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A Second Bite of the (Copyright) Apple for Songwriters, Recording Artists and Other Creators [1]

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Mulligan, Do-Over, Ctrl-Z: these terms signify an opportunity to undo something and start afresh. For songwriters and other creators (?authors? in copyright terminology), the Copyright Act of 1976 provides just such a do-over, giving authors ?termination rights? ? the opportunity to recapture rights to their creative works that they previously transferred to someone else. For example, a songwriter who signed a contract granting rights to a catalog of songs to a music publisher can regain those rights, even if the contract said the assignment was forever. Termination allows creators to recapture economic, creative and administrative control over their works, gaining the chance to strike better deals or manage their works in ways tailored to today?s market.

Termination is not an instant do-over. This second chance kicks in some 35 years after the original transfer (after 55 years for pre-1978 transfers), and creators must comply with technical notice provisions and exercise their rights within a defined window of time, or the termination right is lost forever. While 35 years is a long time, the recaptured time can be far longer, since copyright for individual authors typically lasts for the life of the author plus 70 years. (Length of copyright can be a complex matter.)

This article outlines key issues to help creators (or their heirs) understand the basics; it is not intended to provide legal advice, and you are advised to seek expert assistance with termination rights. The simplest ?who, what, when, why and how? of termination rights is complicated, but creators seeking to maximize the financial return from their creative works need some understanding of this issue.

Why: The Superman Example

To understand the rationale and significance of the termination right, consider Superman. The full story is complex, but here?s the short version: Superman was created by two teenagers, Joe Shuster and Jerry Siegel; Detective Comics paid them $130 in 1938 for signing over all rights in the Superman character, universally and forever. This scenario illustrates the rationale for termination: young creators who sign away lucrative rights for little compensation, due to inexperience, poor business acumen or lack of negotiating clout. Decades later, Siegel?s widow and daughter relied on termination rights, among other claims, to regain a share in the U.S. copyright for the Superman character. (The court order in the Superman case is a fascinating, well-illustrated read; an online link to it follows this article.)

Who & What: Simple, With Two Tricky Complexities

Termination rights apply to all ?authors?: songwriters, recording artists, photographers, painters, sculptors, writers and more ? generally, creators of any types of work eligible for copyright protection.

A tricky complexity arises if a work is claimed to be a work made for hire. If a work meets the

definition of a ?work made for hire? in section 101 of the Copyright Act, then the employer or person for whom the work was prepared, and not the creator, is legally the author of the work from its inception (and not by transfer). That means the termination right is unavailable to the creator, because the right applies to authors, and because there is no transfer of rights to terminate. Whether something is a ?work made for hire? can be a complex and highly contentious issue, not necessarily resolved by language in a contract stating that it is a work made for hire. Why might you care about this issue? Because, for example, many recording contracts have provisions stating that the sound recordings covered by the contract are works made for hire. The extent to which sound recordings are works made for hire, and thus not covered by termination rights, is an issue for litigation and stakeholder negotiations as the termination windows open for these works; for now, it?s a murky area.

Termination rights generally apply to any transfer of rights ? exclusive or nonexclusive grants or licenses of copyright or any right under a copyright. However, there is a complexity in the ?what? department involving previously-created derivative works. The termination provisions of the Copyright Act provide an exception for derivative works prepared under authority of the grant before its termination. This exception has produced interesting court cases involving ?Who?s Sorry Now,? ?When the Red, Red Robin Comes Bob, Bob Bobbin? Along,? Joe Cocker?s versions of ?Bye, Bye Blackbird? and the film *Sleepless in Seattle*.

When & How (Heed the Ticking Clock!)

Termination rights are available only during a designated window, with specific time frames for giving advance notice, and detailed requirements as to the content, service and requirements for recording a copy.

Terminations of pre-1978 transfers are somewhat different from those for post-1977 transfers. Pre-1978, copyright term was split into an initial 28-year term plus a renewal term of 28 years, with later amendments adding 19 years, then an additional 20 years, to the renewal term. Renewal, rather than termination, provided a measure of protection to authors from bad deals. The Copyright Act of 1976, which went into effect Jan. 1, 1978, did away with renewal for post-1977 works and instead extended the duration of copyright, creating the termination provisions of section 203 for post-1977 transfers, and sections 304(c) and (d) for pre-1978 transfers.

For pre-1978 transfers, authors have a five-year window for termination, beginning in the 56th year after the transfer. Authors missing that window have another opportunity at the end of 75 years to recapture the last 20 years of copyright term. The Jassin article listed below provides detailed information about termination rights for pre-1978 copyrights, including who can exercise these rights when the author is deceased.

For post-1977 transfers, termination can occur during the 5-year window beginning at the end of 35 years from the date the grant was executed.

For all terminations, notice requirements apply. Notice must be sent not less than 2 nor more than 10 years before the effective date of the termination, and the effective date of termination must be within the 5-year window described above.

Example: A songwriter transferred rights to a song to a music publisher on 1/1/78. The five-year window for termination is from 1/1/13 to 12/31/17. For the earliest possible termination date of 1/1/13, proper notice must be given no earlier than 1/1/03 and no later than 12/31/10. The clock is always ticking. Creators should keep track of the windows of opportunity for termination rights to their works and factor in time to gather the information required for the notice.

Notice requirements are detailed by federal regulation, 37 CFR section 201.10 (link below), including identification of the work, which section of law the termination is made under, details about the grant being terminated, the effective date of termination and more, including

requirements for recording a copy of the notice with the Copyright Office as a condition to its taking effect.
Details are key to successful termination of rights. This article only sketches the outlines. Further study and expert counsel are highly recommended. If creators resist being overwhelmed by the details and stay aware of the ticking clock, termination rights can be a powerful tool to regain financial, creative and administrative control over their works, for the betterment of their retirement years and their legacy for their heirs.

RESOURCES

Post-1977 grants: Section 203 of the Copyright Act, www.copyright.gov/title17/92chap2.html [2]. **Pre-1978 grants:** Sections 304(c) and (d) of the Copyright Act, www.copyright.gov/title17/92chap3.html [3]

L. Jassin, ?Copyright Termination: How Authors (and Their Heirs) Can Recapture Their Pre-1978 Copyrights, www.copylaw.com/new_articles/copyterm.html [4].

Federal Regulations covering to terminations under Sections 203 and 304: http://www.copyright.gov/docs/201-10-final.pdf [5]

The Superman case: The March 26, 2008 court order, with a full reproduction of the original Superman comic from 1938, is online here: http://uncivilsociety.org/siegel_superman_032608.pdf [6]

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