2013

2013: The Year of Terminations

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This note is available in Denver Sports & Entertainment Law Journal: https://digitalcommons.du.edu/selj/vol14/iss1/4
2013: THE YEAR OF TERMINATIONS

By: Naz Nazarinia Scott

ABSTRACT

Musicians have taken back their songs! The start of 2013 marked the first year that artists who created works of art and gave those rights away in a contract were able to terminate their agreement and reclaim their work. The Copyright Act of 1976 gave recording artists and songwriters the possibility to cancel contracts to works they licensed 35 years ago. Thirty-five years ago, artists like Bruce Springsteen, The Village People and The Eagles, who were virtually unknowns signed licensing agreements in the 1970’s and now are able to break their contracts or enter into new renegotiated contracts. These artists are only few amongst many who now have the opportunity to cancel contracts and reclaim their works.

INTRODUCTION

United States copyright law is a balancing act of promoting creativity by providing a limited monopoly. Copyright laws have undergone changes, substantively and structurally, throughout the years. The most recent and most significant revisions of the last century occurred in the Copyright Act of 1909 (hereinafter the “1909 Act”) and the Copyright Act of 1976 (hereinafter the “1976 Act”). Each overhaul of the United States copyright law was preceded by a pressing need to resolve problems that emerged after the previous act had been ushered through the court system with unforeseen and undesirable outcomes.

1 © 2013 Naz Nazarinia Scott received her Juris Doctorate in 2013 from the University of Utah S.J. Quinney College of Law and is with the law firm of Richards Brand Miller Nelson based in Salt Lake City. Her previous experience includes work as a summer intern for CMG Brands and CMG Worldwide, an intellectual property rights management company located in West Hollywood, California; and as a research assistant researching Copyright Law preemption of contracts. She would like to extend a sincere thanks to Rita T. Reusch for her valuable comments on the previous drafts of this paper and a special thank you to her family and friends for all their support. Comments are welcomed at Naziol.Nazarinia@law.utah.edu.

2 "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. CONST. art. I, § 8, cl. 8.

The copyright system is structured to incentivize authors to create works, permitting those authors to exclusively exploit their works before eventually "falling" into the public domain for unrestricted use. Beginning with a historical analysis of the legal frustrations in the 1909 Act with respect to copyright renewal terms, this paper then proceeds to discuss the 1976 Act's restructuring of the law. The creation of a copyright holder's right to terminate copyright transfers or assignment, often simply called termination rights, in the 1976 Act will be the focus of discussion with an emphasis on the unexpected problems that have subsequently surfaced regarding those termination rights, most of which have not yet been resolved by Congress or the courts.

**PART I: BACKGROUND**

The passage of the 1976 Act was a congressional response to problems that had emerged from provisions within the copyright law of the 1909 Act. The 1976 Act purged many of the formal requirements imposed to retain copyright protection and removed the author's right to a renewal term by replacing it with one single, but longer term. The renewal term in the 1909 Act provided authors of a copyrighted work a second chance to benefit from their work. The abolition of the renewal term eliminated that inherent second chance and replaced it by a newly created right, a termination right. The termination right allows an author to terminate a license or transfer that they granted in a copyrighted work after a given period of years.4

These newly created termination rights were implemented by the 1976 Act to remedy problems in the 1909 Act, but instead subsequently created new problems. Termination rights have been, and will continue to be, a "hot topic" area in copyright because the first termination rights for works created on or after January 1, 1978 go into effect in 2013. While terminations of 4 See infra Section II.
copyright transfers affect a broad spectrum of business, this paper primarily uses examples from the music industry to illustrate the problems that have arisen with respect to termination rights. Many record labels are already becoming involved in legal battles involving artists who seek to reclaim the copyright in their musical works. They, along with many others, are on the cusp of even more litigation as more artists become eligible to exercise their legal termination rights.

With very little legal precedent, and even less statutory interpretation to help guide the courts, a rights holder or a transferee is left guessing the outcome or consequence resulting from an attempt to terminate a copyright that was licensed or transferred after 1978. Courts are relegated into uncharted legal theory and policy, uncertain of the path ahead. This paper explores some of the pending controversies expected in the ensuing years surrounding copyright termination rights.

PART II: 1909 COPYRIGHT ACT

Prior to the 1909 Act, the last major revision to copyright laws was in 1790. The 1909 Act introduced many changes to the United States copyright scheme. However, Congress did attempt to maintain some consistency by preserving much of the language of earlier laws in order to maintain the judicial interpretation and case law already established in those provisions.

The 1909 Act contained two terms: an initial term and a so-called “renewal term.” Congress recognized copyrights as being extremely difficult to accurately value at creation, and therefore provided the renewal term, which was meant to give authors a second chance at benefiting from their work, given the later knowledge of its commercial value. It permitted

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6 H.R. Rep. No. 60-2222, at 4 (1909) (“Many amendments of [phraseology] were suggested, but the committee felt that it was safer to retain without change the old phraseology which has been so often construed by the courts.”).
7 See Copyright Act of 1790, Ch. 15, 1 Stat. 124, § 1 (1790) (A renewal term did exist as part of copyright law prior to the enactment of the 1909 Act); see also Copyright Act of 1831, Ch. 16, 4 Stat. 436 (1831) (Congress made changes to the laws concerning renewal terms in the 1831 Copyright Act).
authors to re-license their work with new and different contract terms, despite the fact that they may have licensed their work at the beginning of the initial term for less than the later, actual realized value. "[The] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces in attempting to ‘secure[e] for limited Times to Authors ... the exclusive Right to their respective Writings.’" In recognizing this, one of the most notable changes in the 1909 Act is that it effectively doubled the copyright term from 14 to 28 years.

Copyright law under the 1909 Act also contained two schemes of protection: unpublished works were provided state common law protection and published works were given federal statutory protection. The 1909 Act included formal requirements for any published work in order to maintain its federal copyright protection. Publication of works without the necessary formalities resulted in the loss of common law protection as well as federal statutory protection. Whether a copyrighted work was a “published” work under the 1909 Act was a significant source of controversy, and is beyond the scope of this paper. Once a copyrighted work was deemed to have been published, it would shift from its previously held common law protection scheme to the federal statutory protection. However, that was only if the necessary formal requirements were followed when the work was published.

10 See Nimmer, supra note 5, § 4.02.
11 Id.
12 Nimmer, supra note 54, § 4.03 ("Publication’ was a term of art under the 1909 Act. The relevant decisions under [the 1909 Act] indicated that publication occurred when, by consent of the copyright owner, the original or tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public, or when an authorized offer is made to dispose of the work in any such manner, even if a sale or other such disposition does not in fact occur.”).
13 Id.
14 Id.
Notice of Copyright

One of the formal requirements to maintain copyright protection was a “notice of copyright” to be affixed on any published work for which the author sought federal copyright protection.\(^{15}\) A published work contained a notice of copyright by including a “©” on each copy of the work.\(^{16}\) This notice granted the work with protection by the federal statutory copyright laws. Publication of the work without the notice resulted in the author losing copyright protection.\(^{17}\)

Loss of protection due to failure to publish with a notice of copyright was one of the most prevalent problems in the 1909 Act. A large number of works, otherwise protected by federal copyright, fell into the public domain this way.\(^{18}\) Proponents who supported the formal requirement of a notice of copyright argued that the benefit of requiring authors to take affirmative steps was that they had to indicate their desire to protect their works.\(^{19}\) This requirement, in turn, allowed the use of more works for which authors did not seek protection.\(^{20}\) Only those works where the author had a genuine interest in protecting and exploiting their work received protection (if the formal requirements were followed), while others works became available for public use. The argument opposing the formal requirements pointed to the vast volume of works that were unintentionally falling into the public domain because mistakes in meeting formality requirements at the time of publication caused a loss of protection. Many

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\(^{15}\) Copyright Act of 1909 § 9 (1909).

\(^{16}\) Id.

\(^{17}\) 2-7 Nimmer § 7.14 ("If a copyright notice is required, and its omission is not excused, the legal consequence is to inject the work into the public domain.").


\(^{20}\) Id.
authors who did intend to protect their works accidentally lost protection because of a simple, but irreversible, mistake or omission at the time of publication.  

*Renewal Rights*

Even the author’s renewal right, intended to give them a second chance at exploiting their works, was coupled with formality requirements.

> When an author produces a work which later commands a higher price in the market than the original bargain provided, the copyright statute is designed to provide the author the power to negotiate for the realized value of the work. That is the method with which the separate renewal term was intended to operate.  

To take advantage of the 28-year renewal term, authors had to formally register, and renew, their copyright with the Copyright Office.  

Registration with the Copyright Office was the pre-requisite to obtaining the renewal right. Though registration was not required for the initial term, to continue protection for the renewal period, the work needed to be registered. Initial registration could take place at any time during the initial term, but the renewal of a copyrighted work was required to have been made within one year of the expiration of the first term. Failure to renew the copyright or mistakes made in the renewal process often resulted in works unintentionally falling into the public domain. “At present about 15% of subsisting copyrights are being renewed; in fiscal  

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21 H.R. REP. NO. 94-1476, at 57 (1985) (“One of the strongest arguments for revision of the present statute has been the need to avoid the arbitrary and unjust forfeitures now resulting from unintentional or relatively unimportant omissions or errors in the copyright notice.”).  
23 Copyright Act of 1909 at § 24.  
24 Id. at § 11.  
25 Id. at § 24.  
26 Id. at §§ 24, 25.  
27 Id. at § 23.
1959, for example, roughly 21,500 copyrights were renewed, as against 124,500 that went into the public domain at the end of their first 28-year term."

An example of the formal renewal requirements gone awry is demonstrated through the circumstances surrounding a feature film titled “It’s a Wonderful Life.” After the copyright ownership changed hands numerous times, the rights holder, at the time the one-year renewal window was tolling did not properly renew the work because of a simple clerical error. As a result, the film “fell” into the public domain after losing its federal copyright protection because it failed to adhere to the formal copyright requirements.

The transfer of the author’s renewal right became a standard provision in most entertainment contracts. Many first-term contracts already contained language requiring authors to assign their right of renewal to a record label or a production company with which they were under contract, essentially negating the purpose of the second-term afforded to authors. Until 1943, however, it was unclear whether the provisions assigning renewal rights were valid and enforceable in court under the law. In 1943, a landmark Supreme Court copyright case, *Fred Fisher Music Co. v. M. Witmark & Sons*, made clear that assignment of renewal terms was

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29 Williams, Should Auld Copyrights Be Forgotten, SIDE TODAY (Dec. 22, 1999), http://homepages.law.asu.edu/~dkarjala/OpposingCopyrightExtension/publicdomain/Williams12-22-99.html (“After languishing for nearly two decades in the studio vaults, “It’s a Wonderful Life” fell into the public domain. Movie historians disagree on the reason behind this. Some attribute it to a clerical error. Others credit simple disinterest on the part of studio management.”).
20 Id. (explaining that the film was a derivative work and it was eventually protected through assertion of rights in the original work which had maintained its federal copyright protection. Although the film as a whole was not protected, it was precluded from being shown due to existing copyrights in compositions and music within the film).
32 HOWARD B. ABRAMS, 2 THE LAW OF COPYRIGHT § 11:26 (“Prior to the Fred Fisher decision there was some uncertainty over whether transfers of rights in the renewal term were valid prior to the vesting of the renewal term.”); see also Corcovado Music Corp. v. Hollis Music, Inc., 981 F.2d 679, 684 (2d Cir. 1993) (“[T]here is a strong presumption against the conveyance of renewal rights: ‘In the absence of language which expressly grants rights in ‘renewals of copyright’ or ‘extensions of copyright’ the courts are hesitant to conclude that a transfer of copyright even if it includes a grant of ‘all right, title and interest’ is intended to include a transfer with respect to the renewal expectancy.’”) (internal citation omitted).
permitted and enforceable under the law. 33 Two sentences was all it took to validate contractual transfers of renewal rights making copyrighted works fully assignable and transferable:

While authors may have habits making for intermittent want, they may have no less a spirit of independence which would resent treatment of them as wards under guardianship of the law. We conclude, therefore, that the Copyright Act of 1909 does not nullify agreements by authors to assign their renewal interests.34

"After this decision, it became common for publishers to require authors to assign their renewal rights at the same time as the initial copyright term," effectively neutralizing the authors ability to take advantage of their second term.35

The original reasoning for the renewal term was rooted in a belief that copyrights (and other intellectual properties) are difficult to accurately value when first created.36 The renewal right was a way for authors to recapture their works and exploit them a second time after the value had been better determined.

It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, [Congress] felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed . . . so that he could not be deprived of that right.37

The Supreme Court’s 1943 decision in Fred Fisher Music Co. guaranteed the enforceability of an author’s alienation of their renewal right and effectively extinguished the congressional intent with respect to the reversion of a renewal right to an author.38 Though authors could refuse to assign their renewal rights in a contract, the practical result was that most,

34 Id. at 657.
38 Bales, supra note 35, at 666.
if not all, were not in a bargaining position to negotiate, and overwhelmingly authors were left in disadvantageous bargaining positions without the power to obtain additional compensation for the renewal period.39 “By the 1960s, recapture of rights through renewal was largely considered to be a failed experiment because corporations routinely required artists to assign their renewal rights away in the first contract negotiation. Such assignments were held to be legally enforceable even though they evaded the legislative intent of protecting authors.”40 This judicial interpretation of the 1909 Act influenced the way Congress reformed the structure of copyright law in the 1976 Act.41 The need for copyright reform was becoming increasingly evident as more time passed since the 1909 Act.42

The purpose of the renewal right was part of the balance achieved by Congress; the assignment of these renewal rights disturbed that congressional balance. Congress still recognized that copyrights were extremely difficult to accurately value at the time of creation43 and it wanted to find another way to provide authors with a second chance to benefit after the value of their copyright had been fairly realized.44 The drafting of the 1976 Act was intended to continue some aspects of copyright law while resolving the issues that had arisen since the enactment of the 1909 Act.45

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40 Id.
41 Id.
42 Emily Burrows, Termination of Sound Recording Copyrights & the Potential Unconscionability of Work for Hire Clause, 30 REV. LITIG. 101, 105 (2010) (“The Copyright Act of 1976 was created in response to the technological changes associated with the development of the motion picture, phonograph, radio, and television.”) (internal citations omitted).
44 H.R. REP. No. 94-1476, at 124 (“A provision of this sort is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited.”).
45 See Ringer, supra note 28.
PART III: 1976 COPYRIGHT ACT

Congress finally began reexamining the United States copyright law in the 1960's and began drafting a copyright reform bill in the mid-1970's. Among the reasons for the new law were the much needed reforms due to new technologies and mass media. Changes included the elimination of formal requirements and a major change with respect to the dual copyright terms being replaced with one single, longer term. International considerations played a significant role in the removal of the dual copyright terms because it brought the United States in line with international treaties and, in turn, provided the United States with reciprocal protection for the works of its authors in foreign countries. The creation of the longer term in the United States was one step toward meeting the intellectual property requirements needed to join the Berne Convention, an international agreement governing copyright. These changes, along with the subsequent elimination of the notice of copyright requirements, significantly reduced the number of works that lost protection and fell into the public domain due to an inadvertent failure to accurately follow all the formalities of copyright protection.

46 See generally H.R. REP. NO. 94-1476 (explaining proposed legislation revising copyright law).
47 Burrows, supra 42, at 105.
However, to continue to preserve the authors chance at a “second bite of the apple” for works that may have been initially undervalued, Congress created a new right contained within the copyright law—a termination right. This right gave an author the ability to terminate an exclusive or non-exclusive license or grant and recapture the rights in their copyrighted work.52

**Termination Right Basics**

The termination right was an attempt by Congress to create another avenue for authors to benefit from their works a second time.53 While the creation of the termination right sought to address some of the problems that had emerged with respect to renewal rights, new problems emerged with this newly created right, and the courts have yet to develop a solution.54

The termination right was structured to create a window of time in which an author is able to reclaim their copyright after providing a license or grant of use in their work. The most significant change from a renewal right was that the termination right did not automatically “revert” the copyright back to the author, but rather the author is required to actively go after their right and serve a notice of termination.55 This structure was formed because Congress was already aware of the unequal bargaining power in contracts negotiations for copyright grants. Rather than allowing a repeat of the 1909 Act where judicial interpretation permitted assignment of a right intended for the author’s benefit, Congress included an explicit clause in the statute prohibiting assignments, “Termination of the grant may be effected notwithstanding any

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52 Stephen W. Tropp, *It Had to Be Murder or Will Be Soon* - 17 U.S.C. § 203 Termination of Transfers: A Call for Legislative Reform, 51 J. COPYRIGHT SOCy U.S.A. 797, 798 (2004) (“The statutory structure enacted by Congress in the 1909 Act was carried over into the 1976 Act in § 304(c). With respect to the 1909 Act works in their initial term on the effective date of the Copyright Act of 1976 (Jan. 1, 1978), § 304(c) effectively gave defined heirs a second bite at the apple to potentially cut off rights to derivative works produced under the initial grant.”).

53 See Woods v. Bourne Co., 60 F.3d 978, 982 (2d Cir. 1995) (“When the Copyright Act was thoroughly revised in 1976, Congress attempted to restore a second chance to authors or their heirs.”) (internal citation omitted).

54 See *infra* Section II.C.

This additional language was significant in that it precluded any contractual assignment of termination rights.\textsuperscript{57}

The termination right was structured in such a way that authors had a five-year window in which they could terminate any past license or grant of their work. The five-year window began thirty-five years after the initial grants for works after January 1, 1978.\textsuperscript{58} For works created prior to January 1, 1978 the window began fifty-six years after the creation of the copyright or beginning January 1, 1978, whichever is later.\textsuperscript{59}

The 1976 Act carved out several exceptions with respect to works eligible for the right of termination. One exception pertained to pre-1978 works where the renewal term was bequeathed to another in a will. Two other exceptions to the termination right, discussed below, apply to works for hire and derivative works.\textsuperscript{60}

Termination of a copyright may be brought about by the author, if living, or by the heirs if the author is deceased.\textsuperscript{61} If the author is deceased, the rights to terminate are apportioned among heirs and governed by the statute itself in a “waterfall” like fashion.\textsuperscript{62} The rights vest first with the widow(er) entirely unless there are surviving children or grandchildren of the author.\textsuperscript{63} Conversely, if the author has no widow(er), the surviving children or grandchildren are granted the entire right.\textsuperscript{64} If both a widow(er) and surviving children or grandchildren exist, the widow(er) maintains one-half of the interest and the other half is divided amongst any children

\textsuperscript{57} But see Bales, supra note 35, at 665.
\textsuperscript{58} 17 U.S.C. §203(a)(3).
\textsuperscript{59} 17 U.S.C. §304(c)(3).
\textsuperscript{60} 17 U.S.C. § 204(c)(6)(a).
\textsuperscript{61} 17 U.S.C. § 304(c)(1).
\textsuperscript{62} 17 U.S.C. § 304(c)(2).
\textsuperscript{63} 17 U.S.C. § 304(c)(2)(A).
\textsuperscript{64} 17 U.S.C. § 304(c)(2)(B).
or grandchildren. If the author dies without a widow(er), children, or grandchildren, the author’s executor shall own the termination interest. This proportional system is identical in 17 U.S.C. §304 for pre-1978 works and 17 U.S.C. §203 for post-1978 works raises some questions with respect to fairness of termination abilities discussed below.

For the termination to take effect, the author must serve a notice to terminate to the grantee of the work. The notice to terminate could be served as early as ten years before the opening of the termination window and as late as two years prior to the termination date. The minimum two year notice requirement prohibits a last minute notice as the termination window is closing. If the author does not exercise their termination right during the termination window, they lose their right indefinitely and may not reclaim their grant of copyright. One problem is the lack of clarity in the notice of termination requirements, which may be hindering terminations being submitted effectively.

The actual effect of terminating a right is that all rights revert to the author, authors, or other persons who owned the termination interest. As a practical matter, the exercise of termination prompts a renegotiation. For joint works with multiple authors, the majority of

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69 See infra Section II. C. a. (This two-year requirement may affect the grantee’s ability to exploit the work more so by creating derivative works which would be ineligible for termination.).
70 Arguably, the closing of this termination window could result in the missed opportunity for recovery of rights by authors similar to the missed opportunity for recovery of the renewal one-year renewal window under the 1990 Act; see Burrows, supra 42, at 110 (“[I]t is still easy for an author or his heir to miss the termination window or not include sufficient information to make the termination effective.”); c.f. Marc H. Greenberg, Reason or Madness: A Defense of Copyright’s Growing Pains, 7 J MARSHALL REV. INTELL. PROP. L. 1, 6 (2007).
71 Burrows, supra 42, at 110.
72 Ryan Ashley Rafnof, Note, Limitations of the 1999 Work-for-Hire Amendment: Courts Should Not Consider Sound Recordings to Be Works-for-Hire When Artists’ Termination Rights Begin Vesting in Year 2013, 53 VAND. L. REV. 1021, 1050 (2000) (“Congress intended the right of termination to give these artists a chance to renegotiate royalties after their work enters the market and obtains definite value.”) (citation omitted); Tropp, supra note 52, at 801.
those who executed the grant of copyright must join to terminate it. Once the grant is terminated by a majority of the authors, the entire grant is terminated; those who did not join in the termination also have their rights reverted.\(^73\)

Congress passed the 1976 Act knowing there would be subsisting copyrights when the new law was enacted; thus, it included two separate termination provisions in the 1979 Act. The first, 17 U.S.C. §304, applies to works which were created before January 1, 1978 and the second, 17 U.S.C. §203, applies to grants made on or after January 1, 1978. Although somewhat paralleling each other, the law, in effect, applies slightly differently to works created after 1978 compared to works that pre-existed 1978, the effective date of the law.

\textit{§304 – Works Created Before January 1, 1978}

Section 304 applies to copyrighted works created prior to January 1, 1978. A form of termination rights applied to pre-1978 works with some variations is discussed below. Pre-1978 copyrighted works in their original term on January 1, 1978 were still entitled to a twenty-eight year original term and were given a forty-seven year renewal term, resulting in an additional nineteen year extension of the duration of their copyright term.\(^74\)

One exception in the 1976 Act was for those works assigned in a will; they were ineligible for termination because the grants were made and executed prior to the law being enacted.\(^75\) Renewal terms assigned or licensed after 1978 could be terminated because Congress

\(^74\) See Fred Ahlert Music Corp. v. Warner/Chappell Music, 155 F.3d 17, 18 (2d Cir. N.Y. 1998). Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (further extending copyright terms from 75 years to 95 years, adding a 20 years to copyrights); see also 17 U.S.C. § 304(b) (2002); see “Gap Works” discussion infra Section II.D.b.
\(^75\) 17 U.S.C. §304(c) (2002). It is important to understand the discussion has shifted from when the work was created to when the grant was executed. The execution date of the grant will affect which provision, 17 U.S.C. §304 or 17 U.S.C. §203, applies to determine termination right; see infra Section II.C.b, “Gap Works” discussion.
assumed constructive notice and knowledge of the new law along with the termination right.76 Renewal rights not assigned in a will were governed by §304(c). The termination right may be affected by authors or any of the author’s heirs.77 The grant of copyright may be exclusive or non-exclusive for the renewal of the copyright and must be executed before January 1, 1978.78

Works in their first term or renewal term were eligible to be terminated during a five year window beginning “fifty-six years from the date the copyright was originally secured, or January 1, 1978, whichever is later.”79 Termination after the end of the renewal term was permitted by authors and their heirs because Congress viewed subsequent extensions of the copyright term as “new” rights that the original grants did not contemplate signing away since they did not yet exist when the copyright were granted.80

A copyright grant may be terminated by the person who executed it, or in the case of one or more authors of the work, may be terminated by those who exercise a “total of more than one-half of that author’s termination interest.”81 The phrasing in this provision of the statute refers to instances where the author has died and the termination interest has been distributed amongst multiple beneficiaries.82 To effectuate a termination, enough beneficiaries must seek or join in the termination so that the proportional interest is more than one-half of the original termination right.83

76 17 U.S.C. §304(c).
77 Id.
78 Id.
79 Id. at § 304(c)(3).
80 H.R. REP. NO. 94-1476, at 141 (1985); Stewart v. Abend, 495 U.S. 207, 218 (1990) (citing G. Ricordi & Co. v. Paramount Pictures, Inc., 189 F.2d 469, 471 (2d. Cir. 1951) (the renewal right “creates a new estate, and the ... cases which have dealt with the subject assert that the new estate is clear of all rights, interests or licenses granted under the original copyright.”).
82 Id.
83 Id.
§203 – Works created on or after January 1, 1978

Works created on or after January 1, 1978 are governed by 17 U.S.C. §203 of the 1976 Act. Of notable significance, the termination of a grant is only permitted if the grant was executed by the author.\(^\text{54}\) A grant executed by anyone other than the author, such as when an heir later grants an assignment of an inherited copyrighted work, is not eligible for termination.\(^\text{55}\) Another exception for the right of termination is expressed in the phrase “otherwise than by will.”\(^\text{86}\) Though unclear, this seems to indicate that an author’s intent in a will should supersede statutory rules.\(^\text{87}\) The termination window in 17 U.S.C. §203 begins thirty-five years after the date of an execution of a grant. For grants that provide the grantee the right of publication of a work, the period begins thirty-five years after the date of publication or at the end of forty years from the date of execution of the grant, whichever date is earlier.\(^\text{88}\)

Termination of a copyright can only be effected by a majority of the people who executed the grant originally. Thus, the determination of who may terminate a copyright grant may be difficult if the termination interest has been divided amongst many heirs of an author. As explained above, the termination interests are apportioned statutorily depending on whether there is a surviving widow(er), children or grandchildren. Termination interests divided among the author’s children or grandchildren are on a per stirpes basis, meaning each child of the author receives an equal share of the termination interest. A child’s share is then distributed equally to their children, or the author’s grandchildren. In other words, the grandchildren are given an equal portion of only their parent’s inheritance, and not an equal portion of the entire termination

\(^{54}\) 17 U.S.C. § 203(a).

\(^{55}\) Id.

\(^{86}\) Id.

\(^{87}\) See David Donahue, Statutory Termination Of Transfers, 932 PLI/Pat 457, 466 (2008) (expressing that there is little understanding regarding this exception but that the legislative history suggests Congress intended to give an author’s intent embodied in a will more weight.).


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interest. The statute goes on to indicate that, in order to exercise the share of the deceased child of the author, a majority of the children must join in the action. The same difficulty can arise, as explain below in Section C., in the discussion of the termination of joint works.

With the understanding that this provision in the statute controls grants executed after January 1, 1978, the termination window for these works begins January 1, 2013, thirty-five years after the execution. Although notices of termination have already been served for these works, the new immediacy of these terminations and the actual opening of the termination window will result in a rush of litigation. The ambiguity and uncertainty surrounding termination rights leave much to be determined. The remaining sections of this paper explore a variety of problems created by the 1976 Act, most of which have yet to be adjudicated or interpreted by the courts. Understanding the intricacies of these problems is necessary in order to successfully develop solutions.

A. Derivative Works Exception

The derivative works exception was one of a few single points where the balancing of other considerations produced an exception to the author’s ability to reclaim their rights through termination. This exception permits derivative works created under the grant of a copyrighted work, which inherently contain elements of the original work, to continue being “utilized” after

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90 Id.
91 Larry Rohter, Record Industry Braces for Artists’ Battles Over Song Rights, N.Y. TIMES, Aug. 15, 2011.
92 17 U.S.C. § 101 defines derivative work as: “a work based upon one or more pre-existing works, such as a translation, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'”
the termination of the grant.\textsuperscript{94}

This provision granting the derivative works exception was discussed by the Supreme Court in \textit{Mills Music, Inc. v. Snyder}.\textsuperscript{95} The claim at issue was "whether an author's termination of a publisher's interest in a copyright also terminates the publisher's contractual right to share in the royalties on such derivative works."\textsuperscript{96} The party seeking termination argued that the payments made for the derivative works should have been reassigned to the individual who terminated the grant of the original copyrighted work.\textsuperscript{97} In its analysis, the court's primary focus was on the phrase "under the terms of the grant" in 17 U.S.C. §304(c)(6)(A). The court interpreted the statutory provision to allow a termination of a copyright grant, but held that the statutory termination did not also result in a "statutory assignment of contractual rights."\textsuperscript{98} In other words, licensing and contractual grants of a derivative work, based on a previous and separate grant of a pre-existing work, would remain in place. The grantor of the derivative work who is also the grantee of the pre-existing work would continue to receive royalty fees regardless of the termination.\textsuperscript{99}

Based on congressional legislative history, the court found that "Congress saw no reason to draw a distinction between a direct grant by an author to a party that produces derivative works itself and a situation in which a middleman is given authority to make subsequent grants to such producers."\textsuperscript{100} The court recognized that excluding this specific category of works may be unfair to the author, stating the purpose of preserving the "right of the owner of a derivative work to exploit it, notwithstanding the reversion" was more important than the termination rights

\textsuperscript{94} 17 U.S.C. § 304(b)(1).
\textsuperscript{95} 469 U.S. 153 (1985).
\textsuperscript{96} Mills Music, Inc., 469 U.S. at 156.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 168.
\textsuperscript{99} Gould, supra note 31, at 131.
\textsuperscript{100} Mills Music, Inc., 469 U.S. at 172.
granted to the author or the author’s heirs.\textsuperscript{101} The purpose in protecting derivative works was to “enable [these] works to continue to be accessible to the public after the exercise of an author’s termination rights.”\textsuperscript{102} This simple statutory exception has a profound impact because “on its face [it] would not restrict the record labels from quickly preparing a large number of derivative works upon receiving notice of termination, which would compete with any future re-licensing by the artist to a different label.”\textsuperscript{103}

The derivative works exception is a stark contrast from the 1909 interpretation of renewal rights. Under the 1909 Act, a grant of a renewal right was viewed as a contingent right that only vested if the author was alive the first day of the renewal term.\textsuperscript{104} Under the 1909 Act, if an author died before the beginning of the renewal term, the renewal right reverted to the heirs of the author while the owner who was assigned the renewal right in a grant received nothing.\textsuperscript{105} The court reasoned that “assignment of renewal rights by an author before the time for renewal arrives cannot defeat the right of the author’s statutory successor to the renewal rights if the author dies before the right to renewal accrues.”\textsuperscript{106} The assignment of an author’s renewal right was viewed as a contingent interest, which did not vest until the first day of the renewal term and only if the author was still alive.\textsuperscript{107}

In contrast, the 1976 Act does not have a renewal right, and in turn, no contingent interest. When interpreting the 1976 termination provisions, the court recognized that the

\textsuperscript{101} Mills Music, Inc., 469 U.S. at 173.
\textsuperscript{102} Id. at 176.
\textsuperscript{103} Gould, supra note 31, at 131.
\textsuperscript{104} Copyright Act of 1909 at § 24; Stewart v. Abend, 495 U.S. 207, 216 (1990).
\textsuperscript{105} Copyright Act of 1909 at § 24; Stewart, 495 U.S. at 219-20 (The legislative history of the 1909 Act echoes this view: “The right of renewal is contingent. It does not vest until the end of the original term. If the author is alive at the time of renewal, then the original contract may pass it, but his widow or children or other persons entitled would not be bound by that contract.”) (internal modification omitted) (internal citation omitted).
\textsuperscript{106} Stewart, 495 U.S. at 208.
\textsuperscript{107} See id. at 222.
reformation of the Copyright Act was the result of the congressional balancing of interests.\textsuperscript{108} The new structure of termination rights with the derivative works exception was one of the characteristics of the newly found balance.\textsuperscript{109} This balancing act between competing parties was apparent in the drafts of the 1976 Act, as well as the legislative history.\textsuperscript{110} The Court found that Congress would not have made the derivative work exception explicit in the 1976 Act if it had "assumed that the owner continued to hold the right to sue for infringement even after incorporation of the pre-existing work into the derivative work."\textsuperscript{111} Thus, under the 1976 Act, the termination of a grant only eliminates the ability to create new, post-termination derivative works, but has no effect on derivative works prepared prior to the termination of the grant using the pre-existing copyright.\textsuperscript{112}

In another case, the Second Circuit relied heavily on the statutory interpretation of the derivative works exception in \textit{Mills}.\textsuperscript{113} In \textit{Woods v. Bourne Co.}, an heir to the author Harry Woods terminated the grant to a copyrighted song called "\textit{When the Red, Red Robin Comes Bob, Bob, Bobbing Along}," at the end of the renewal term in 1982.\textsuperscript{114} The company that owned the rights during the original and renewal terms had exploited the song for approximately 20 different arrangements.\textsuperscript{115} The company claimed that each arrangement was a derivative work of the original and argued that they all fell under the derivative works exception and could continue

\textsuperscript{108} \textit{Id.} at 210.
\textsuperscript{109} See \textit{id.} at 225.
\textsuperscript{110} Ringer, \textit{supra} note 28; H.R. REP. NO. 94-1476 (1985); H.R. CONF. REP. NO. 94-1733, 71; see also Stewart v. Abend, 495 U.S. 207, 229 (1990) ("While some limitations and conditions on copyright are essential in the public interest, they should not be so burdensome and strict as to deprive authors of their just reward.... their rights should be broad enough to give them a fair share of the revenue to be derived from the market for their works") (internal citation omitted).
\textsuperscript{111} Stewart, 495 U.S. at 226-27; Cf. Mills Music, Inc. v. Snyder, 469 U.S. 153, 164 (1985) (Section 304(c)(6)(A) "carves out an exception from the reversion of rights that takes place when an author exercises his right to termination.").
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} Woods v. Bourne, 60 F.3d 978, 982-84 (2d Cir.1995).
\textsuperscript{115} \textit{Id.} at 983.
to be used after termination of the copyright grant.\textsuperscript{116}

After recognizing that an exception is created with respect to derivative works, the court articulated the rule in which any derivative works created under the authority of a grant can continue to be used after the termination of the grant for the pre-existing work.\textsuperscript{117} The court then examined the arrangements to determine whether they added enough originality to qualify as derivative works.\textsuperscript{118} The burden of proof to show that the pre-termination works did in fact qualify as derivative works was assigned to the party claiming the exception.\textsuperscript{119} Finding that many of the arrangements were not original enough to qualify as derivative works, the court held they did not fall under the derivative works exception. Therefore, the termination of the copyright grant gave heirs a right to all royalties, rather than the fifty percent as indicated in the contract terms if the works were found to be derivatives.\textsuperscript{120}

\textbf{B. Gap Works}

The 1976 Act created a gap in governance that has resulted in tremendous uncertainty for authors who are wishing to terminate their grants. “Gap Works” refer to grants of a work where the contracts were executed prior to January 1, 1978 for works that were not actually created until after January 1, 1978. A simple example can illustrate this: a writer who signs a contract in 1977 to write a book within 5 years, which she has not yet begun. The work, begun after 1978 and completed shortly thereafter, is a so-called “gap work.”

The issue lies with the fact that §203 of the 1976 Act applies to grants that were \textit{executed}

\textsuperscript{116}Id. at 986.
\textsuperscript{117}Id. at 989-90.
\textsuperscript{118}Id. at 990.
\textsuperscript{119}Id. at 993-94 (“The district court placed the burden on Bourne, as the party claiming an exception to the heirs’ right of termination to prove that any post-termination performances were based upon pre-termination derivative arrangements of the Song.”) (citations omitted).
\textsuperscript{120}Id. at 992-93.
on or after January 1, 1978. In the scenario above, the grant was executed prior to the required date so the grant does not fall under §203. Looking to §304 only creates confusion as the content of that section reveals that the statute discusses terminations in the context of works in their original or renewal term on January 1, 1978. Thus, §304 only applies to works which were created prior to the 1976 Act taking effect. Therefore, a work, which has not yet been created, does not fall under §304 of the 1976 Act and the contract providing a grant is not governed by §203. This leaves the author, and her attorney, unsure with respect to which section to follow when seeking to terminate a copyright grant. These “gap works” find themselves hopelessly lost between two statutory provisions, neither of which seem to govern the circumstances.

The Authors Guild estimates there are thousands of works which fall into this “gap” created by the 1976 Copyright Act. The well-recognized song by Charlie Daniels called “The Devil Went Down to Georgia” is one such copyrighted work that falls within this gap. Daniels, who signed a recording deal with Universal Music Group before 1978, wrote the song in 1979 while in the studio. Thus, based on the face of the plain language in the statutory provisions, the work is not governed by either §203 or §304 of the 1976 Act.

The “gap works” problem caught the attention of the United States Copyright Office, which acted first by requesting public comments on how to address the problem. The Copyright Office subsequently issued an analysis and possible solutions to gap works. In its discussion, it

123 See Shafer, supra note 121.
125 Brian Reisinger, Charlie Daniels' Signature at Heart of Copyright Dispute, NASHVILLE BUS. J., (Mar. 28, 2010).
126 Id.
stated, very simply, that “it would be beneficial for Congress to clarify the statute.”¹²⁸ After exploring the comments received from the public, the Copyright Office suggested the best solution was viewing a contract for a copyrighted work that did not yet exist as merely executory.¹²⁹ “[I]n U.S. contract law, an ‘executed’ agreement is ‘one in which nothing remains to be done by either party, and where the transaction is completed at the moment that the agreement is made,’ while ‘an executory contract is a contract to do some future act.’”¹³⁰ The Copyright Office believes that the correct interpretation is that a contract that grants a future copyright does not vest until the work is created.¹³¹ Though the Copyright Office made this suggestion, little was done to actually resolve the conflict regarding the execution date differing from the vesting date. It is still unclear when the thirty-five years will begin to toll, at the date of execution or the date of creation for gap works. Although the Copyright Office will accept notices of termination, its rulemaking authority is not binding in a court and “the fact that the Office has recorded the notice does not mean that it is otherwise sufficient under the law.”¹³² This non-binding administrative opinion could result in copyright holders missing their termination windows if a court interprets the statutory language differently than the Copyright Office.

Alternatives to the recommendation by the Copyright Office have included backdating

¹²⁸ U.S. COPYRIGHT OFFICE, supra note 127.
¹²⁹ Id.; see also T.B. Harms v. Stern, 229 F. 42, 49 (2d Cir. 1915) (“At law one cannot transfer by a present sale what he does not then own, although he expects to acquire it. But, while the contract was without effect at law as a contract of sale, it operated as an executory agreement to sell.”).
¹³⁰ U.S. COPYRIGHT OFFICE, supra note 127.
¹³¹ Id. (“For the reasons stated above, which are discussed more fully in the pages that follow, the Office suggests the following amendment [underlined] to Title 17: § 203. Termination of transfers and licenses granted by the author (a)... (3) ... For purposes of this section, and without prejudice to the operation of any other provision in Title 17, the date of execution of the grant is no earlier than the date on which the work is created.”).
the contract once the work is created. However, this creates problems for the party who was given a grant in the work: a grantee who expects at least thirty-five years to exploit the work is now robbed of the years the copyright was not in existence, but the author would be able to terminate the right thirty-five years after the date the contract was signed.

Though it is unlikely new gap works are being created, beginning on January 1, 2013 and a few years thereafter, post-1978 works are entering the first year of the five year termination window with uncertainty. One thing is evident: until gap works are addressed in court or clarified by amendment, authors will continue to tread in uncharted waters waiting for an answer.

C. Joint Works

Termination of joint works is another field of uncertainty for authors that have yet to be resolved through judicial interpretation or congressional amendment. Notably, §304 and §203 of the 1976 Act have different statutory requirements in order to successfully terminate joint works. Section §304 governs works created prior to January 1, 1978, whereas Section §203 governs all grants executed on or after January 1, 1978.

Determining who the author of a work is, and whether there is more than one author, will affect the ability to execute a termination right. The determination of the authors of a joint work is still somewhat imprecise. To determine whether two parties are both authors, some courts look at factors such as intent of the contribution, whereas other look at the contribution alone and whether it is a copyrightable work. However, the fact that “[a]cademic authorities [are] split on what type of ‘contribution’ the copyright law requires for joint authorship purposes,” in turn causes ambiguity for termination rights. Though the Supreme Court originally applied an

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133 Id.
134 Tropp, supra note 52, at 811 (referring to the Nimmer v. Goldstein test).
135 See Ashton-Tate Corp. v. Ross, 916 F.2d 516, 521 (9th Cir. 1990).
agency analysis for joint works, the issue is far from resolved.\textsuperscript{136} Consider works created by bands rather than individuals, and the uncertainty with respect to what sort of contribution an individual must make to be considered an author of the work.\textsuperscript{137} Only an author or their heirs may terminate a copyright grant. Determining who the authors of a work are is necessary in order to determine who actually holds the right to terminate a grant for a joint work.\textsuperscript{138}

Looking beyond the difficulties in determining who the author of a work is, the grants executed for joint works are riddled with other problems with respect to the statutory meaning of words in the copyright provisions. The word “grant” as used in the termination provisions is undefined and, therefore, unclear. The ambiguity causes uncertainty for authors in deciding who may terminate a grant and what practical effect termination actually has.

It is useful here to take another step back and understand what the effect of being a joint author has in a copyright grant circumstance. Joint authors share full and undivided ownership of a copyrighted work.\textsuperscript{139} The full ownership gives an individual author the ability to license the work without consent of the other author(s); however, the individual author’s ownership does not extend to the ability to sign an exclusive license in the work.\textsuperscript{140} Put another way, each author of a joint work can allow nonexclusive use of the work without consent from the other authors of the joint work.\textsuperscript{141}

Under §304 of the 1976 Act, a grant of a renewal term executed prior to January 1, 1978
may be terminated to the extent of that particular author's ownership in the renewal copyright.\textsuperscript{142} The author who provides the grant for the renewal right may terminate their share of ownership in that grant. An example may provide better understanding of this concept: consider a circumstance where four authors collaborate on a book; each individual would be considered a joint author and the authors collectively agree to provide an exclusive license to the book for the duration of the renewal term in a contractual agreement with a publisher. Under §304, if one author wishes to terminate his or her grant, they may do so. The effect, as explained by Nimmer, is that the license is still in effect by the other three authors, and the termination of the fourth author removes only the exclusive license. The entire grant, however, is not wholly terminated; just the individual author's share of ownership is terminated. The publisher still has a valid grant from the three other joint authors and now shares a non-exclusive license with the terminating author.\textsuperscript{143}

Under §203 of the 1976 Act, the outcome would be substantially different. For a grant executed by two or more authors of a joint work, the grant can only be terminated by a majority of the authors who executed the agreement.\textsuperscript{144} In the example above, a single joint author would be unable to terminate the grant to the work unless two other joint authors agree to join in the notice of termination. The effect when a majority of authors who executed the grant terminate it, results in the grant being \textit{completely} terminated, including the grants by authors who did not join in the termination.\textsuperscript{145} No court has yet interpreted the implication of grants and terminations with respect to joint authors and it could, obviously, result in significant differences and

\textsuperscript{142} 17 U.S.C. § 304 (c)(1) (2002).
\textsuperscript{143} \textit{Id}.
\textsuperscript{144} 17 U.S.C. § 203 (a)(1).
\textsuperscript{145} See \textit{id}.
outcomes for individual authors of joint works.\textsuperscript{146} Another complication arises when discussion narrows around the meaning of a “grant” as understood in the 1976 Act. In a case currently before the United States District Court, the question asked is what is embodied in the meaning of a “grant” for purposes of termination by one author of a joint work?\textsuperscript{147} The defendant in the case is Victor Willis, a member of the musical group the Village People, which saw broad success in the 1970’s and 1980’s.\textsuperscript{148} Willis is seeking to terminate the copyright grants to the record labels for thirty-three musical compositions he co-authored.\textsuperscript{149} The record label, Scorpio, sought a judicial declaration that Willis cannot terminate the grants without a majority of the joint authors under §203.\textsuperscript{150}

The controversy surrounding the fact that the documents signed by Willis granting Scorpio his share of ownership in the work were separate and independent from the documents his co-authors signed.\textsuperscript{151} As Willis argues, the plain language interpretation of the statute states that “a grant executed by two or more authors of a joint work” requires the grant to be embodied in a single writing.\textsuperscript{152} In contrast, Scorpio argues that the “mere circumstance” that the writings for the grant are separate does not preclude the application of §203 requiring a “majority of the authors who executed it” in order to effectuate a termination.\textsuperscript{153} Scorpio argues the “grant” does not refer to the actual paper but the actual legal right that is transferred.\textsuperscript{154}

\textsuperscript{146} The preceding analysis was a prospective speculation. Nimmer, supra note 139.
\textsuperscript{148} Larry Rohter, A Village Person Tests Copyright, N.Y. TIMES, Aug. 16, 2011.
\textsuperscript{149} Id.
\textsuperscript{151} Id.
\textsuperscript{153} Amended Memorandum of Points in Opposition to Motion to Dismiss Complaint for Declaratory Relief, Scorpio Music S.C. v Willis, 2012 WL 1598043 (S.D. Cal. 2012) (No. 3:11-CV-01557).
\textsuperscript{154} Id.
If Willis succeeds he will have, at the very least, eliminated the record label’s exclusive rights to the Village People songs. An exclusive grant is far more valuable to a record label because the rights can only be obtained from one source. On the other hand, “[o]pportunities for strategic bargaining may also arise because producers and artists typically make grants to record labels in separate documents. Separate grantors can terminate separately and enjoy a non-exclusive license subject to accounting.” While the outcome of this litigation is still unclear, the implication of either outcome could send shock waves through the entertainment industry causing record labels and movie studios rushing to old file cabinets in order to determine whether other artists signed the same piece of paper, in what would then be considered the “same” grant.

D. Works Made for Hire

Another major exception to termination rights are works for hire. Both termination provisions explicitly state that “any work other than a work made for hire,” is terminable. The function of a work for hire is based on whether the work and surrounding circumstances fits within either of two statutory prongs. The first is if the party who creates the work is an

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156 Id at 134.
157 Subsequent to the writing of this note, the United States District Court in the Southern District of California resolved this case by granting a motion to dismiss by Willis viewing each grant as separately terminable. See generally Scorpio Music S.C. v Willis, 2012 WL 1598043 (S.D. Cal. 2012); see also Larry Rohter, A Copyright Victory, 55 Years Later, N.Y. TIMES, C1, Sept. 11, 2013.
159 A “work made for hire” is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwards, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a
employee of the company and the creation is within the scope of their employment, the work is considered a work for hire and the company is considered the author. The second prong allows a work for hire to fall within an enumerated category when the creator is not an employee of the company if three requirements are met: a work for hire must have 1) a written agreement 2) stating that the work is a work made for hire and 3) the work falls within one of the enumerated categories in the statute.\textsuperscript{160}

Works that fall within the statutory definition of a work made for hire are particularly valuable to many businesses, particularly the recording industry. Most record labels have recently learned to expect the grants to their most successful copyrights to be terminated thirty-five years from execution unless they can show that it fits within the work for hire exception. However, record labels face an uphill battle in maintaining ownership of the works under this exception because it is unlikely they will succeed in court in most cases.\textsuperscript{161}

Most record contracts explicitly state that the artist is an independent contractor and not an employee of the company.\textsuperscript{162} Though an artist could still be an employee notwithstanding a written agreement, the agency analysis in almost all cases would reveal that the artist was not an employee.\textsuperscript{163} If a record label was successful in claiming the artist is an employee, it would also face significant tax implications because of the likelihood that it did not pay employment tax, social security tax, etc. on behalf of those now-claimed “employees.”\textsuperscript{164}

The other option for record labels is to claim the work falls within one of the enumerated

\begin{footnotes}
\item[160] Id.
\item[161] See Bales, supra note 35, at 671.
\item[162] See, e.g., Gould, supra note 31, at 96.
\item[163] Id.
\item[164] Id. at 105 (“These subtleties should be kept in mind when applying the [work for hire] test in the recording industry context, since record labels do not pay taxes or benefits in connection with recording contracts.”).
\end{footnotes}
categories in the copyright statute. For many works, this is an attempt to fit a square peg into a round hole. Most of the works for a record label would be considered a sound recording and would not fall within the categories enumerated as a work made for hire.\footnote{Burrows, supra, at 123 (“Case law also supports the proposition that sound recordings are not a work for hire and should not be included on the list of enumerated categories.”).} Alternatively, and on an extremely fact intensive basis, record labels could claim the works are a collective work or part of a compilation.\footnote{Ryan Ashley Rafoth, Note, Limitations of the 1999 Work-for-Hire Amendment: Courts Should Not Consider Sound Recordings to Be Works-for-Hire When Artists’ Termination Rights Begin Vesting in Year 2013, 53 VAND. L. REV. 1021, 1042-43 (2000).} In those cases, if the work falls within the statutory exception, it would be immutably exempt from termination. Of course, the writing requirement would need to be met, but most recording agreements include standard clauses which easily meet this requirement.\footnote{Williams, supra, note 29.}

Obtaining these legal classifications of a work made for hire is extremely difficult and would likely need to be determined in a court of law with many dollars spent, but it could be well worth the money for a record label that wants to preserve its royalty rights to a successful copyrighted work.

The notion driving the works made for hire exception is that the company is the author and not the creator. One “rationale behind the doctrine recognizes the idea that if an employer pays an employee for the purpose of creating a work, the employer should reap the benefits of the payment,” by exploiting the created work.\footnote{Burrows, supra note 42, at 111.} Another argument is that the categories of works that are enumerated include many collaborators. “For example, collective works and audiovisual works both involve large numbers of contributors. Termination of copyrights for such works could lead to high transaction costs and co-authorship disputes that might effectively...
remove those works from the market."\textsuperscript{169} Many of the enumerated categories are of the type that would require many contributors and collaborators, and those contributors would have a claim of authorship in the work had it not been for the work made for hire designation.\textsuperscript{170}

The work for hire exception has been very beneficial for companies, but the single fact that sound recordings are not included in the enumerated categories of a work made for hire is frustrating for many within the music industry.\textsuperscript{171} Sound recordings were included in earlier drafts of the legislation but ultimately excluded from the final version of the 1976 Act. Some argue that they were distinguished because sound recordings are created with many fewer contributors that the other categories of enumerated works.\textsuperscript{172} Attempts to re-insert sound recordings as an enumerated category in the work made for hire provision were made in 1999. This insertion was successful, but ultimately failed after the insertion was amended just one year later.\textsuperscript{173}

\textit{Termination Rights as Federal Policy}

Copyright, and more broadly intellectual property, has been treated differently than any other area of law. Courts often bring in legal principles and concepts from contract law and property law as parallels in their judicial interpretation.\textsuperscript{174}

Similarly, copyright law is unique in that no other scheme of law permits an outright termination of a contractual agreement after thirty-five years simply on the desire to recapture

\textsuperscript{169} See Gould, \textit{supra} note 31, at 107.
\textsuperscript{170} \textit{Id.} at 102.
\textsuperscript{172} See Gould, \textit{supra} note 31, at 107.
\textsuperscript{174} Ringer, \textit{supra} note 28, at 188 ("There is an apparent conviction that copyright involves an element of personal creativity entitling an author to special consideration in his contractual dealings, together with a recognition that when most copyright bargains are made there is no way to judge the ultimate value or life of the work.").
the rights. Congress has made a “market based assumption,” claiming that this ability to terminate an agreement stems from the fact that the valuation of a copyrightable work is inherently impossible at the time of creation.175 It is arguable whether this should matter. Contractual agreements in industries such as the stock market carry the same, or more, uncertainty with respect to the future value of the item being bargained for; however, those circumstances do not permit such a termination of contractual rights. While investing in stocks is a risk/reward game, copyright authors get away with terminating their works when the value is higher than initially expected. The right to void an agreement is not reciprocal. Record labels are not able to ask for their advance back or cancel their deal if the first album by an author is a “flop.” Further cutting against termination rights is the fact that record labels are “assuming virtually all of the financial risk.”176

Congress has long had the preconceived notions of copyright valuation being difficult, but an analysis of copyrights in the new millennium renders those assumptions flawed and no longer valid.177 The legislative history does not lend much in terms of support with respect to the author’s second chance; the legislative record simply states that “[t]he renewal copyright established in the Act of 1831 and elaborated in the Act of 1909 is a unique form of property whose nature and theoretical basis are still unclear.”178 The argument was slightly stronger when the right of renewal was characterized by courts “as a ‘new estate’ or a ‘new grant’ rather than a mere continuation or extension.”179 But with the renewal term now replaced with a termination right, the reason for granting a second chance, through a termination of a grant of rights, is

175 Tropp, supra note 52, at 821-22.
176 Id.
177 Id. at 825.
178 Ringer, supra note 28, at 124.
179 Id.
Attempts to contract around the statutory termination provisions have not wholly been unsuccessful. Some courts have concluded that subsequent agreements extinguish the termination right. The courts reason that the effect embodied within the right, the ability for the holder to renegotiate the grant, has been accomplished through a new contract even if the termination itself was not completed. Opponents of the right of termination have objected particularly to its inalienability, arguing that no other type of intellectual property is subject to governmental interference with the freedom to contract. Is the perceived, if not actual, difficulty in accurately valuing copyrighted works enough to justify statutory preemption of contractual obligations or statutory restrictions on the freedom to contract? Is there a valid basis for termination rights at all? And what will become of copyright law and recording contracts as technological advances give authors the ability to exploit their works without a record label’s assistance?

**Conclusion**

Whatever the justification for an author’s right of termination, the ambiguity leaves authors, record labels, and studios scrambling for a legal trail to follow when determining who owns a copyrighted work, who may terminate the grant, when they may terminate, and what is required to terminate. As technology continues to advance, the need for copyright reform will continue to grow and inevitably result in another
reform of copyright laws.

A wave of new terminations will be effective this year, in 2013, which also create a new range of problems, including what will be done with terminated copyrights after they are reclaimed. It has been argued that many works are not valuable enough to justify termination after thirty-five years. However, those works that hold value after thirty-five years are some of the most valuable in the entertainment industry, and in a record label’s collection. Record labels have no choice but to move forward as the era of copyright termination shifts into full swing with artists terminating the best-selling songs of a past generation.