UIC
REVIEW OF INTELLECTUAL PROPERTY LAW

UNINTENDED REPERCUSSIONS: COPYRIGHT TERMINATION AND THE PUNITIVE EFFECT OF 17 U.S.C. §203(A)(3) ON THE RIGHTS OF CREATORS

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ABSTRACT

The termination provisions of the U.S. Copyright Act were designed for the primary purpose of giving creators a second opportunity to make remunerative transfers of their works at a fair bargained for exchange. In most situations, when a work is first created and shopped for a deal, for example with a publisher or recording company, the creator is in a disadvantaged bargaining position vis-à-vis the corporate entity that is negotiating to purchase or license the work. Subsequently, the deal terms that are consummated almost always weigh heavily in favor of the corporate entity. Congress, recognizing this inevitability, included termination provisions in the Copyright Acts. These provisions are manifested under the 1909 Act via the bi-furcated term, and under the 1976 Act via the termination window beginning with year 35 after the date of transfer. This article suggests that in spite of the statutory opportunity to seek termination, far too often, authors are missing out on these opportunities because they do not understand how copyright terminations work, or they learn of these opportunities after the window has closed for serving notice or accessing the reversion rights. If these termination and recapture rights were indeed provided for the purpose of leveling the playing field, the statutes need to be revised so as to prevent these united repercussions, i.e., the punitive effects of creators forever forfeiting their rights to terminate simply because they did not act quickly enough to access these rights. This article provides a historical framework, and a roadmap for how the statute can be revised so that the original intent is satisfied.

Cite as Loren E. Mulraine, *Unintended Repercussions: Copyright Termination and the Punitive Effect of 17 U.S.C. §203(a)(3) on the Rights of Creators*, 22 UIC REV. INTELL. PROP. L. 23 (2022).

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I. INTRODUCTION

Theory – a supposition or a system of ideas intended to explain something, especially one based on general principles independent of the thing to be explained.[1]

Practice – the actual application or use of an idea, belief, or method, as opposed to theories relating to it.[2]

Scholarship is often created either in support of a theory, to contradict a theory, or perhaps to add to the body of knowledge that studies a particular theory. On other occasions, scholarship is created to contrast the ways in which the theory or intent behind a particular law, statute or court ruling starkly contrasts with the effect that it has upon the intended beneficiaries. This is such an article.

This article argues that the language of section 203 of the Copyright Act of 1976 inadvertently creates an undue burden upon original authors, potentially resulting in punitive consequences.[3] Specifically, the restriction to a five-year window within which terminations must be exercised is unduly punitive to creators who may not be aware of their termination rights, let alone the strict window within which those rights must be exercised. The stated intent of Congress, as shown through the development of the legislative process, was to agilize the exercise of termination rights of authors to balance the negotiation power of authors with their licensees, which are often corporations that record, distribute, and publish the author's original creative works.[4]

Unfortunately, the termination provisions of the Copyright Act, while well intentioned, work better in theory than in practice.[5] The specific reasons for this conclusion will be discussed in this article. This article lays out the history and development of the statute and the legislative intent of the bi-furcated copyright term in the earlier statutes and the specific termination window under the life-plus term of the Copyright Act. This article first looks at a practical scenario that is being commonly

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[1] Oxford, *Theory*, OXFORD LEARNER'S DICTIONARIES, https://www.oxfordlearnersdictionaries.com/us/definition/english/theory?q=theory (last visited Nov. 11, 2022).

[2] Oxford, *Practice*, OXFORD LEARNER'S DICTIONARIES, https://www.oxfordlearnersdictionaries.com/us/definition/english/practice_1?q=practice (last visited Nov. 11, 2022).

[3] 17 U.S.C. § 203 (2022).

[4] House Report on Copyright Act of 1976, H.R. Rep. No. 94-176 (1976) at 124.

[5] *See* CDAS, *Copyright Termination: A Primer*, CDAS LEGAL BLOG (Jan. 18, 2017), https://cdas.com/copyright-termination-prime/. "While seemingly straightforward in concept, copyright termination is complex in practice."

repeated by authors who find themselves uninformed and/or unprepared to take advantage of the termination rights that are purportedly designed for their benefit. Following the establishment of that narrative, review the history of copyright law in the U.S., the language of the statute, and the legislative history supporting the thesis of this article will be analyzed. Finally, the article concludes with suggested changes to the language of the statute that would rectify these unintended repercussions.

II. THE STORY

The following practical story is loosely based on a real-life scenario, that is repeating itself among many artists:

Artist X has had substantial success in the recording industry over the past 40 years, writing iconic songs and taking his place among the most respected artists of his generation in his musical genre. Like many recording artists, Artist X was not well-versed, or even aware of the statutory provisions that allow him to terminate his copyright transfers and retrieve his works from the recording and publishing companies to which he has been signed. In mid 2022, during a casual conversation with a friend in the industry, Artist X was asked if he had filed terminations for his songs and master recordings. Artist X responds, "I'm not sure what that is – could you explain it to me?" After learning what copyright terminations are and how they work, he is enthusiastic about filing terminations on his works. He consults with a lawyer, and they begin to compile a list of the music catalog of Artist X. For the purposes of this example, we will focus on the seven albums he recorded prior to 2000 since the others (as of this writing) would not yet have entered into the 10-year maximum notice period. The list, as compiled includes the albums, release dates, termination window and notice window for each of the albums. Here is the status report on the works of Artist X:

Album	**Contract Date**	**Release Date**	**35-40 year termination window**	**2-10 year notice window**
1	1982	1982	2017-2022	2007-2020
2	1982	1984	2019-2024	2009-2022
3	1982	1986	2021-2026	2011-2024
4	1982	1989	2024-2029	2014-2027
5	1982	1992	2027-2032	2017-2030
6	1992	1995	2030-2035	2020-2033
7	1992	1998	2033-2038	2023-2036

As you can see, the artist has a problem. Artist X has already missed the window to give notice of termination for Album 1 and is in on the verge of missing the window to give notice of termination for album 2. Now remember, Artist X was not aware of the termination provisions and because of this lack of awareness, he has lost the opportunity to terminate the copyright transfer of his first album. This result is contrary to the legislative intent of making sure the terminations would be not only available to creators, but also the stated desire to eliminate the complexity, awkwardness, and unfairness of the renewal provisions.[6] Unfortunately, we instead have a statute that is complex, awkward, and has a high likelihood of operating in an unfair manner.

III. A BRIEF HISTORY OF COPYRIGHT – HOW DID WE GET HERE?

Under the authority of the U.S. Constitution, "the 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."[7]

The above constitutional provision appears straight forward and harmless enough. Under the authority of that provision, Congress has created, and from time to time, revised the federal statutes that govern the rights and responsibilities attached to the creation, ownership, exploitation, and transfer of intellectual property, such as patents, trademarks, and copyrights.[8] Each of these statutes provides protection for specific types of intellectual property.

Patents offer intellectual property protection for inventions, formulas and designs in the form of an exclusive right to make, use, sell, offer to sell, or import a patented invention anywhere in the United States for the patent's duration.[9] Compared with copyright, patents are harder to secure, more difficult to maintain, and are shorter in duration of term.[10] There are three types of patents: utility patents, plant patents, and design patents.[11] The current term for utility and plant patents is twenty years from the patent application date and the term for design patents is fourteen years from the date of the issuance of the patent.[12] After their terms, the patents become part of the

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[6] USCO, *General Guide to the Copyright Act of 1976*, USCO (1977) 1:1, https://www.copyright.gov/reports/guide-to-copyright.pdf .

[7] U.S. CONST. Art. I, § 8, cl. 8.

[8] *See* USCO, *A Brief History of Copyright in the United States*, USCO https://www.copyright.gov/timeline/ (last visited Nov. 11, 2022) (stating, "[c]opyright law in the United States has changed often since the Constitution granted Congress the power to provide protection to authors' creative works").

[9] GARY MYERS, PRINCIPLES OF INTELLECTUAL PROPERTY LAW 278 (2d. ed. 2013).

[10] MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 31 (3d ed. 2010).

[11] USPTO, *General information concerning patents*, USPTO (Mar. 14, 2018), https://www.uspto.gov/patents/basics/general-information-patents; *see also* Richard Goldstein, *The Difference Between Utility and Design Patents*, GOLDSTEIN PATENT LAW (2022), https://www.goldsteinpatentlaw.com/the-difference-between-utility-and-design-patents-made-simple/. ("There are three types of patents to consider: Utility patent, Design patent, and Plant patent.").

[12] Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994). This term is the result of the Uruguay Round Agreements Act of 1994 ("URAA"), which established the present term for patents sough after June 8, 1995. Prior to the URAA, the standard patent term was seventeen years from the date of patent issuance. Myers, *supra* note 9, at 341; *see also* 35 U.S.C. § 173 (2022).

public domain.[13] Unpatentable subject matter includes laws of nature, natural phenomena, abstract ideas, mathematical algorithms, and printed matter.[14]

In contrast to patents and copyrights, which are exclusively creatures of statute, the origins of trademark protection are in the common law.[15] Trademarks protect names, logos, slogans, and other brand identifiers.[16] Trademark law serves two purposes: protecting consumers from being confused or deceived about the source of goods or services in the marketplace and encouraging merchants to stand behind their goods or services by protecting the goodwill they have developed in their trademarks.[17] Unlike the limited term of protection for patents, trademarks can be protected indefinitely, provided the owner continues to use the mark in commerce and follows specific filing formalities.[18]

The term for copyright protection falls somewhere in between the very limited term for patents and the potentially perpetual term of trademarks. Under the Copyright Act of 1976, as amended by the 1998 Sonny Bono Copyright Term Extension Act, the general term for copyright protection is the life of the author plus 70 years.[19] Copyrights protect the original writings of an author with the subject matter being proscribed by the following categories:[20]

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.

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35 U.S.C. § 173 states "[p]atents for designs shall be granted for the term of fourteen years from the date of grant." *Id.* Unlike utility and plant patents, design patents were not extended under the URAA and are thus still governed by the prior law regarding the patent term. The utility patent term is therefore keyed to the issuance date of the patent, rather than to the application date.

[13] Richard Goldstein, *What Happens When a Patent Expires?*, GOLDSTEIN PATENT LAW (2022), https://www.goldsteinpatentlaw.com/what-happens-when-patent-expires/. ("After a certain number of years, your patent protection will expire…and it will become part of the public domain.").

[14] *Id.*

[15] Leaffer, *supra* note 10, at 35.

[16] *See* USPTO, *What is a Trademark?*, USPTO (Mar. 31, 2021), https://www.uspto.gov/trademarks/basics/what-trademark. "A trademark can be any word, phrase, symbol, design, or a comvbination of these things that identifies your goods or services. It's how customers recognize you in the marketplace and distinguish you from your competitors."

[17] MARY LAFRANCE, UNDERSTANDING TRADEMARK LAW 1 (2d ed. 2009)

[18] 15 U.S.C. § 1051 *et seq*. (2022). The Lanham Act provides a federal registration scheme for trademarks and service marks that are used in any commerce that Congress has the authority to regulate and provides an array of remedies against parties that infringe such registered marks.

[19] 17 U.S.C. § 302(a) (2022). 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.

[20] 17 U.S.C. § 102 (2022).

A. Copyright Protection in the Colonies

The Intellectual Property (IP) Clause of the United States Constitution has somewhat of a mysterious origin. The clause was not debated at the Constitutional Convention and received little scrutiny at the ratification debates.[21] However, the founding fathers understood the necessity for providing IP protection.[22] Inspired by the Statute of Anne, copyright protection in the colonies was originally unveiled through a patchwork of state statutes beginning in 1641 in Massachusetts.[23] Clause 9 of the Massachusetts Body of Liberties states: "No monopolies shall be granted or allowed amongst us, but of such new Inventions that are profitable to the Countrie [sp], and that for a short time."[24] Massachusetts granted the first U.S. patent in 1642 and the first American copyright in 1672.[25] While Massachusetts codified their IP statute in its first post-colonial constitutions, the other colonies continued to protect IP through an ad hoc system of special legislative acts and resolutions, all of which granted IP creators an exclusive right for a limited duration.[26] After John Ledyard authored *A Journal of Captain Cook's Last Voyage to the Pacific Ocean*, he petitioned the Connecticut General Assembly for copyright protection.[27] The Connecticut general assembly responded by enacting the first general colonial copyright statute.[28] A

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[21] Jacob R. Weaver, *The Forgotten History of the Intellectual Property Clause*, THE FEDERALIST SOC'Y (Apr. 4, 2021), https://fedsoc.org/commentary/fedsoc-blog/the-forgotten-history-of-the-intellectual-property-clause.

[22] Suiter Swantz, *The United States Constitution and Intellectual Property*, SUITER SWANTZ IP (Sept. 16, 2016), https://suiter.com/the-united-states-constitution-and-intellectual-property/.

> George Washington was a strong proponent for a patent system. In his first Annual Message to a Joint Session of Congress, he urged Congress to pass legislation on patents and copyrights. A few months later, the Patent Act of 1790 was signed into law on April 10, 1790, followed by the Copyright Act of 1790 signed into law on May 31, 1790. Washington signed the first United States issued patent on July 31, 1790 (U.S. Patent No. 1) granted to Samuel Hopkins for an improvement 'in the making of Pot ash and Pearl ash by a new Apparatus and Process.'

[23] 8 Anne. Ch. 21 (also cited as 8 Anne. Ch. 19), The Statute of Anne, also known as the Copyright Act of 1710, was an act of the Parliament of Great Britain passed in 1710, which was the first statute to provide for copyright regulated by the government and courts, rather than by private parties. The Massachusetts Body of Liberties, 1641, was the first legal code established by European colonists in New England and was composed of a list of liberties, rather than restrictions, and intended for use as guidance for the General Court of the time.

[24] *Id.*

[25] Weaver, *supra* note 21. Inventor Joseph Jenks Sr. was awarded a fourteen-year patent for the invention of a faster water-mill engine in 1642. The first American copyright was granted to John Usher, a Massachusetts printer in 1672.

[26] *Id.*

[27] WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 18 (1994).

[28] Noah Webster, *First General Copyright Law – Today in History: January 29*, CONNECTICUT HISTORY (Jan. 29, 2020), https://connecticuthistory.org/first-general-copyright-law-today-in-history/. All of the colonial statutes are reproduced in Copyright Enactments: Laws Passed in the United States. Since 1783, the Connecticut statute is reproduced. *Id.* Connecticut protected the works of authors of the other colonies, provided those colonies passed laws similar to Connecticut's. Georgia, Maryland, Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, and Rhode Island also extended reciprocal protection. The Maryland and Pennsylvania statutes had an extra twist on this principle, declaring that their statute did not go into effect unless "all and every of the

disjointed collection of copyright and IP statutes followed, with Delaware being the only colony not passing an IP statute.[29] The chart on the following page outlines the basic provisions of the statutes passed by the various colonies (the shaded boxes indicate the provision was consistent with the Statute of Anne):

States" passed similar laws. *Id.* at 6, 11. Since Delaware did not pass a copyright law, Maryland and Pennsylvania's copyright laws arguably never went into effect. *Compare with* G. Thomas Tanselle, *Copyright Records and the Bibliographer, in* 22 STUDIES IN BIBLIOGRAPHY 77, 84 (1969) (listing a number of registrations of title under both the Pennsylvania and Maryland statutes). Since Maryland and Pennsylvania passed their laws early on (1783 and 1784, respectively), one might expect they would accept registrations and only later determine, after all the states had had a chance to consider the matter, whether all the states had passed similar laws. Passage of the Constitution on September 17, 1787, with its grant to Congress of the power to provide for a uniform federal statute, and the subsequent enactment of the first federal law on May 31, 1790, rendered Maryland and Pennsylvania's possible wait-and-see approach moot.

[29] Patry, *supra* note 27, at 18.

COLONY	SUBJECT MATTER COVERED	TERM OF PROTECTION	RENEWAL TERM?	FORMALITIES	ADDITIONAL NOTES	REMEDIES	OTHER REQUIREMENTS
Connecticut	Books, pamphlet, maps, and charts	14 years	14 years	Filing with the Secretary of State		Forfeiture of all infringing copies and a fine of double their value.	The author was required to provide a sufficient number of copies at a "reasonable price."
Delaware	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Georgia	Books, pamphlets, maps, and charts	14 years	14 years	Filing with the Secretary of State		Forfeiture of all infringing copies and a fine of double their value.	The author was required to provide a sufficient number of copies at a "reasonable price."
Maryland	Books and writings	14 years	14 years		Registration required not as a prerequisite to protection, but to prevent innocent infringement	2 pence per printed sheet	
Massachusetts	Books, treatises, and other literary works	21 years		No provisions on registration		Minimum fine of pbp5 and maximum of pbp3,000	
New Hampshire	Books, treatises, and other literary works	20 years		No provisions on registration		Minimum fine of pbp5 and maximum of pbp1,000	
New Jersey	Books and pamphlets	14 years	14 years	Filing with the Secretary of State		Forfeiture of all infringing copies and a fine of double their value.	
New York	Books and pamphlets	14 years	14 years	Filing with the Secretary of State		Forfeiture of all infringing copies and a fine of double their value.	The author was required to provide a sufficient number of copies at a "reasonable price."
North Carolina		14 years		Filing with the Secretary of State		Forfeiture of all infringing copies and a fine of double their value.	The author was required to provide a sufficient number of copies at a "reasonable price."
Pennsylvania	Books and pamphlets	14 years	14 years	Filing in the prothonotary's office		Forfeiture of all infringing copies and a fine of double their value.	
Rhode Island	Books, treatises, and other literary works	21 years		No provisions on registration		Minimum fine of pbp5 and maximum of pbp3,000	
South Carolina	Books	14 years	14 years	Filing with the Secretary of State	Registration required not as a prerequisite to protection, but to prevent innocent infringement	1 pence per printed sheet	The author was required to provide a sufficient number of copies at a "reasonable price."
Virginia	Books and pamphlets	21 years		Filing with the clerk of the council		Forfeiture of all infringing copies and a fine of double their value.	

B. Federal Copyright Protection

When the U.S. passed the first Copyright Act in 1790, it closely mirrored the Statute of Anne as it included the initial term and renewal term.[30] The Statute of Anne effectively shifted the balance of power from the printers who had controlled copyrighted works prior to 1731, to the authors, who for the first time would be rewarded for their creations.[31] It also recognized the value of the public domain by limiting these rights to a specific number of years.[32] New books were protected for a term of fourteen years for authors and their assigned, plus a second term (i.e., a renewal term) of fourteen years.[33]

It should be noted that under U.S. copyright law, Congress provided copyright protection to creators to incentivize creation of works of value, specifically mentioning authors in the grant as opposed to publishers, distributors, and consumers of their works.[34] The following timetable outlines the progression of federal copyright law protection:

> **1787** – The Copyright Clause was presented by James Madison and Charles Pinckney on August 18, 1787. On September 5, the Copyright Clause was unanimously adopted by Conventional delegates. The U.S. Constitution was signed on September 17.[35]
>
> **1788** – The U.S. Constitution was ratified on June 21, 1788.
>
> **1790** – The Copyright Act of 1790 was enacted on May 31, 1790, as "An Act for the Encouragement of Learning, by securing the copies of maps, Charts And books, to the authors and proprietors of such copies during the times therein mentioned." This Act established a copyright term of 14 years.
>
> **1831** – The term was expanded to 28 years, with an option of a 14-year extension. This amendment expanded the "writings" definition to include musical compositions.

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[30] Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124 (1790). Signed into law by President George Washington on May 31, 1790. The Statute of Anne was the first act to directly protect the rights of authors. It did so by granting them the exclusive right to reproduce their intangible creations, rather than granting the right to a printer or bookseller as it had been in the past.

[31] Leaffer, *supra* note 10, at 4.

[32] *Id.*; *see also* Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1141 (1983).

[33] Leaffer, *supra* note 10, at 5. The second term would revert to the author if he lived to its commencement.

[34] MARC. H. GREENBERG, COPYRIGHT TERMINATION AND RECAPTURE LAWS – GOOD INTENTIONS GONE AWRY 5 (2016).

[35] Scott Bomboy, *On this day, the Constitution was signed in Philadelphia*, CONSTITUTION CENTER (Sep. 17, 2022), https://constitutioncenter.org/interactive-constitution/blog/today-the-constitution-was-signed-in-philadelphia.

1841 – *Folsom v. Marsh* established the common law principles of fair use (later codified into law).[36]

1853 – The "writings" definition was expanded to include dramatic performances.

1856 – The "writings" definition was expanded to include photographs.

1870 – Copyright registration was moved from the District Courts to the Library of Congress.

1886 – International Berne Convention Treaty was signed, establishing ownership for life of the author plus 50 years. (The U.S. would not become a signatory for another 102 years.)

1909 – The Copyright Act of 1909 was enacted. The new act extended the duration of copyright to 28 years, created a renewal term of an additional 28 years and expanded protection to music. Under the 1909 Act, an author was required to register the work, place notice on every commercially distributed copy, and publish this notice to the public for the copyright term to begin.

1976 – The Copyright Act of 1976 was signed.[37] The new act extended duration to the life of the author plus 50 years and extended works for hire to 75 years after publication or 100 years after creation (the first to occur). The Fair Use doctrine was codified. The 1976 Act also eliminated the formalities of copyright that had been present under the 1909 Act, i.e., registration, notice and general publication, and instead allowed protection to begin upon the fixation of a work in a tangible medium of expression.

1980 – The definition of "writings" was expanded to include computer programs.

1988 – The United States becomes a signatory to the Berne Convention and Treaty on October 31, 1988.

1990 – The "writings" definition was expanded to include architectural works.

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[36] *See generally* Folsom v. Marsh, 9 F.Cas. 342 (C.C.D. Mass. 1841). In *Folsom*, Judge Joseph Story set forth four factors that are in use today and were ultimately codified in the Copyright Act of 1976 in 17 U.S.C. § 107.

[37] *See* USCO, *Copyright Law in the United States (Title 17)*, USCO (May 2021), https://www.copyright.gov/title17/. The 1976 Act became effective on January 1, 1978.

1992 – The Copyright Renewal Act of 1992 was enacted. This Act made renewal automatic for any 1909 Act works that were still under their first term of protection (i.e., all works copyrighted between 1964-1977).

1998 – The Sonny Bono Copyright Term Extension Act (CTEA) was enacted. The CTEA extended the duration of copyright to a life plus 70 years term, added 20 years to all 1909 Acts that were still under protection, and added 20 years to the term of works for hire, pseudonymous, and anonymous works, which were now protected for 95 years from publication or 120 years from creation (the first to occur). Also in 1998, the Digital Millennium Copyright Act (DCMA) was passed on October 12. This Act amended U.S. Copyright law to address important parts of the relationship between copyright and the Internet.

2010 – The Satellite Television Extension and Localism Act of 2010 was enacted.

2018 – The Orrin G. Hatch-Bob Goodlatte Music Modernization Act was enacted. This Act facilitated the legal licensing of music by digital download services.

IV. TERMINATIONS… WHO, WHAT, WHEN, AND WHY?

§ 106 of the Copyright Act provides the owner of a copyright with six exclusive rights and allows the owner to transfer those rights to others.[38] Those exclusive § 106 rights are:

(1) To reproduce the copyrighted work in copies or phonorecords;
(2) To prepare derivative works based upon the copyrighted work;
(3) To distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
(4) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
(5) In the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
(6) In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[39]

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[38] 17 U.S.C. § 106 (2022).
[39] *Id.* at § 106(1)-(6).

Keeping in mind that these § 106 rights are "exclusive" to the author, it follows that anytime an artist enters a publishing or recording deal, they will be required to grant one or more of these rights to the corporate entity that is recording, publishing, and distributing their product.[40] After all, a record company needs the right to distribute, make copies or perform publicly to market an artist's music. A challenge arises, however, when a transfer is made while the artist is at a bargaining disadvantage, which is essentially all new artists entering recording or publishing deals.[41] This is where the remedial nature of copyright terminations may be available to give the artist a second bite at the apple.

The statutory language that governs termination of copyright grants is codified in the Copyright Act of 1976 in 17 U.S.C. § 304 (c) and (d) for pre-1978 works.[42] Section 203 of the same act governs works created on or after January 1, 1978.[43] Termination rights under § 304(c) and (d) govern works under the 1909 Act that are in their second renewal term as of January 1, 1978.[44] In other words, works that were already renewed under the 1909 Act. Section 304(c) allows the author and statutory successors to terminate transfers made before 1978 in order to recover the 39 years of the extended renewal term.[45] Section 304(d) was added by the 1998 CTEA, and allows authors to terminate in the event that they did not terminate their rights under § 304(c).[46] Section 304(c) and (d) ensure that any windfall resulting from extension should go first to authors rather than be given to the owner of the existing renewal rights.[47]

The mechanics of the § 304(c) and (d) termination rights can be broken down into six questions:[48]

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[40] 17 U.S.C. § 106 (2022). "Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following…."

[41] David Arditi, *How record contracts exploit musicians and how we can fix it*, THE TENNESSEAN (Nov. 24, 2020), https://www.tennessean.com/story/opinion/2020/11/24/kanye-west-right-record-labels-exploit-musicians-how-fix/6062315002/.

[42] 17 U.S.C. § 304(c)-(d) (2022).

[43] 17 U.S.C. § 203 (2022) (covering works created on or after January 1, 1978).

[44] 17 U.S.C. § 304(c)-(d) (2022).

[45] 17 U.S.C. § 304(c) (2022). This is at year 56, i.e., for works that were in their renewal term – after the first 28 years – under the 1909 Act. The original 19 years was added on when the 1909 Act's renewal term was extended from 28 to 47 years in 1962, as well as the additional 20 years that was added with the 1998 Sonny Bono Copyright Term Extension Act "CTEA." *Id.*

[46] USCO, *Notices of Termination*, USCO, https://www.copyright.gov/recordation/termination.html (last visited Oct. 25, 2022). This would be at year 75, but only if the author did not exercise termination rights at year 56.

[47] Lloyd J. Jassin, *Copyright Termination: How Authors (And Their Heirs) Can Recapture Their Pre-1978 Copyrights*, COPYLAW, https://www.copylaw.com/new_articles/copyterm.html (last visited Oct. 25, 2022).

> If you miss the opportunity to recapture the 39-year term of copyright (56 + 39 = 95), you can try again at the end of 75 years to recapture the final 20 years of copyright. This provision allows authors, artists, and composers who missed the opportunity to recapture the 19-year term extension provided under the 1976 Copyright, to reap the benefits of the 20-year windfall afforded under the 1998 Copyright Term Extension Act.

[48] Jeffrey P. Cunard & Brandon C. Gruner, *Statutory Termination Rights (Copyright)*, WESTLAW PRACTICAL LAW (2022), https://1.next.westlaw.com/Document/I49e8e46d8cca11e79bef99c0ee06c731/View/FullText.html?cont

1. *What are the rights that are covered?*
    a. Grants executed before January 1, 1978, by the author or his successors.
    b. Exceptions are works made for hire and dispositions by will.
2. *Who can terminate?*
    a. The author or a majority of authors of a joint work.[49]
    b. If the author is deceased, the spouse and children may terminate per stirpes.[50]
3. *When may termination take place?*
    a. § 304(c) concerns the additional 19 years and may be affected during the five-year period beginning at the end of 56 years from the date of copyright, or 56 years from January 1, 1978, whichever is later.
    b. § 304(d) concerns the additional 20 years provided by the CTEA of 1998; sec. 304(d) can only be used (1). if the termination rights under § 304(c) expired before the effective date of the 1998 CTEA, and (2) if the termination right provided in § 304(c) were not exercised; § 304(d) rights may be effected during the five-year period beginning at the end of 75 years from the date of copyright.
4. *How may termination be effected?*
    a. By serving written notice.
    b. Notice must comply with copyright office regulations.
    c. A copy of the notice must be recorded in the Copyright Office before the effective date of termination.
5. *What is the effect of termination?*
    a. All rights revert to those having the right to terminate.
    b. The exception is that derivative works prepared before termination may continue to be exploited under the terms of the grant.
    c. No new derivative works may be prepared after the termination date.
    d. Termination rights vest on the date notice is served.
6. *Who can make further grants?*

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extData=(sc.Default)&transitionType=Default&oWSessionId=670459b06f014919961b7cb24fd70d59&isplcus=true&fromAnonymous=true&firstPage=true&bhcp=1 (last visited Nov. 11, 2022).

[49] *Id.* A "majority of authors" is defined not by the total number of authors of a particular work, but by the total number of authors on the contract that grants the rights; *see also* Scorpio Music (Black Scorpio) S.A. v. Willis, 2012 WL 1598043 *1, *3 (S.D. Cal. 2012); ROBERT BRAUNEIS & ROGER E. SCHECHTER, COPYRIGHT A CONTEMPORARY APPROACH 772 (2d ed., West Academic Publishing 2018). In *Scorpio*, the Court held, in a case where joint authors of a work transfer their respective copyright interests through separate agreements, a single author may alone terminate his separate grant of his copyright interest in the joint work. The court found that the term "grant" refers to a single transaction whereby the rights of one or more joint authors was transferred, because the time for terminating a grant is calculated from the date of election of the grant.

[50] *Id.* The surviving spouse would own 50% of the termination right, and the surviving children would equally share the remaining 50% of the rights. As such, in the event that there is a surviving spouse, the "more than 50%" requirement would only be attainable if the surviving spouse and at least on surviving child agree to the termination."

a. Owners are tenants-in-common[51] who can authorize further grants if signed by the same number and proportion as are required to terminate.
b. The right granted is effective for all owners, even non-signers.

Both §§ 304 and 203 allow the author or author's heirs to terminate only if the procedures established by statute and regulation are followed.[52] It is not automatic, and if the author or the author's heirs fail to take the necessary steps within the statutory period, the transfer will continue in accordance with the original contract.[53] These restrictions serve to thwart the original stated intent of including a termination provision in the statute.

The right to terminate after a specified period under the 1976 Act is an unwaivable right which serves much the same purpose as the renewal term of the 1909 Act.[54] The renewal term, or bi-furcated term of the 1909 Act created a certain date, i.e., 28 years after the copyright date, wherein an original author automatically had the right to terminate a transfer.[55] However, under the 1909 Act, if the author or the author's heirs failed to terminate the transfer at the end of 28 years, the work did not continue to be the property of the grantee – instead, it entered the public domain.[56]

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[51] *Id.* Tenants-in-common – all tenants in common hold an individual, undivided ownership interest in the property. This means that each party has the right to alienate, or transfer the ownership of, her ownership interest. Joint Tenants – joint tenants share equal ownership of the property and have the equal, undivided right to keep or dispose of the property. Joint tenancy creates a Right of Survivorship. Tenants in the entirety – an interest in property that can be held only between a husband and wife in which each party has a right of survivorship over the property and which neither party can terminate without the consent of the other. A tenancy by the entirety is a form of concurrent ownership that can only exist between a husband and wife.

[52] *Id.*

[53] *See* 17 U.S.C. §§ 203(b)(6), 304(c)(6)(F) (2022).

[54] Leaffer, *supra* note 10, at 251-52.

[55] Stephen K. Rush, *A Map Through The Maze of Copyright Termination: Authors or Their Heirs Can Recapture Their Valuable Copyrights*, NIESAR & VESTAL LLP (2003) 2, https://nvlawllp.com/wp-content/uploads/2018/05/A-Map-Through-the-Maze-of-Copyright-Termination.pdf. "Under the 1909 U.S. Copyright Act, the term was doubled, copyright protection was divided into two separate terms: an original term of 28 years and a renewal term of 28 years for a total term of 56 years." The article further states:

> The drafters of the 1909 Act granted rights in the renewal term directly to the author of the work or his/her statutory designees, intending that the author or his/her heirs be given an opportunity to sell or commercially exploit the work on better terms than might have been secured when the author had little bargaining power with respect to unproven works.

[56] *See* Fred Fisher Music v. M. Witmark & Sons, 318 U.S. 643, 657 (1943) (holding that an assignment by an author of the renewal term, before that right had vested, was binding on the author). While the stated congressional purpose of the two-term copyright protection was to protect authors against unremunerative transfers, the goal was to a degree undermined by case law under the 1909 Act. This led to many deals being drafted for the author to agree to assign his renewal term in the initial contract. In order to sell their works, authors were often pressured into conveying their renewal rights in the second term. The dissent in this case by Justices Black, Douglas, and Murphy stated that the language and history of the copyright law in the dissenting opinion of the lower court demonstrates a congressional purpose to reserve the renewal privilege for the personal benefit of authors and their families. *See also* Miller Music Corp. v. Charles N. Daniels, 362 U.S. 373, 377, 378 (1960) (holding

This result aligned with the dual purpose of the copyright statute serving to incentivize creation of new works, while at the same time being mindful of the importance of a robust public domain.[57]

For as long as Copyright has been protected by federal statute, authors have had the opportunity to recapture rights which they may have assigned to other parties during the term of the Copyright.[58] The Congressional intent of creating such recapture rights was based on the reality that authors are typically in an unfair bargaining position in negotiating the value of their original works at the time the works are created.[59] While authors may believe they have written the great American novel, the next Billboard No. 1 single, or a film that will reach the box office success of *Black Panther*, there is no way to place an accurate value on the work until it has been received by the public.[60] In turn, the public will not be able to respond to the work until it is made available through commercial distribution channels.[61] These channels are mostly controlled by large corporations with enormous bargaining advantages over authors at the outset of any negotiation.[62]

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that when an assigning author died before the renewal vested, the right to the second term would vest in the statutory successors under sect. 24 of the 1909 Act). The result of this holding was that assignees of renewal rights sought to bind all the potential statutory successors, such as the author's spouse, by written contract (again contrary to congressional intent). Courts upheld these agreements as long as they were supported by adequate consideration and were written in express language granting rights in the renewal term. Fred Fisher and its progeny undermined the basic policy of the renewal grant, which was to protect the unequal bargaining position of many authors. It should be notes that there are a couple of very specific exceptions to the 1901 Act.

[57] Beth Daley, A Healthy Public Domain Generates Millions on Economic Value – Not Bad for 'Free', THE CONVERSATION (Mar. 25, 2015), https://theconversation.com/a-healthy-public-domain-generates-millions-in-economic-value-not-bad-for-free-39290. "Public domain works – those that exist without restriction on use either because their copyright term has expired or because they fall outside of the scope of copyright protection – create significant economic benefits…"

[58] Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124 (1790).

[59] Dana Halber, *Copyright Termination Rights: Giving Artists Their Second Bite at the Apple*, PIPSELF (Apr. 21, 2013), https://pipself.blogs.pace.edu/2013/04/21/copyright-termination-rights-giving-artists-their-second-bite-at-the-apple/:

> When Congress enacted the 1976 Act, which went into effect on January 1, 1978, the intent of Section 203 was to give authors and artists a 'second bite at the apple,' as it's commonly heard throughout the industry; a chance for artists and authors to recapture rights to their now successful works that they may have granted to an industry giant, like a record label or publishing house, for a nominal fee when they were in a position of little bargaining power.

[60] Pamela McClintock, *Box Office: 'Black Panther' Becomes Top-Grossing Superhero Film of All Time in U.S.*, THE HOLLYWOOD REP. (Mar. 24, 2018), https://www.hollywoodreporter.com/movies/movie-news/box-office-black-panther-becomes-top-grossing-superhero-film-all-time-us-1097101/. *Black Panther* opened in theatres on February 16, 2018. By March 24, 2018, it had eclipsed $1.237 billion in global ticket sales, and ultimately grossed well over $1.3 billion.

[61] Jon Ostrow, *How to Measure Success with Key Performance Indicators*, DISC MAKERS BLOG (Sep. 2, 2014), https://blog.discmakers.com/2014/09/how-to-measure-success-with-key-performance-indicators/ (discussing the key performance indicators to measure the success of a recording, including, sales, album sales, ticket sales, merch sales, and licensing/sync placement).

[62] Music and Copyright, *SME and WMG the Biggest Market Share Winners in 2021*, MUSIC & COPYRIGHT'S BLOG (Apr. 5, 2022), https://musicandcopyright.wordpress.com/2022/04/05/sme-and-wmg-the-biggest-market-share-winners-in-

With this disadvantage in negotiating power, a creator's work is rarely compensated at a level equal to its ultimate worth.[63] A work's value may significantly increase over time resulting from any number of factors.[64] For example, the work may be well received and commercially successful in the marketplace; the grantee may be exceptional in their efforts to promote the work; or additional opportunities for exploitation may exist because of new technologies such as online and mobile platforms that were not known or widely used at the time of the grant.[65] Statutory rights to terminate and recapture copyrights vary depending on the following factors: the date the copyright was secured; the identity of the original grantor; when did the transfer or license take place; and what specific exclusive rights were transferred or licensed.[66]

IP is unique in this manner, as other forms of property can often be accurately valuated prior to, or in the earliest stages of their creation. For example, the value of a new home can be accurately estimated before a shovel breaks through the fallow ground. Factors such as the square footage, number of bedrooms, bathrooms, materials, neighborhood, and comparables will provide the data needed to accurately reflect the value of the yet to be built home. Likewise, the commercial value of a pair of shoes or any article of clothing can be accurately estimated based on the materials, uniqueness of the style, scarcity of the brand, the name of the designer, etc. IP – including songs, books, films, and theatrical plays – enjoys no such advantage.[67] The bifurcated term of Copyright protection under the U.S. Copyright statutes in place from 1790 through 1977 provided an opportunity for the original author to recapture her transferred copyrights, and either keep them or regrant the licenses for much more lucrative fees.[68]

Under the original copyright statute and the first three major revisions to the statute, the opportunity for recapture was initially based on the length of the

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2021/#:~:text=SME's%20share%20of%20all%20recorded,%25%20(see%20Figure%202).&text=The%20smaller%20of%20the%20three,both%20digital%20and%20physical%20sales. Market share leaders for 2021 were Universal Music Group (26.8%), Sony Music Entertainment (18.5%), Warner Music Group (10.5%) and Independent labels (43.2%).

[63] Ken Liu, *A Second Bite at the Apple: Termination Rights for Writers*, SCIENCE FICTION & FANTASY WRITERS ASSOC. (Aug. 31, 2013), https://www.sfwa.org/2013/08/31/second-bite-apple-termination-rights-writers-introduction/. "Early in their careers, writers sometimes sign away valuable rights under less than favorable terms."

[64] Ostrow, *supra* note 61 (discussing the key performance indicators to measure the success of a recording, including, sales, album sales, ticket sales, merch sales, and licensing/sync placement).

[65] Cunard & Gruner, *supra* note 48.

[66] *Id*.

[67] *See* Jean Folger, *What You Should Know About Real Estate Valuation*, INVESTOPEDIA (Dec. 31, 2021), https://www.investopedia.com/articles/realestate/12/real-estate-valuation.asp; WIPO, *Valuing Intellectual Property Assets*, WIPO, https://www.wipo.int/sme/en/ip-valuation.html (last visited Nov. 11, 2022).

[68] Ass'n of Research Libr., *Copyright Timeline: A History of Copyright in the United States*, ASS'N OF RESEARCH LIBR., https://www.arl.org/copyright-timeline/ (last visited Oct. 30, 2022). The Copyright Act of 1790:

> granted American authors the right to print, reprint, or publish their works for a period of 14 years and to renew for another fourteen." "A major revision of the US Copyright Act was completed in 1909. The bill broadened the scope of categories protected to include all works of authorship and extended the term of protection to 28 years with a possible renewal of 28.

Copyright term.[69] Each of these statutes apportioned the term for copyright protection for an initial period of years followed by a possible renewal period.[70] The final year of the initial term also served as an opportunity for the original author to terminate any assignment or exclusive transfer of copyright and reclaim the work for the renewal term.[71] As discussed earlier, the Copyright Act of 1790, "An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books to the Authors and Proprietors of Such Copies," was modeled on the Statute of Anne (1710) and granted American authors the right to print, reprint, or publish their works for a period of 14 years and to renew for another 14 years.[72] Congress's goal in drafting this statute was to provide an incentive to authors, artists, and scientists to create original works by providing creators with a limited monopoly.[73] The limitation was put in place to stimulate creativity and the advancement of "science and the useful arts" through wide public access to works in the "public domain."[74] The initial fourteen-year term of the 1790 Act was renewable as follows:

> …if at the expiration of the said term, the author or authors, or any of them be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors, administrators or assigns, for the further term of fourteen years; Provided, He or they shall cause the title thereof to be a second time recorded and published in the same manner as is herein after directed, and that within six months before the expiration of the first term of fourteen years aforesaid.[75]

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[69] *Id*.

[70] *Id*.

[71] USCO, *Duration of Copyright*, USCO (2022) 2, https://www.copyright.gov/circs/circ15a.pdf. Under the 1909 Act, "[a] copyright lasted for a first term of 28 years from the date it was secured. The copyright was eligible for renewal during the final, that is, 28th year, of the first term."

[72] Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124 (1790). The Statue of Anne was enacted by the British parliament in 1709. The statute was An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the authors or purchasers of such Copies, during the Times therein mentioned. Named after Anne, Queen of Great Britain, this was the first copyright statute in the Kingdom of Great Britain, and the first full-fledged copyright statute in the world. It was enacted in the regnal year 1709-1710 and entered into force on April 10, 1710. The Statute of Anne, enacted by the British parliament, had granted publishers of books legal protection for 14 years with the commencement of the statute. It also granted 21 years of protection for any book already in print. At the expiration of the first 14-year copyright term, the copyright re-vested in its author, if he or she were still alive, for a further term of 14 years.

[73] LSU Libr., *Copyright Basics*, LSU LIBR., https://www.lib.lsu.edu/services/copyright/basics (last visited Nov. 11, 2022) (stating, copyright… "is a limited monopoly given to authors and creators of intellectual property to control uses of their work"). *See also Copyright Timeline*, *supra* note 68:

> It granted American authors the right to print, reprint, or publish their work for a period of 14 years and to renew for another fourteen. The law was meant to provide an incentive to authors, artists, and scientists to create original works by providing creators with a monopoly.

[74] *Copyright Timeline*, *supra* note 68.

[75] Copyright Act of 1790, Pub. L. No. 1-15, 1 Stat. 124 (1790).

A fair amount of this initial act was dedicated to administrative functions and requirements such as filing and registration.[76] However, no further discussion is dedicated to renewal, and there is no mention of termination, likely because the renewal period served as a *de facto* opportunity for termination of any grant of copyright.[77]

The 1831 revision of the Copyright Act extended the term of protection to 28 years with no change to the 14-year extension.[78] This revision also added musical compositions to the list of statutorily protected works, specifically for reproductions of compositions in printed form (the public performance right was not yet recognized).[79] The statute of limitations for copyright actions was also extended from one year to two years.[80] Among the reasons given by Congress for the extended term was to give American authors the same protection as those in Europe.[81] The extension applied to both future works and those works still enjoying copyright protection.[82]

The 1870 revision made no changes to the term of protection.[83] Its major purpose was to move the administration of copyright registrations from the individual district courts to the Library of Congress Copyright Office.[84] In 1886, the Berne Convention, which is arguably the most important international treaty governing copyright law, was enacted.[85] However, the U.S. did not join the Berne Convention until 1988.[86]

The 1909 revision of the Copyright Act broadened the scope of categories protected to include all works of authorship and extended the term of protection to 28 years with a possible renewal of 28 additional years.[87] The record indicates that as Congress was drafting the 1909 Act, they took great efforts to address the difficulty of balancing the public interest with proprietor's rights:

> The main object to be desired in expanding copyright protection accorded to music has been to give the composer an adequate return for the value of his composition, and it has been a serious and difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests.[88]

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[76] *Copyright Timeline*, *supra* note 68.

[77] *Id*.

[78] Copyright Act of 1831, 4 Stat. 436 (1831).

[79] *Id*.

[80] *Id*.

[81] *Id*.

[82] *Id*.

[83] Copyright Act of 1831, 4 Stat. 436 (1831) at 1870 (Revision of Copyright Act).

[84] *Id*.

[85] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221, ART. 23 [hereinafter Berne Convention]. The Berne Convention provided for mutual recognition of copyright between sovereign nations and promoted the development of international norms in copyright protection.

[86] Berne Convention Implementation Act of 1988, H.R. 4262, 100th Cong. § 3 (1988).

[87] Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909).

[88] Renewal of Copyright, H.R. Rep. No. 2222, 60th Cong. § 7 (1909).

While the original statute of 1790 was followed by major revisions of the Act implemented in 1831, 1870, and 1909, it was the 1976 Act that first eliminated the bifurcated term of protection.[89] The 1976 Act preempted all previous copyright law and extended the term of protection to life of the author plus 50 years, with works for hire being protected for 75 years from publication or 100 years from creation, whichever expired first.[90] As the U.S. was preparing to join the Berne Convention, the transition from a bifurcated term of years, to one based upon the life of the author plus an additional 50 years was among the changes Congress implemented in order for the U.S. to come within its requirements.[91] The other major changes between the 1909 and 1976 Acts stimulated by the Berne Convention included abolishing all formalities to copyright protection, namely copyright registration, notice, and general publication, all of which were required for copyright protection under the 1909 Act.[92] These formalities were replaced with the singular requirement that the work must be fixed in a tangible medium of expression. § 102 of 1976 Act states:

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[93]

As the new statute relates to copyright termination, with the bifurcated term being eliminated, it was necessary to provide for a new benchmark date for the termination of copyright transfers.[94] The old statute had a neat cut off point – the end

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[89] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

[90] 17 U.S.C. §106 (2022). In 1998, with the passage of the Sony Bono Copyright Term Extension Act (CTEA), the term for protection was expanded to life of the author plus 70 years, with works for hire being expanded to 95 years from publication or 120 years from creation, whichever expired first. The CTEA also added 20 years to the term of all works that were still under copyright protection at the time of the statute's enactment, e.g., 1909 Act works that were still under copyright protection saw their terms expanded by 20 years to a possible maximum of 95 years instead of 75 if all renewals had been filed. The 1976 Act also implemented additional protections for authors and a codification of the fair use defense and first sale doctrine. The 1976 Act covered scope and subject matter of works covered, exclusive rights, copyright term, copyright notice and copyright registration, copyright infringement, fair use and defenses, and remedies to infringement. The new act also provided protection to unpublished works.

[91] WIPO, *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WIPO, https://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Nov. 11, 2022).

[92] *Id*.

[93] 17 U.S.C. §102(a) (2022) (stating works of authorship include the following categories: 1) literary works; 2) musical works, including any accompanying words; 3) dramatic works, including any accompanying music; 4) pantomimes and choreographic works; 5) pictorial, graphic, and sculptural works; 6) motion pictures and other audiovisual works; 7) sound recordings; and 8) architectural works).

[94] USCO, Notices of Termination, USCO, https://www.copyright.gov/recordation/termination.html (last visited Nov. 11, 2022). "Grants may only be terminated during a specific statutory window of time and must specify the date that the termination goes into effect. The effective date must fall within a five-year 'termination period,' which is based on factors set forth in sections 203, 304(c), or 304(d), as applicable."

of the initial term – upon which to build the author's opportunity to terminate.[95] With the new term having no such natural cutoff point, Congress endeavored to create a similar point at which the author could recapture her rights. The codification of these rights can be found in § 203 of the Copyright Act of 1976, which states:

> 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.[96]

As stated in the introduction, this article argues that the language from the above section inadvertently creates an undue burden upon original authors that has potentially punitive consequences. The specific language at issue reads as follows:

> 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.[97]

Under 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.[98]

V. WHAT WAS THE LEGISLATIVE INTENT?

It is imperative to look at not only the final statute, but also the legislative intent of the Congress as the law was being crafted. The statutory termination and recapture provisions of the statute aim to rectify what Congress perceived as a bargaining imbalance. It allows authors or their statutory successors an opportunity to reap the enhanced or new value of the work by renegotiating the existing grant with the same grantee on more favorable terms. It can also be done by entering a new and presumably more advantageous arrangement with third parties.[99]

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[95] Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909) at § 13.

> The proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright.

[96] 17 U.S.C. § 203(a) (2022).
[97] 17 U.S.C. § 203(a)(3) (2022).
[98] 17 U.S.C. §203(b) (2022).
[99] Cunard & Gruner, *supra* note 48.

In the years leading up to the passing of the 1976 Act, Copyright Register Barbara Ringer noted the importance of protecting author's rights during her testimony at the Copyright Law Revision Hearings, stating:

> There is another provision which I am doubtful anyone will raise as an issue, but I might mention in the context of the general content of the bill. There are reforms that are of benefit to authors and artists with respect to ownership, in addition to the longer term, and one of the most notable of these is in section 203 of the bill.[100] Ms. Ringer continued: Instead of the present complex and rather arbitrary and capricious renewal provisions, it allows an author or his beneficiaries to re-do a bad deal. In effect the present law was intended to accomplish that result but has been most imperfect in doing this.[101]

Ultimately, when the statute was completed, it provided a compromise in several ways instead of the full-throated protection of authors rights. One of those compromises was instead of the termination being automatic, as it had been at the end of 28 years under the 1909 Act, a transfer or license under § 203 could be terminated only by means of an advance notice within specified time limits and under specified conditions.[102] In her testimony at the 1974-75 hearings, Ms. Ringer defended the compromised language of the statute and stated that it was her opinion that authors would be much better off than they were under the 1909 Act.[103] Even with her optimistic view of the statutory changes, it is noteworthy that she referred to the language of chapter 2, particularly section 203, as "labyrinthine provisions."[104] Indeed, labyrinthine is a suitable description of the statutory language.

So how does this statute potentially have punitive effects on original authors?

The 1976 House Report states that the provisions of § 203 are based on the premise that the reversionary provisions of the 1909 Act on copyright renewal.[105] It also states that 17 U.S.C. § 24, should be eliminated, and that the proposed law should replace those provisions with language that safeguards author against unremunerative transfers.[106] In the 1977 Report from the Copyright Office, *General Guide to the Copyright Act of 1976*,[107] these definitive words were stated:

> It is generally acknowledged that during the early stages of the revision effort, "the most explosive and difficult issue" concerned a

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[100] *Copyright Law Revision*, *Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary*, 94th Cong. 1 (1975) (statement of Barbara Ringer).

[101] *Id.*

[102] Greenberg, *supra* note 34, at 23.

[103] *Copyright Law Revision*, *supra* note 100.

[104] *Id.*

[105] Copyright Law Revision, H.R. Rep. No. 94-1476, 94th Cong. § 2 (1976) at 124-28.

[106] ROBERT A. GORMAN, ET AL., COPYRIGHT CASES AND MATERIALS 450 (8th ed. 2011). 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. Section 203 reflects a practical compromise that will further the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.

[107] *See* USCO, *General Guide to the Copyright Act of 1976*, USCO (1977) 6:1, https://www.copyright.gov/reports/guide-to-copyright.pdf.

> provision for protecting authors against unfair copyright transfers. The aim was to protect authors against unremunerative transfers and to get rid of the complexity, awkwardness, and unfairness of the renewal provision. As both the House and Senate reports note, the problem stems from the unequal bargaining position of authors and from the impossibility of determining a work's value until it has been exploited.[108]

Discussing the potential impact of section 203, noted author and critic Elizabeth Janeway, representing the Authors League of America, noted:

> The termination clause is one of the most important terms in the Bill. Like the present renewal clause, its purpose is to safeguard the author against being compelled to transfer his rights for the entire copyright term. Often these transfers deprive him, and his family, of income from uses of a work during the latter part of its copyright…this clause represents a compromise between those concerned with the problem.[109]

During these same hearings, Tom Mahoney of the Society of Magazine Writers, agreed with Ms. Janeway's statement and said the following:

> So, too, we hail the prudent provisions of §§203 and 304(c) of this bill, limiting the duration of an author's assignment of his rights to a period of thirty-five years. Again, we feel confident that other authors' organizations will have more to say on this subject thoroughly coincident with our views. We content ourselves, therefore, by saying that, though no other provisions of this bill have, in the years of study of which is the product, been more hotly debated between authors and users, the resulting harmonization and compromise of their conflicting views is as statesmanlike as it is necessary.[110]

Even prior to the 1976 Act, there was clear intent to protect authors with the renewal term provisions of the 1909 Act.[111] In 1962, reflecting on the impetus of having a renewal term under the 1909 Act, *The Copyright Law Revision Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law* stated,

> The primary purpose of [the reversionary provision] was to protect the author and his family against his unprofitable or improvident disposition of the copyright. The renewal copyright was intended to revert to them so that they could negotiate new contracts for the further exploitation of the work."[112]

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[108] *Id.*

[109] *Copyright Law Revision*, *supra* note 100 (statement of Elizabeth Janeway).

[110] *Id.* (statement of Tom Mahoney).

[111] Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909).

[112] House Comm. Print, *Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, U.S. GOV. PRINTING OFF. (1961) 53, https://www.copyright.gov/history/1961_registers_report.pdf.

But is the statute, as currently written achieving its goal? In too many ways, it is failing miserably. A review of the congressional hearings held prior to the creation of the 1976 Act reveal there were legitimate concerns regarding the copyright renewal process under the bifurcated term of the 1909 Act.[113] Chief among those concerns were the complicated administrative process, the cost of renewals – particularly for artists with many original works, and the ongoing problem of authors or their heirs missing out on the renewals because they were either unaware of the deadlines or administrative requirements.[114] Witnesses who testified to these concerns spoke positively about the potential change to the life-plus 50 terms because of its elimination of these challenges.[115] For example, Elizabeth Janeway testified that many authors missed out on their renewal because of either ignorance or inadvertence, while others were confounded by the high cost of renewal with some of them having numerous works that were due for renewal.[116] Likewise, James Blish, Vice President of Science Fiction Writers of America, testified that the requirements of the renewal process represented a considerable expense, and "an even more considerable nuisance."[117] Mr. Blish, when testifying about the common occurrence of authors losing their renewal term because of failure to satisfy administrative requirements stated, "…it has happened in the past, and I am sure it will happen in the future, that authors have lost very considerable properties; either through their own inattention or, more seriously, through the inattention of their heirs."[118] Their testimony was specifically aimed at the transition from the renewal process under the 1909 Act to a life-plus term that would not require renewal.[119] Ms. Janeway and Mr. Blish's concerns are directly applicable to the concerns presented by this article regarding the current requirements for copyright termination under the 1976 Act – that is, the cost of the process, and perhaps more urgently, the administrative complications and requirements, i.e., the strict 5-year window and 2–10-year notice requirements.[120]

Not all parties would agree that there is a problem. Some would say that it is the responsibility of the artist to keep up with the law and know the status of their works or that recordings should be deemed works for hire and thus not subject to termination.[121] Others would say there should be no right to recapture at all.[122] In fact, major record labels throughout the U.S. are going to great lengths to avoid the legal

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[113] *Id*.

[114] *Id*.

[115] *Copyright Law Revision*, *supra* note 100 (statement of Elizabeth Janeway), at 51.

[116] *Id*.

[117] *Id*.

[118] *Id*.

[119] *Id*.

[120] *Copyright Law Revision*, *supra* note 100 (statement of Elizabeth Janeway), at 51. The author has worked pro bono on a copyright termination for an ailing songwriter who composed a successful song and now is faced with major health issues and virtually no income. The challenge of handling a matter like this one for a songwriter with 10 or 20 hit songs would be cost prohibitive for the filing fees alone. These requirements include the strict five-year window and two-to-ten-year notice requirements.

[121] Bob Donnelly, *Everything You Need to Know About Copyright Reversions*, 1 ST. JOHN'S ENT. ARTS & SPORTS L.J. 1, 3 (2012).

[122] *Copyright Law Revision*, *supra* note 100 (statement of Elizabeth Janeway), at 51.

requirement of returning masters to artists who have filed copyright terminations for sound recordings.[123]

This issue is seen in *Waite v. UMG Rec.*.[124] *Waite* is a class action involving recording artists whose albums were released by predecessors in interest of defendant UMG.[125] Artists signed in the 1970s and 1980s that granted copyright in their works to UMG's predecessor recording companies.[126] These grants allowed those companies to market, distribute, and sell the artists' sound recordings.[127] While each member of the class filed termination notices, UMG disputed the validity of those terminations.[128] The plaintiffs argued that UMG infringed on the artists' copyrights by continuing to market and sell the recordings after the effective date of termination passed.[129]

Regarding the recordings whose effective dates of termination have not yet passed, the plaintiffs sought a declaratory judgment of certain legal rights and duties of the parties, as well as an injunction restraining the defendant from continuing to deny and disregard the termination notices.[130] UMG filed a motion to dismiss, arguing that the claims were barred by the Copyright Act's three-year statute of limitations because the plaintiffs were put on notice of an authorship and ownership dispute when they signed their contracts in the 1970s and 1980s.[131] The district court denied UMG's motion, finding that "it is impossible for there to be a legally cognizable infringement claim until a termination right vests, a valid and timely termination notice is sent, is ignored, and the copyright's grantee continues to distribute the work."[132] Furthermore, the court explained that the

> 'explicit purpose of Section 203 reinforces the conclusion that plaintiffs' copyright claims could not have accrued upon the signing of their contracts' and that 'authors needed statutory protection '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.'[133]

Waite has not reached a final adjudication, however the district court's ruling in favor of the plaintiffs on the motion to dismiss noted the recurring theme of the unequal bargaining power of the parties falls squarely in line with the statutory intent that termination rights were created to benefit authors.[134]

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[123] Donnelly, *supra* note 121, at 3.
[124] Waite v. UMG Rec., 450 F.Supp. 3d 430, 432 (S.D.N.Y. 2020).
[125] *Id*.
[126] *Id*.
[127] *Id*.
[128] *Id.* at 433.
[129] *Waite*, F. Supp. 3d at 433.
[130] *Id*.
[131] *Id*.
[132] *Id*. at 436.
[133] *Id.* 438.
[134] *Waite*, F. Supp. 3d at 432.

VI. How Do We Fix This Problem?

A. Termination Language under Section 203

As Congress considers the next revision of the Copyright Act, there is an opportunity to fill in the gaps and address many issues that exist with the current statute.[135] The language of 17 U.S.C. §203 (a)(3), is primed for revision.[136] As discussed earlier, the legislative aim of the termination provision was to protect authors against unremunerative transfers and to get rid of the complexity, awkwardness, and unfairness of the renewal provision.[137] Intent notwithstanding, the current statute is complex, awkward, and arguably unfair to creators.[138]

Suggested revised language for §203(a):

(3) Termination of the grants may be effected at any time after the end of thirty-five years from the date of execution of the grant;
(4) Deleted

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[135] Amy Gilbert, *The Time Has Come: A Proposed Revision to 17 U.S.C. § 203*, 66 Case W. Res. L. Rev. 807, 809 (2016). "The major issues stem from the overbroad inalienability of the provision and the far too expansive notice requirement."

[136] *Id.*

[137] *Id.*

[138] 17 U.S.C. § 203(a) (2022) (stating in pertinent part):

> (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 (10 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).

B. Revising the Work for Hire Language

In addition to the language changes in the requirements for termination, an additional change that would assist in the stated goal of protecting authors involves the work for hire loophole. According to the House Report of 1976, the right of termination would not apply to "works made for hire," which is one of the principal reasons the definition of that term assumed importance in the development of the bill.[139] § 101 of the Copyright Act of 1976 provides the definition for a work made for hire and creates a mechanism whereby authors would not be considered owners of these works.[140] Under the first subdivision of this provision, when a work is created by an employee within the scope of employment, it is presumed to be made for hire unless the parties agree otherwise in a written instrument.[141] This portion of the statute does not necessarily need revision. However, the second provision has proven to be a loophole through which the unbalanced bargaining position of creators has arguably been unduly exploited by their corporate contractual partners.[142] Subdivision 2 applies to specially commissioned works that fall within one of the nine enumerated categories of works.[143] The fact that these works are immune from termination rights again contradicts the stated intent of copyright protection, that is, to incentivize authors to create more works and thereby enrich the public.

One of the compromises in creating the termination provisions was in this work for hire language.[144] Ms. Ringer noted that achieving compromise on the changes to the doctrine of work made for hire was "extraordinarily difficult to achieve."[145] The right of termination would not apply to "works made for hire," exempting works prepared by an employee within the scope of their employment and certain works prepared on special order or commission.[146]

The result of this loophole is that those with the financial advantage, and the position of power in negotiation (i.e., corporations such as record companies) are

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[139] Copyright Law Revision, H.R. Rep. No. 94-1476, 94th Cong. § 2 (1976) at 124-28.

[140] 17 U.S.C. §101 (2022).

> (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.

[141] Leaffer, *supra* note 10, at 187.

[142] Mark Fowler, *Cultivating a Healthy Loathing for "Work Made for Hire" Agreements*, RIGHTS OF WRITERS (May 26, 2011), http://www.rightsofwriters.com/2011/05/cultivating-healthy-loathing-for-work.html:

> The 'work made for hire' clause is the bete noire of freelance writers. While the clause is frequently very unfair to authors, it is not unfair in all circumstances; it's never your friend, but there are times when it is not necessarily your enemy.

[143] 17 U.S.C. § 101 (2022).

[144] *Copyright Law Revision*, *supra* note 110, at 1889.

[145] *Id*.

[146] *Id*. at 2079.

systematically proceeding as a matter of business operation to secure as much of the authors' creations as works made for hire.[147] This allows those in power to avoid the termination rights that the statute provides to authors.[148] This is not unlike the circumvention that occurred under the 1909 Act after *Fred Fisher Music v. M. Witmark & Sons* and *Miller Music Corp. v. Charles N. Daniels*.[149] In *Fisher*, an assignment by an author of the renewal term, before that right had vested, was held to be binding on the author.[150] This holding, in conflict with the stated congressional purpose of the two-term copyright, led to most deals being drafted for the author to assign his renewal term in the initial contract.[151] To sell their works, authors were pressured into conveying their renewal rights in the second copyright term.[152] This holding was further expanded by *Miller*, where the Supreme Court held that when an assigning author dies before the renewal vested, the right to the second term vests in the statutory successors under § 24 of the 1909 Act.[153] The result *Miller* was that assignees of renewal rights sought to bind all the potential statutory successors, such as the author's spouse, by written contract, again contrary to congressional intent.[154] *Fred Fisher* and its progeny undermined the basic policy of the renewal grant, which was to protect the unequal bargaining position of many authors.[155]

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[147] Morris Music Law, *Work For Hire Contract Basics and Services*, MORRIS MUSIC LAW, PC, https://www.morrismusiclaw.com/work-for-hire (last visited Nov. 11, 2022). "A work for hire contract is used in almost all music recording projects to ensure that a label (or a DIY artist) owns everything created as a result of the services of others involved in the recording process such as session musicians, producers, engineers, mixers, and masterers." *Id.*

[148] *See generally* USCO, *Works Made for Hire*, USCO (2021), https://www.copyright.gov/circs/circ30.pdf.

[149] *See generally* Fred Fisher Music v. M. Witmark & Sons, 318 U.S. 643 (1943); Miller Music Corp. v. Charles N. Daniels, 362 U.S. 373 (1960).

[150] *Fred Fisher*, 318 U.S. at 643.

[151] *Id.* at 663. (Black, J., Douglas, J., and Murphy, J. dissenting) (stating in part, the analysis of the language and history of the copyright law in the dissenting opinion of Judge Frank in the court below, demonstrates a Congressional purpose to reserve the renewal privilege for the personal benefit of authors and their families).

[152] Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright Law's "Inalienable" Termination Rights*, 57 J. OF THE COPYRIGHT SOC'Y 799, 805 (2010).

> What *Fisher* permitted under the 1909 Act, Congress expressly forbade in the amended legislation. In 1961, the Copyright Office submitted a comprehensive study of copyright law to Congress so that it might revise the 1909 Act. The report noted that the 'reversionary feature of the present renewal system has largely failed to accomplish its primary purpose.'

[153] *Miller*, 362 U.S. at 374.

[154] Leaffer, *supra* note 10, at 239. Courts upheld these agreements so long as they were supported by adequate consideration and were written in express language granting rights in the renewal term.

[155] *Fisher*, 318 U.S. at 643; *Miller*, 362 U.S. at 373. The rationale behind the legislation was to "safeguard authors against unremunerative transfers" and improve the "bargaining position of authors" by giving them a second chance to negotiate more advantageous grants in their works after the works had been sufficiently "exploited" to determine their "value." *Id. See also* Copyright Law Revision, H.R. Rep. No. 94-1476, 94th Cong. § 2 (1976) at 124; House Report on Copyright Act of 1976, H.R. Rep. No. 94-176 (1976) at 124. Congress sought to foster this purpose by permitting an author's heirs to use the increased bargaining power conferred by the imminent threat of statutory termination to enter into new, more advantageous grants.

VII. CONCLUSION

The stated purposes of copyright protection include encouraging the creations of new works of authorship by providing limited monopolies to authors, wherein they may exploit their work; providing a mechanism wherein licensees may expand the market for these works and benefit from their investment; and protecting the public by way of a robust public domain.[156] With the inherent imbalance of negotiation power between authors and publishers or recording companies, the opportunity for an author to have a second bite at the apple is theoretically achieved through the language of the termination provisions of the copyright statute.[157] Unfortunately, the current language of the § 203 too often creates an illusory promise of that second opportunity for authors to reap the benefits of their creative works. As evidenced by the legislative history during the creation of the 1976 Act, and the history of the Act itself from 1790 to the present day, an illusory promise was never the intent of the statute.[158] As Congress reimagines the copyright laws, termination of transfer is an area that is ripe for a major revision. The most logical starting point for this revision would be to eliminate the complex maze of requirements for terminations and allow transferred works to automatically terminate as a matter of law after a specified number of years. The result would satisfy the original legislative goals of the statute and would allow authors to truly reap the fruits of their labors.

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[156] Leaffer, *supra* note 10, at 8.

[157] Dana Habler, *Copyright Termination Rights: Giving Artists Their Second Bite at the Apple*, PACE INTELL. PROP., SPORTS & ENT. L. F. (Apr. 21, 2013), https://pipself.blogs.pace.edu/2013/04/21/copyright-termination-rights-giving-artists-their-second-bite-at-the-apple/.

[158] Dylan Gilbert, *It's Time To Pull Back the Curtain on the Termination Right*, PUBLIC KNOWLEDGE (Dec. 5, 2019), https://publicknowledge.org/its-time-to-pull-back-the-curtain-on-the-termination-right/.

> Unfortunately, many artists and creators appear unable to exercise what is supposed to be an inalienable right. Court records, academic studies, and press reports all point to dysfunction within the termination right regime. The right is complex to execute, and that has allowed problems to take root as artists struggle to fulfill obscure eligibility, timing, and filing formalities which together create significant hurdles that are difficult (if not impossible) to overcome without expensive legal representation. Even when artists meet their statutory obligations, they can find themselves entangled in lengthy and expensive litigation to resolve ambiguities in the law and its application, ranging from judicial 'work for hire' determinations to disputes over the statute of limitations. Artists shouldn't have to become legal experts or hire pricey lawyers just to benefit from their work.