

3. The Visual Artists Rights Act of 1990, which added subsection (f), states, "Subject to subsection (b) and except as provided in subsection (c), this title and the amendments made by this title take effect 6 months after the date of the enactment of this Act," that is, 6 months after December 1, 1990. Pub. L. No. 101-650, 104 Stat. 5089, 5132. See also note 39, chapter 1.

4. In 1998, the Sonny Bono Copyright Term Extension Act amended section 302 by substituting "70" for "fifty," "95" for "seventy-five," and "120" for "one hundred" each place they appeared. Pub. L. No. 105-298, 112 Stat. 2827. This change was effective October 27, 1998. *Id.*

5. In 1997, section 303 was amended by adding subsection (b). Pub. L. No. 105-80, 111 Stat. 1529, 1534. In 1998, the Sonny Bono Copyright Term Extension Act amended section 303 by substituting "December 31, 2047" for "December 31, 2027." Pub. L. No. 105-298, 112 Stat. 2827. The Copyright Cleanup, Clarification, and Corrections Act of 2010 amended section 303(b) to substitute "any musical work, dramatic work, or literary work" for "the musical work." Pub. L. No. 111-295, 124 Stat. 3180, 3181.

6. The Copyright Renewal Act of 1992 amended section 304 by substituting a new subsection (a) and by making a conforming amendment in the matter preceding paragraph (1) of subsection (c). Pub. L. No. 102-307, 106 Stat. 264. The Act, as amended by the Sonny Bono Copyright Term Extension Act, states that the renewal and extension of a copyright for a further term of 67 years "shall have the same effect with respect to any grant, before the effective date of the Sonny Bono Copyright Term Extension Act [October 27, 1998], of a transfer or license of the further term as did the renewal of a copyright before the effective date of the Sonny Bono Copyright Term Extension Act [October 27, 1998] under the law in effect at the time of such grant." The Act also states that the 1992 amendments "shall apply only to those copyrights secured between January 1, 1964, and December 31, 1977. Copyrights secured before January 1, 1964, shall be governed by the provisions of section 304(a) of title 17, United States Code, as in effect on the day before … [enactment on June 26, 1992], except each reference to forty-seven years in such provisions shall be deemed to be 67 years." Pub. L. No. 102-307, 106 Stat. 264, 266, as amended by the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827, 2828.

In 1998, the Sonny Bono Copyright Term Extension Act amended section 304 by substituting "67" for "47" wherever it appeared in subsection (a), by substituting a new subsection (b), and by adding subsection (d) at the end thereof. Pub. L. No. 105-298, 112 Stat. 2827. That Act also amended subsection 304(c) by deleting "by his widow or her widower and his or her children or grandchildren" from the first sentence of paragraph (2), by adding subparagraph (D) at the end of paragraph (2) and by inserting "or, in the case of a termination under subsection (d), within the five-year period specified by subsection (d)(2)," into the first sentence of subparagraph (4)(A). *Id.*

7. In 1998, the Sonny Bono Copyright Term Extension Act amendment to subsection 304(b) completely deleted the previous language that was originally part of the 1976 Copyright Act. Pub. L. No. 105-298, 112 Stat. 2827. That earlier statutory language continues to be relevant for calculating the term of protection for copyrights commencing between September 19, 1906, and December 31, 1949. The 1976 Copyright Act extended the terms for those copyrights by 20 years, provided they were in their renewal term between December 31, 1976, and December 31, 1977. The deleted language states:

The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured.

The effective date of this provision was October 19, 1976. That effective date provision is contained in Appendix A, herein, as section 102 of the Transitional and Supplementary Provisions of the Copyright Act of 1976. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2598.

In addition, prior to the 1976 Copyright Act, Congress enacted a series of nine interim extensions for works whose copyright protection began between September 19, 1906, and December 31, 1918, if they were in their renewal terms. Without these interim extensions, copyrights commencing during that time period would have otherwise expired after 56 years, at the end of their renewal terms, between September 19, 1962, and December 31, 1976. The nine Acts authorizing the interim extensions are as follows, in chronological order:

Pub. L. No. 87-668, 76 Stat. 555 (extending copyrights from September 19, 1962, to December 31, 1965)
Pub. L. No. 89-142, 79 Stat. 581 (extending copyrights to December 31, 1967)
Pub. L. No. 90-141, 81 Stat. 464 (extending copyrights to December 31, 1968)
Pub. L. No. 90-416, 82 Stat. 397 (extending copyrights to December 31, 1969)
Pub. L. No. 91-147, 83 Stat. 360 (extending copyrights to December 31, 1970)
Pub. L. No. 91-555, 84 Stat. 1441 (extending copyrights to December 31, 1971)
Pub. L. No. 92-170, 85 Stat. 490 (extending copyrights to December 31, 1972)
Pub. L. No. 92-566, 86 Stat. 1181 (extending copyrights to December 31, 1974)
Pub. L. No. 93-573, 88 Stat. 1873 (extending copyrights to December 31, 1976)

8. The effective date of the Sonny Bono Copyright Term Extension Act is October 27, 1998.
9. See note 8, *supra*.

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Title 37 → Chapter II → Subchapter A → Part 201 → §201.10

Title 37: Patents, Trademarks, and Copyrights
PART 201—GENERAL PROVISIONS

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§201.10 Notices of termination of transfers and licenses.

This section covers notices of termination of transfers and licenses under sections 203, 304(c) and 304(d) of title 17, of the United States Code. A termination under section 304(d) is possible only if no termination was made under section 304(c), and federal copyright was originally secured on or between January 1, 1923, and October 26, 1939.

(a) *Form.* The Copyright Office does not provide printed forms for the use of persons serving notices of termination.

(b) *Contents.* (1) A notice of termination covering the extended renewal term under sections 304(c) and 304(d) of title 17, U.S.C., must include a clear identification of each of the following:

(i) Whether the termination is made under section 304(c) or under section 304(d);

(ii) The name of each grantee whose rights are being terminated, or the grantee's successor in title, and each address at which service of the notice is being made;

(iii) The title and the name of at least one author of, and the date copyright was originally secured in, each work to which the notice of termination applies; and, if possible and practicable, the original copyright registration number;

(iv) A brief statement reasonably identifying the grant to which the notice of termination applies;

(v) The effective date of termination;

(vi) If termination is made under section 304(d), a statement that termination of renewal term rights under section 304(c) has not been previously exercised; and

(vii) In the case of a termination of a grant executed by a person or persons other than the author, a listing of the surviving person or persons who executed the grant. In the case of a termination of a grant executed by one or more of the authors of the work where the termination is exercised by the successors of a deceased author, a listing of the names and relationships to that deceased author of all of the following, together with specific indication of the person or persons executing the notice who constitute more than one-half of that author's termination interest: That author's surviving widow or widower; and all of that author's surviving children; and, where any of that author's children are dead, all of the surviving children of any such deceased child of that author; however, instead of the information required by this paragraph (vii), the notice may contain both of the following:

(A) A statement of as much of such information as is currently available to the person or persons signing the notice, with a brief explanation of the reasons why full information is or may be lacking; together with

(B) A statement that, to the best knowledge and belief of the person or persons signing the notice, the notice has been signed by all persons whose signature is necessary to terminate the grant under section 304 of title 17, U.S.C., or by their duly authorized agents.

(2) A notice of termination of an exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, under section 203 of title 17, U.S.C., must include a clear identification of each of the following:

(i) A statement that the termination is made under section 203;

(ii) The name of each grantee whose rights are being terminated, or the grantee's successor in title, and each address at which service of the notice is being made;

(iii) The date of execution of the grant being terminated and, if the grant covered the right of publication of a work, the date of publication of the work under the grant;

(iv) For each work to which the notice of termination applies, the title of the work and the name of the author or, in the case of a joint work, the authors who executed the grant being terminated; and, if possible and practicable, the original copyright registration number;

(v) A brief statement reasonably identifying the grant to which the notice of termination applies;

(vi) The effective date of termination; and

(vii) In the case of a termination of a grant executed by one or more of the authors of the work where the termination is exercised by the successors of a deceased author, a listing of the names and relationships to that deceased author of all of the following, together with specific indication of the person or persons executing the notice who constitute more than one-half of that author's termination interest: That author's surviving widow or widower; and all of that author's surviving children; and, where any of that author's children are dead, all of the surviving children of any such deceased child of that author; however, instead of the information required by this paragraph (b)(2)(vii), the notice may contain both of the following:

(A) A statement of as much of such information as is currently available to the person or persons signing the notice, with a brief explanation of the reasons why full information is or may be lacking; together with

(B) A statement that, to the best knowledge and belief of the person or persons signing the notice, the notice has been signed by all persons whose signature is necessary to terminate the grant under section 203 of title 17, U.S.C., or by their duly authorized agents.

(3) Clear identification of the information specified by paragraphs (b)(1) and (b)(2) of this section requires a complete and unambiguous statement of facts in the notice itself, without incorporation by reference of information in other documents or records.

(c) *Signature.* (1) In the case of a termination of a grant under section 304(c) or section 304(d) executed by a person or persons other than the author, the notice shall be signed by all of the surviving person or persons who executed the grant, or by their duly authorized agents.

(2) In the case of a termination of a grant under section 304(c) or section 304(d) executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by that author or by his or her duly authorized agent. If that author is dead, the notice shall be signed by the number and proportion of the owners of that author's termination interest required under section 304(c) or section 304(d), whichever applies, of title 17, U.S.C., or by their duly authorized agents, and shall contain a brief statement of their relationship or relationships to that author.

(3) In the case of a termination of a grant under section 203 executed by one or more of the authors of the work, the notice shall be signed by each author who is terminating the grant or by his or her duly authorized agent. If that author is dead, the notice shall be signed by the number and proportion of the owners of that author's termination interest required under section 203 of title 17, U.S.C., or by their duly authorized agents, and shall contain a brief statement of their relationship or relationships to that author.

(4) Where a signature is by a duly authorized agent, it shall clearly identify the person or persons on whose behalf the agent is acting.

(5) The handwritten signature of each person effecting the termination shall either be accompanied by a statement of the full name and address of that person, typewritten or printed legibly by hand, or shall clearly correspond to such a statement elswhere in the notice.

(d) *Service.* (1) The notice of termination shall be served upon each grantee whose rights are being terminated, or the grantee's successor in title, by personal service, or by first-class mail sent to an address which, after a reasonable investigation, is found to be the last known address of the grantee or successor in title.

(2) The service provision of section 203, section 304(c) or section 304(d) of title 17, U.S.C., whichever applies, will be satisfied if, before the notice of termination is served, a reasonable investigation is made by the person or persons executing the notice as to the current ownership of the rights being terminated, and based on such investigation:

(i) If there is no reason to believe that such rights have been transferred by the grantee to a successor in title, the notice is served on the grantee; or

(ii) If there is reason to believe that such rights have been transferred by the grantee to a particular successor in title, the notice is served on such successor in title.

(3) For purposes of paragraph (d)(2) of this section, a *reasonable investigation* includes, but is not limited to, a search of the records in the Copyright Office; in the case of a musical composition with respect to which performing rights are licensed by a performing rights society, a "reasonable investigation" also includes a report from that performing rights society identifying the person or persons claiming current ownership of the rights being terminated.

(4) Compliance with the provisions of paragraphs (d)(2) and (d)(3) of this section will satisfy the service requirements of section 203, section 304(c), or section 304(d) of title 17, U.S.C., whichever applies. However, as long as the statutory requirements have been met, the failure to comply with the regulatory provisions of paragraph (d)(2) or (d)(3) of this section will not affect the validity of the service.

(e) *Harmless errors.* (1) Harmless errors in a notice that do not materially affect the adequacy of the information required to serve the purposes of section 203, section 304(c), or section 304(d) of title 17, U.S.C., whichever applies, shall not render the notice invalid.

(2) Without prejudice to the general rule provided by paragraph (e)(1) of this section, errors made in giving the date or registration number referred to in paragraph (b)(1)(iii), (b)(2)(iii), or (b)(2)(iv) of this section, or in complying with the provisions of paragraph (b)(1)(vii) or (b)(2)(vii) of this section, or in describing the precise relationships under paragraph (c)(2) or (c)(3) of this section, shall not affect the validity of the notice if the errors were made in good faith and without any intention to deceive, mislead, or conceal relevant information.

(f) *Recordation.* (1) A copy of the notice of termination will be recorded in the Copyright Office upon payment of the fee prescribed by paragraph (2) of this paragraph (f) and upon compliance with the following provisions:

(i) The copy submitted for recordation shall be a complete and exact duplicate of the notice of termination as served and shall include the actual signature or signatures, or a reproduction of the actual signature or signatures, appearing on the notice; where separate copies of the same notice were served on more than one grantee or successor in title, only one copy need be submitted for recordation; and

(ii) The copy submitted for recordation shall be accompanied by a statement setting forth the date on which the notice was served and the manner of service, unless such information is contained in the notice. In instances where service is made by first-class mail, the date of service shall be the day the notice of termination was deposited with the United States Postal Service.

(iii) The copy submitted for recordation must be legible per the requirements of §201.4(c)(3).

(2) The fee for recordation of a document is prescribed in §201.3(c).

(3) The date of recordation is the date when all of the elements required for recordation, including the prescribed fee and, if required, the statement referred to in paragraph (f)(1)(ii) of this section, have been received in the Copyright Office. After recordation, the document, including any accompanying statement, is returned to the sender with a certificate of record.

(4) Notwithstanding anything to the contrary in this section, the Copyright Office reserves the right to refuse recordation of a notice of termination as such if, in the judgment of the Copyright Office, such notice of termination is untimely. Conditions under which a notice of termination will be considered untimely include: the effective date of termination does not fall within the five-year period described in section 203(a)(3) or section 304(c)(3), as applicable, of title 17, United States Code; or the documents submitted indicate that the notice of termination was served less than two or more than ten years before the effective date of termination. If a notice of termination is untimely or if a document is submitted for recordation as a notice of termination on or after the effective date of termination, the Office will offer to record the document as a "document pertaining to copyright" pursuant to §201.4(c)(3), but the Office will not index the document as a notice of termination.

(5) In any case where an author agreed, prior to January 1, 1978, to a grant of a transfer or license of rights in a work that was not created until on or after January 1, 1978, a notice of termination of a grant under section 203 of title 17 may be recorded if it recites, as the date of execution, the date on which the work was created.

(6) A copy of the notice of termination shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect. However, the fact that the Office has recorded the notice does not mean that it is otherwise sufficient under the law. Recordation of a notice of termination by the Copyright Office is without prejudice to any party claiming that the legal and formal requirements for issuing a valid notice have not been met, including before a court of competent jurisdiction.

(7) Notices of termination should be submitted to the address specified in §201.1.

(Pub. L. 94-553; 17 U.S.C. 304(c), 702, 708(11))

[42 FR 45920, Sept. 13, 1977, as amended at 56 FR 59885, Nov. 26, 1991; 60 FR 34168, June 30, 1995; 64 FR 29521, June 1, 1999; 64 FR 36574, July 7, 1999; 66 FR 34372, June 28, 2001; 67 FR 69136, Nov. 15, 2002; 67 FR 78176, Dec. 23, 2002; 68 FR 16959, Apr. 8, 2003; 71 FR 36486, June 27, 2006; 74 FR 12556, Mar. 25, 2009; 76 FR 32320, June 6, 2011; 78 FR 42874, July 18, 2013]

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§ 203 . Termination of transfers and licenses granted by the author[3]

(a) Conditions for Termination. — In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest. In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, the termination interest of any such author may be exercised as a unit by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, as follows:

(A) The widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest.

(B) The author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them.

(C) The rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(D) In the event that the author's widow or widower, children, and grandchildren are not living, the author's executor, administrator, personal representative, or trustee shall own the author's entire termination interest.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.

(4) The termination shall be effected by serving an advance notice in writing, signed by the number and proportion of owners of termination interests required under clauses (1) and (2) of this subsection, or by their duly authorized agents, upon the grantee or the grantee's successor in title.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) Effect of Termination. — Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests under clauses (1) and (2) of subsection (a), including those owners who did not join in signing the notice of termination under clause (4) of subsection (a), but with the following limitations:

(1) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(2) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of subsection (a). The rights vest in the author, authors, and other persons named in, and in the proportionate shares provided by, clauses (1) and (2) of subsection (a).

(3) Subject to the provisions of clause (4) of this subsection, a further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under clause (2) of this subsection, as are required to terminate the grant under clauses (1) and (2) of subsection (a). Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under clause (2) of this subsection, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this clause.

(4) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the persons provided by clause (3) of this subsection and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of subsection (a).

(5) Termination of a grant under this section affects only those rights covered by the grants that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(6) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the term of copyright provided by this title.