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NOTE

CHARLIE DANIELS AND “THE DEVIL” IN THE DETAILS: WHAT THE COPYRIGHT OFFICE’S RESPONSE TO THE TERMINATION GAP FORESHADOWS ABOUT THE UPCOMING STATUTORY TERMINATION PERIOD

*Joshua Beldner**

ABSTRACT

In 2013, authors of copyrighted works and their statutory heirs will have the first opportunity to terminate assignments of their copyrights and enjoy a second opportunity to exploit their works under 17 U.S.C. § 203. However, in addition to the statutory requirements, many authors like Charlie Daniels, Bob Dylan and Bruce Springsteen face an additional obstacle: the termination gap. The termination gap arises in when authors entered term songwriter’s agreements or other multiyear agreements prior to January 1, 1978 to assign their copyrighted works but did not create these works until after January 1, 1978, the effective date of the Copyright Act of 1976 and Section 203. Due to an ambiguity in the language of Section 203, it is unclear whether authors affected by the termination gap can actually terminate their assignments under Section 203 or whether they must wait longer to terminate their works under Section 304. The Copyright Office had the first opportunity to address the issue through its rulemaking process but did not offer an authoritative interpretation of Section 203, leaving it to the courts or Congress to address the termination gap. The Copyright Office’s conservative rulemaking leaves authors and their heirs vulnerable to courts who have not always respected Congress’s intent to give authors an inalienable termination right and to a Congress that in recent years has at times shown more fidelity to larger business interests than to individual authors.

This Note briefly explores the history of termination rights under the Copyright Act before considering the Copyright Office’s efforts to address the termination gap. This Note then argues that the Copyright Office should have offered a more substantive rule in order to possibly garner some deference for their interpretation, giving authors in the termination gap more leverage in

* J.D. Candidate, Boston University School of Law, Class of 2012; B.A., Physics, Boston University, 2009; B.A., English, Boston University, 2009.

negotiations and court battles with their publishers. This Note concludes that authors and their statutory heirs might again lose their termination rights unless Congress and the courts break away from their current trend of deferring to the business interests of larger music publishers. Congress can do so by giving the Copyright Office clearer authority to make substantive copyright law. Congress and the courts can also adopt an interpretation of Section 203(a) that concurs with Congress's original intent in giving authors an inalienable termination right: to give authors a second chance to exploit copyrights that they may have assigned before realizing their true value.

ABSTRACT

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I. INTRODUCTION

For all but the most creative imagination, Charlie Daniels, Billy Joel, Bob Dylan, Bruce Springsteen, John Steinbeck, and Superman would make for strange bedfellows. Yet these artists, author, character, and many others face a coming opportunity that is also an impending problem: the upcoming statutory

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termination period for assignment of copyrights.¹ Starting in 2013, original authors may reclaim the copyrights in their works created after January 1, 1978 and enjoy a second opportunity to profit from their works after originally assigning their interests to publishers and record labels.² Publishers and records labels, however, have not sat idly by. Instead, they have challenged termination notices in the courts and even lobbied Congress for more leverage in negotiations regarding an author’s termination rights.³

For the heirs of John Steinbeck and of Jerome Siegel and Joseph Shuster, the creators of Superman, the battle over whether they may terminate earlier assignments of copyright has already begun. Their assignees – Penguin Books and Warner Brothers, respectively – have challenged the inalienability of termination rights, their compliance with termination notice requirements, and whether some works are really works made for hire.⁴ So far, the assignees have won these early court cases.⁵

Many recording artists and songwriters who created songs between 1978 and 1985 (and possibly later) face an additional challenge: the termination gap. The termination gap arises from an ambiguity in the coverage of the termination provisions applicable to works created before January 1, 1978, the effective date of the 1976 Amendments to the Copyright Act, and works created thereafter.⁶ The ambiguity lies in the unclear coverage of Section 304 of the Copyright Act, which covers transfers of copyright prior to January 1, 1978, and Section 203, which provides for terminations of transfers that took place on or after January 1, 1978.⁷ Under Section 304(c), authors or their statutory heirs have a five-year window to termination assignments of

¹ See 17 U.S.C. § 203 (2006).

² *Id.*

³ See discussion *infra* Parts III.C, IV.

⁴ See discussion *infra* Part III.C; Anthony Cheng, Note, *Lex Luthor Wins: How the Termination Right Threatens to Tear the Man of Steel in Two*, 34 COLUM. J.L. & ARTS 261, 261-62 (2011); M. Brian Bacher, Note, *Faster Than A Speeding Bullet! More Powerful Than A Locomotive! Worth the Paper He’s Drawn on? An Examination of the Practical & Economic Implications of the Recent District Court Decisions Involving the Superman Copyright*, 20 DEPAUL J. ART, TECH. & INTELL. PROP. L. 393, 397 (2010).

⁵ See *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193, 196 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009); *Siegel v. Warner Bros. Entm’t Inc.*, 542 F.Supp.2d 1098, 1098 (C.D. Cal. 2008), *rev. denied*, 2008 WL 2690718 (C.D. Cal. Jul. 3, 2008); *Siegel v. Warner Bros. Entm’t Inc.*, 658 F.Supp.2d 1036, 1037 (C.D. Cal. 2009), *rev. denied* 690 F.Supp.2d 1048 (C.D. Cal. 2009).

⁶ 17 U.S.C. §§ 203, 304(c) (2006).

⁷ *Id.*

copyrights fifty-six years after the author originally secured the copyright; Section 304(c) applies to copyrights in their first or renewal terms.⁸ Section 203 takes a similar approach as Section 304(c), but applies strictly to transfers of copyrights executed on or after January 1, 1978.⁹ Section 203 provides that “[t]ermination 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*.”¹⁰

The “date of execution” language creates a possible gap in the termination provisions of Sections 203 and 304 for works created after January 1, 1978 but subject to a term songwriter’s agreement or other license agreement entered into before January 1, 1978.¹¹ Although an artist may have entered an assignment agreement before 1978, many copyrights subject to the agreement did not exist until the date of the work’s fixation after 1978.¹² The agreement’s pre-1978 execution date appears to indicate that the transfer of licenses occurred before the effective date of the Copyright Act of 1976, even though the author had yet to create the songs at issue or secure copyrights for those songs. Given that the author signed the agreement before 1978, but created the songs after 1978, does Section 203 or Section 304(c) govern the author’s termination rights?¹³

⁸ 17 U.S.C. § 304(c)(3) (2006). Section 304(d) also covers copyrights that the author secured under the Copyright Act of 1909 for which the termination rights under Section 304(c) have expired before the effective date of the 1998 Sonny Bono Copyright Term Extension Act. 304(d) permits copyright transferors to terminate transfers of copyrights within a five-year window that begins seventy-five years after the date that the author acquired the original copyright. 17 U.S.C. § 304(d) (2006).

⁹ 17 U.S.C. § 203(a) (2006).

¹⁰ 17 U.S.C. § 203(a)(3) (2006) (emphasis added). For transfers including the right of first publication, the termination window starts 35 years after the date of publication or 40 years after execution of the grant, whichever comes earlier. *Id.* The right of publication involves the author’s right to issue the first version of a copyrighted work. The right of publication is one of the bundle of copyrights protected by 17 U.S.C. § 106 (2006).

¹¹ In a typical term songwriter’s agreement, an artist assigns his copyrights in all musical compositions for a set period of years in exchange for compensation, future royalties and production costs. See Don E. Tomlinson, *Everything That Glitters is Not Gold: Songwriter-Music Publisher Agreements and Disagreements*, 18 HASTINGS COMM. & ENT. L.J. 85, 106-20 (1995).

¹² For a copyright in a work to exist, it must be fixed in a tangible medium of expression. In the case of a sound recording, fixation occurs when the recording is first recorded in a phonorecord. 17 U.S.C. § 101 (2006).

¹³ Here, the term “author” refers to the original creator of the copyrighted work. I will

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The experience of Charlie Daniels—the country star famous for “The Devil Went Down to Georgia” and other hits in the late 1970s and early 1980s—with the termination gap is typical of what other musicians face as 2013 draws closer.¹⁴ Charlie Daniels signed a term songwriter’s agreement before 1978 but crafted his signature song, “The Devil Went Down to Georgia,” in 1979, after the revisions to the Copyright Act in 1976 took effect.¹⁵ He desires to terminate his assignments to Universal Music Publishing Group and regain an opportunity to exploit his copyrights for profit, especially after objecting to how Universal licensed his song for use in the video game *Guitar Hero III: Legends of Rock*.¹⁶ However, Daniels finds himself in the “uncharted territory” of the termination gap.¹⁷

Although it is unclear how many other similarly situated individuals there are, some estimate that the ambiguity may affect as many as 100,000 authors and composers.¹⁸ To date, however, only 155 parties have filed notices of their intent to terminate assignments with the Copyright Office.¹⁹ These notices reflect a few hundred original authors and several thousand individual songs and works – nowhere near the estimated 100,000 authors and composers.²⁰ The relatively small amount of termination notices recorded does not necessarily mean that the current estimates of the termination gap are

use it to refer both to recording artists and others possibly facing the termination gap, including the writers of books, sculptors, etc.

¹⁴ See Brian Reisinger, *Charlie Daniels’ Signature Song at Heart of Copyright Dispute*, NASHVILLE BUSINESS JOURNAL (Mar. 29, 2010), <http://nashville.bizjournals.com/nashville/stories/2010/03/29/story2.html?b=1269835200^3095971> (discussing Daniels and the termination gap).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Comments of Charles J. Sanders, Counsel, The Authors Guild and Jan F. Constantine, Counsel, The Songwriters Guild of America to the U.S. Copyright Office at 3-4, *available at* <http://www.copyright.gov/docs/termination/comments/2010/sga-authors-guild.pdf>.

¹⁹ Letter from David J. Christopher, Chief, Information & Records Division, U.S. Copyright Office, to author (Dec. 19, 2011) (on file with author). The Copyright Office confirmed the number of termination notices filed under Section 203(a) through December 19, 2011 in response to a Freedom of Information Act request. Termination notices recorded with the Copyright Office can be viewed in the Copyright Office’s online records database, available at <http://www.copyright.gov/records/>.

²⁰ See *id.*; Comments of Charles J. Sanders & Jan F. Constantine to the U.S. Copyright Office, *supra* note 18, at 3-4, *available at* <http://www.copyright.gov/docs/termination/comments/2010/sga-authors-guild.pdf>.

overblown. The estimated 100,000 authors and composers represent a small fraction of the 3,778,823 copyright registrations from 1978 to 1985, the years most likely spanned by the termination gap.²¹ Instead, the few notices filed might indicate more about the lack of knowledge among those with assignments of copyright eligible for termination, particularly that the termination right exists and the statutory requirements to terminate assignments.²²

The termination gap may cover some of the most profitable artists and albums in the music industry. Authors have filed notices for the musical works behind enduring songs like Charlie Daniels' "The Devil Went Down to Georgia," Pat Benatar's "Hit Me with Your Best Shot," Tom Petty's "Refugee," Steven Greenberg's "Funkytown," and Gary Morris' "The Wind Beneath My Wings."²³ Bob Dylan, Bryan Adams, Loretta Lynn, Kris Kristofferson, and Tom Waits have all also filed termination notices for songs written soon after the effective date of Section 203.²⁴ As time passes, more artists whose copyrights may be affected by the termination gap will consider whether to exercise their termination rights. Such artists include Bruce Springsteen, Billy Joel, Kenny Rogers, the Eagles, and Donna Summer.²⁵ At stake in these cases is the opportunity to control copyrights that have proven to be valuable commodities.²⁶ The works possibly falling in the termination gap include albums that have sold a combined total of 200 million copies over their

²¹ Letter from David J. Christopher, Chief, Information & Records Division, U.S. Copyright Office, to author (Dec. 19, 2011) (on file with author). Recall that the termination gap affects copyrights assigned in agreements entered before January 1, 1978 for works created on or after January 1, 1978. Agreements entered before 1978 are most likely to lead to the creation of new copyrighted works before 1985.

²² See discussion *infra* Parts III.A, B; discussion *infra* notes 28-31, 178-83 and accompanying text.

²³ Letter from David J. Christopher, Chief, Information & Records Division, U.S. Copyright Office, to author (Dec. 19, 2011) (on file with author).

²⁴ See *id.*; Larry Rohter, *Record Industry Braces for Artists' Battles Over Song Rights*, N.Y. TIMES, Aug. 15, 2011, <http://www.nytimes.com/2011/08/16/arts/music/springsteen-and-others-soon-eligible-to-recover-song-rights.html>?

²⁵ *Id.*

²⁶ See, e.g., Reisinger, *supra* note 14 (discussing how Charlie Daniels sought to direct the use of his songs to generate wealth now that their marketability had been proven). If works in the termination gap fall under Section 304, authors will have to wait until the end of fifty-six years to terminate an assignment, rather than Section 203's thirty-five years. 17 U.S.C. §§ 203(a)(3), 304(c)(3) (2006).

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lifetimes and generated millions of dollars in profits for their record labels.²⁷

Many artists are unsure of their rights under the termination gap and have decided to wait for a more definitive resolution of the gap issue by the Copyright Office, Congress, or the courts.²⁸ Yet, with every passing day, authors and songwriters who might have exercised their termination rights lose that opportunity due to Section 203’s two-year notice requirement.²⁹ Section 203(a)(4)(A) requires authors or their statutory heirs to serve termination notices at least two years prior to the effective date of termination of the work.³⁰ Several members of the music industry have indicated that music publishers have already rejected termination notices and that the Copyright Office has treated these notices inconsistently.³¹ Due to the termination gap, authors and their assignees continue to waste time and money jockeying for position in the courts, lobbying Congress, and arguing about their relative rights rather than thinking about how to use their regained copyrights or planning for the future.

With the termination-of-transfers “storm” approaching, the Copyright Office had the opportunity to address the termination gap through regulation, to defer to Congress for further statutory revisions, or to wait and allow the courts to interpret the statutory language.³² The Copyright Office chose all three courses of action when it decided to accept termination notices but called on the courts or Congress to determine the termination rights of those affected by the termination gap.³³ In taking this course of action, the Copyright Office

²⁷ Richard A. Catalina, Jr., *Major Artists and Songwriters File Termination Notices under Section 203; Record Labels Vow to Fight*, CATALINA LAW (Sept. 19, 2011), <http://catalinalaw.com/intellectual-property/recording-artists-songwriters-reclaim-copyrights/>. Notable albums include Michael Jackson’s *Thriller*, AC/DC’s *Back in Black*, Pink Floyd’s *The Wall* and Billy Joel’s *Greatest Hits Vol. 1 & 2*. *Id.*

²⁸ See discussion *infra* Part III.C.3.

²⁹ 17 U.S.C. § 203(a)(4)(A) (2006).

³⁰ *Id.*

³¹ See, e.g., *id.*; Comments of Karyn Soroka, Soroka Music Ltd., to U.S. Copyright Office (Apr. 30, 2010), <http://www.copyright.gov/docs/termination/comments/2010/karyn-soroka.pdf> (on file with author).

³² David Nimmer and Peter S. Menell use the term “storm” to describe the coming termination period for transfers of licenses in copyrights in 1978 and after, as they expect serious litigation regarding the inalienability of termination rights and works made for hire, especially in the recording industry. See Peter S. Menell & David Nimmer, *Sound Recordings, Works for Hire, and the Termination-of-Transfers Time Bomb*, 49 J. COPYRIGHT SOC’Y 387 (2001) [hereinafter Menell & Nimmer, *Time Bomb*].

³³ See Gap in Termination Provisions; Final Rule, 76 Fed. Reg. 32315 (June 6, 2011);

missed an opportunity to push the limits of its rulemaking authority and possibly secure *Chevron* deference for its interpretation by not taking a firm position on the termination gap.³⁴ Although the argument for deference might not have held up in court, the Copyright Office overlooked a chance to signal, first, to Congress and the public that it should play a more than a strictly administrative role in enumerating the rights of copyright holders and, second, to convince the courts of the value of giving more deference to the Copyright Office.

Without more solid support from the Copyright Office, the situation looks bleak for authors affected by the termination gap. Although the Copyright Office served an advisory role in both the 1909 and 1976 revisions to the Copyright Act, Congress and the courts have historically made most of the substantive changes to the rights of authors.³⁵ While Congress attempted to revise the Copyright Act to correct the balance of bargaining power between authors and publishers through rights of renewal and termination, the courts significantly altered the balance crafted by Congress on several occasions.³⁶ Worse, Congress has, on other occasions, failed to honor its goal of protecting authors during bargaining with publishers.³⁷ The Copyright Office's limited role leaves recording artists and authors vulnerable during the upcoming statutory termination period.

This Note briefly examines the evolution of termination of transfer rights with a focus on the recording industry and the role of the Copyright Office in the upcoming termination period. Part II recounts the historical balance between authors and publishers in the Copyright Act, as reflected in the revisions to the termination of transfer provisions in 1909 and 1976. Part III looks to the current state of termination rights under the 1976 Act and considers the struggle for bargaining power through the works made for hire provision and the inalienability of termination rights. Part IV analyzes the termination gap issue in more depth and discusses the possible solutions or

U.S. COPYRIGHT OFFICE, *Analysis of Gap Grants under the Termination Provisions of Title 17*, Dec. 7, 2010, <http://www.copyright.gov/reports/gap-grant%20analysis.pdf>.

³⁴ See discussion *supra* Part IV.B.

³⁵ See notes 43-78 and accompanying text; discussion *infra* Part III.C.

³⁶ Malcolm L. Mimms, Jr., *Reversion and Derivative Works under the Copyright Acts of 1909 and 1976*, 25 N.Y.L. SCH. L. REV. 595, 597-602, 625-27 (1979-1980). Most notably, the Supreme Court in *Fred Fisher Music Co. v. M. Witmark & Sons* delivered a "death blow" to the renewal rights created under the Copyright Act of 1909 by indicating that grantors could assign their renewal rights away before they became viable after the end of the first renewal term. 318 U.S. 643, 651 (1943). See discussion *infra* Part I.A.

³⁷ See discussion *infra* Part III.C.2.

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actions that were available to Copyright Office. Part V considers the effect of the Copyright Office’s action on the relative positions of authors and publishers entering the termination period and reasons for an increased regulatory role for the Copyright Office. Finally, Part VI discusses the vulnerability of authors in the upcoming termination period.

II. A BRIEF HISTORY OF TERMINATION OF TRANSFER RIGHTS

A. *Renewal Rights Before and Under the Copyright Act of 1909*

Congress historically endeavored through copyright law to strike a delicate balance between the rights of authors and those of publishers, especially when it comes to termination and renewal rights.³⁸ Article I, Section 8 of the Constitution charges Congress with “promot[ing] 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.”³⁹ To achieve this purpose, Congress grants authors and scientists limited monopolies through copyrights and patents to ensure that authors and scientists benefit from their labors.⁴⁰ The first Copyright Act, enacted in 1790, provided for a fourteen-year copyright with a right of renewal for another fourteen years by the author (if living) or his executors, administrators, or assigns.⁴¹ The copyright did not automatically revert to the original author and assigns could apply for a renewal term.⁴²

Although Congress relied heavily on the 1790 copyright framework, the 1831 revisions to the Copyright Act provided for a twenty-eight year original

³⁸ See Peter S. Menell & David Nimmer, *Pooh-Poohing Copyright’s “Inalienable” Termination Rights*, 57 J. COPYRIGHT SOC’Y U.S.A. 799, 801-08 (2010) [hereinafter Menell & Nimmer, “*Inalienable” Termination Rights*]; Mimms, *supra* note 36, at 597-601.

³⁹ U.S. CONST. art. I, § 8, cl. 8.

⁴⁰ See Kathleen M. Bragg, Note, *The Termination of Transfers Provision of the 1976 Copyright Act: Is it Time to Alienate it or Amend it?*, 27 PEPP. L. REV. 769, 769 (1999-2000) (citing Virginia E. Lohmann, Note, *The Errant Evolution of Termination of Transfer Rights and the Derivative Works Exception*, 48 OHIO ST. L.J. 897, 898 (1987)).

⁴¹ Mimms, *supra* note 36, at 598.

⁴² *Id.* The renewal process, like the process for securing the copyright, involved recording the title to the copyright and notifying the public through the newspapers. *Id.* For an insightful look at termination and reversion rights under early British copyright law, see Lionel Bently & Jane C. Ginsburg, “*The Sole Right . . . Shall Return to the Authors*”: *Anglo-American Authors’ Reversion Rights from the Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475 (2010).

term of copyright and a fourteen-year renewal term.⁴³ Notably, Congress also removed “assigns” from the list of beneficiaries who could renew a copyright; instead, the revised Copyright Act designated the author’s widow and children as a new class of beneficiaries who could claim renewal if the author died during the original term.⁴⁴ The changes to the beneficiaries of renewal rights provided authors and their families with a “second chance” to enjoy the profits of a successful work.⁴⁵ The new policy reflected Congress’s concern that authors were assigning their copyrights for inadequate sums of money because they had no way of predicting the true monetary value of their works until the works received public appraisal.⁴⁶ This system incorporated the popular view that publishers used superior bargaining power to exploit authors when negotiating deals to distribute new works.⁴⁷ The 1871 Copyright Act largely adopted the renewal provisions of the previous Copyright Act.⁴⁸

Concerns with the “paternalistic” approach taken by prior versions of the Act motivated the revisions to the Copyright Act of 1909.⁴⁹ The new prevailing view held that authors should not be “treated as children” and that copyright law should not protect them from their own ill-advised contracts.⁵⁰ This change in predominant thought caused both the House and Senate committees to draft two bills in 1907 that provided for a single copyright term of the author’s life plus thirty years.⁵¹ Both bills also required renewal of copyrights twenty-eight years after their publication for continued protection.⁵² The committees believed that renewal would cause most works to fall into the public domain in a short amount of time, whereas copyright holders could still

⁴³ Mimms, *supra* note 36, at 598.

⁴⁴ *Id.*

⁴⁵ See Stephen W. Tropp, *It Had to Be Murder or Will Be Soon – 17 U.S.C. § 203 Termination of Transfers: A Call for Reform*, 51 J. COPYRIGHT SOC’Y U.S.A. 797, 799-800 (2004).

⁴⁶ *Id.* at 799-800. See also 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 9.02 (2003) (noting that, in contrast to most property, copyrights evade accurate monetary evaluation before their exploitation).

⁴⁷ Tropp, *supra* note 45, at 800.

⁴⁸ Mimms, *supra* note 36, at 599.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 599-600. The House committees believed that the renewal terms under the 1870 Act largely served to cause works to enter the public domain because only five percent of copyrights were ever renewed under the Act. *Id.*

⁵² *Id.*

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continue protection for works of proven value.⁵³

The debate turned when Congress and the public became suspicious that publishers secretly orchestrated a revision to copyright law to prevent original authors from recapturing their copyrights.⁵⁴ This suspicion resulted mainly from William Jenner’s *The Publisher Against the People* and Mark Twain’s story of how he made a profit on *Innocents Abroad* solely due to the renewal term.⁵⁵ In response, Congress passed the Copyright Act of 1909 and adopted the familiar two-term system with renewal and reversion rights.⁵⁶ The House adopted this scheme to protect authors from “improvident bargains.”⁵⁷ Congress intended the right of renewal to be “exclusive” to authors and their families “so that they could not be deprived of this right.”⁵⁸

Despite Congress’s clear intent to provide authors with an exclusive right of renewal, the Supreme Court crippled this right in *Fred Fisher Music Co. v. M. Witmark & Sons*.⁵⁹ In *Fred Fisher Music Co.*, the Court interpreted the Copyright Act of 1909 to determine whether the Act allowed authors to assign their renewal rights before securing the renewal term.⁶⁰ In holding that authors could assign their renewal rights before they vested, the Court looked to the legislative history of the Act and found no indication that the Act altered the common-law rule that authors could assign their rights before securing them.⁶¹ The Court failed to address a House Report discussing the importance of protecting authors during negotiations with publishers.⁶² The Court stated that the assignment of a right to a renewal term might be important for authors who need to assign this right before it vests to receive immediate monetary

⁵³ *Id.*

⁵⁴ Mimms, *supra* note 36, at 600.

⁵⁵ *Id.* Mark Twain was able to make a more sizable profit through the renewal term even though his original contract only rewarded him a small sum for his copyright. *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 600-01.

⁵⁸ Menell & Nimmer, “Inalienable” Termination Right, *supra* note 38, at 804 (citing H.R. Rep. No. 60-2222, at 14-15 (1909); *see also* Mimms, *supra* note 35, at 601.

⁵⁹ *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

⁶⁰ *Id.* at 643-45; Mimms, *supra* note 36, at 601-02. The Copyright Act clearly provided that an author could assign his rights in the original or the renewal term once they had been secured. Mimms, *supra* note 36, at 601.

⁶¹ *Fred Fisher*, 318 U.S. at 656; Mimms, *supra* note 36, at 602.

⁶² Mimms, *supra* note 36, at 601. The House Report discussed how “[i]t not infrequently happens that the authors sells his copyright outright to a publisher for a comparatively small sum” and how authors should be entitled to the renewal term for works that prove to be lasting successes. *See id.* (quoting H.R. Rep. No. 1108 (1909)).

compensation for their copyrights.⁶³ Supreme Court Justice White, in a later case, wrote that Congress's goal of giving authors and their families a renewal right "was substantially thwarted by this Court's decision in *Fred Fisher Music Co. v. M. Witmark & Sons*."⁶⁴

B. *Termination Rights under the Copyright Act of 1976*

One of the central focuses of the drastic revision to United States copyright law in 1976 was overruling *Fred Fisher Music Co.* and providing an inalienable termination right for copyright holders.⁶⁵ In the years leading up to the 1976 Act, the Copyright Office released a study of copyright law that concluded that the "reversionary feature of the present renewal system has largely failed to accomplish its primary purpose."⁶⁶ The study observed that the renewal system failed to correct the inequality of bargaining power between authors and publishers, and that special protection remained necessary for authors due to unpredictability in the value of new works.⁶⁷ The Copyright Office found that "the primary purpose of the reversionary interest would seem to require that the renewal interest be made unassignable in advance."⁶⁸

Setting out to rectify "the deficiency of the Supreme Court in *Witmark v. Fisher*," Congress followed the suggestion of the Copyright Office and recognized the inalienable right to terminate assignments of copyrights after thirty-five years.⁶⁹ In doing so, Congress shifted the balance of copyright

⁶³ *Fred Fisher*, 318 U.S. at 657; Mimms, *supra* note 36, at 602.

⁶⁴ *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 185 (1985) (White, J., dissenting).

⁶⁵ See 17 U.S.C. § 203(a)(5) (2006). Barbara Ringer, the Register of Copyrights in 1976, characterized the revisions as a "fundamental change in the American copyright system." See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 858-59 (1987) (citing Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479 (1977)).

⁶⁶ Menell & Nimmer, "Inalienable" *Termination Rights*, *supra* note 38, at 805 (quoting STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW 53 (Comm. Print 1961)).

⁶⁷ See Mimms, *supra* note 36, at 626.

⁶⁸ Menell & Nimmer, "Inalienable" *Termination Rights*, *supra* note 38, at 805 (quoting STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., REP. OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW 53 (Comm. Print 1961)).

⁶⁹ *Id.* at 805-806 (quoting H. COMM. ON THE JUDICIARY, 88TH CONG., DISCUSSION AND COMMENTS ON THE REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 93 (Comm. Print 1963)). See 17 U.S.C. §§ 203(a)(3), (5) (2006).

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protection in favor of authors instead of publishers, as the Supreme Court observed in *Mills Music v. Snyder*⁷⁰ and *New York Times v. Tasini*.⁷¹

During the revision process, both authors and publishers engaged in the same policy discussion regarding termination rights that occurred regarding the renewal rights in the 1909 Act.⁷² Publishers argued that American copyright law was too paternalistic, interfered with an author’s right to contract, and that authors were no longer in a poor bargaining position relative to publishers.⁷³ Publishers also contended that they needed more time to recover their initial investments.⁷⁴ In sharp contrast, authors and groups like the Author’s League

Some commentators have criticized Congress for assuming that all copyright authors lack sufficient bargaining power to get full remuneration for their works. *See, e.g.*, Bragg, *supra* note 40, at 802-04 (proposing that the Copyright Act protect only first-time authors during negotiations).

⁷⁰ *Mills Music*, 469 U.S. at 172-73 (“[T]he termination right was expressly intended to relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product. That general purpose is plainly defined in the legislative history and, indeed, is fairly inferable from the text of § 304 itself.”).

⁷¹ *New York Times Co. v. Tasini*, 533 U.S. 483, 495 n.3 (2001). In a footnote, the Court observed,

Two Registers of Copyrights have observed that the 1976 revision of the Copyright Act represented “a break with a two-hundred-year-old tradition that has identified copyright more closely with the publisher than with the author.” . . . Congress’ adjustment of the author/publisher balance is a permissible expression of the “economic philosophy behind the [Copyright Clause],” i.e., “the conviction that encouragement of individual effort [motivated] by personal gain is the best way to advance public welfare.”

Id. (citations omitted).

⁷² *See* discussion *supra* notes 43-58 and accompanying text; Tropp, *supra* note 45, at 804-806.

⁷³ Mimms, *supra* note 36, at 627. In one bit of colorful commentary, one person commented:

We are not blind to the attractive force of the Register’s proposal There must always be a certain glamour in the idea of riding forth, like a knight of old, to rescue the maiden, authorship, from the dragon of unremunerative transfers. But the age when a mean-spirited publisher would offer no more than 5 pounds to John Milton for ‘Paradise Lost’ is as dead and gone as the age of chivalry. Today, the dragon is a myth; the maiden, a muscular Brunnehilde; and the gallant knight, we fear, more nearly akin to Don Quixote than to St. George.

Id. at 628 (citations omitted).

⁷⁴ *Id.* at 630-31.

of America argued that it would be reasonable to require publishers to renegotiate their copyright agreements once the value of the work had been established.⁷⁵ Their solution recognized that authors possess “some sort of continuing rights” in their works and that allowing them to participate in the exploitation of their works benefits both authors and the public at large.⁷⁶

Section 203 represented a compromise between authors and publishers: “The provisions of section 203 . . . are accepted by the industry in the spirit of compromise and represent the minimal basis on which the industry can live with this innovation in copyright.”⁷⁷ Section 203’s termination provisions became part of a new copyright system that was markedly different from the system embodied in the Copyright Act of 1909.⁷⁸

Some scholars characterized the 1976 revisions as a response to interest group lobbying for major publishers and distributors to the detriment of authors.⁷⁹ Before the 1976 revisions, authors desired a new copyright regime that restored their termination rights after the *Witmark* decision and reduced the eighty-five percent of registered works that entered the public domain under the then-existing renewal system.⁸⁰ However, publishers occupied a stronger bargaining position because they had no issue with the status quo.⁸¹ This discrepancy in bargaining power allowed publishers to prevent the termination provisions from executing automatically and to create a complex scheme of regulatory hurdles for authors seeking to exercise their termination rights.⁸² Because of these statutory hurdles, many authors have failed to record their transfers with the Copyright Office, leaving them behind in exercising

⁷⁵ *Id.* at 632.

⁷⁶ *Id.* at 639 (citations omitted).

⁷⁷ Mimms, *supra* note 36, at 634 (citing *Hearings on Copyright Law Revision Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong. 134-35 (1965)).

⁷⁸ The new copyright act included a number of notable changes. The 1976 Act provided for a single copyright term covering the life of the author plus fifty years. 17 U.S.C. § 302(a) (2006). Section 304, governing copyrights created before January 1, 1978, allowed a lengthier renewal term of forty-seven years, not simply twenty-eight years. *Id.* § 304(a). The Act also preempted the common-law copyright system and replaced it with a strictly statutory system whereby copyright protection attaches upon creation of the work. *Id.* §§ 301(a), 302(a).

⁷⁹ See William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907 (1997); see also Litman, *supra* note 65 (discussing the detrimental comprises for authors and the lobbying during the passage of the 1976 Act).

⁸⁰ Patry, *supra* note 79, at 923.

⁸¹ *Id.*

⁸² *Id.* at 922.

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their termination rights.⁸³

The compromises that took place in the 1976 negotiations suggest that lobbying by publishers and the recording industry have shifted the purposes of copyright law away from incentivizing authors to produce new works for the public good.⁸⁴ Instead, as Professor Patry, author of the influential treatise *Patry on Copyright*, argues, copyright law now serves as a form of business protectionism for the publishing and recording industries by lengthening the monopolies of copyrights and preventing authors from recognizing the full value of their initial copyrights through their termination rights.⁸⁵ Since the 1976 revisions, publishers have secured increased protection for their investments through court cases reinterpreting the alienability of termination rights and the copyright term extension and may further increase this protection through the resolution of the termination gap.⁸⁶

III. TERMINATION UNDER SECTIONS 304(C) AND 203 AFTER THE 1976 ACT⁸⁷

A. *Termination of Assignments under Section 304(c)*

Section 304 provides for the termination of any grant of a license in a copyright in its first or renewal term prior to January 1, 1978.⁸⁸ Termination

⁸³ *Id.*

⁸⁴ *Id.* at 907-08.

⁸⁵ Patry, *supra* note 79, at 908. See also Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 882-83 (1997) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996)) (arguing that copyright law has developed in a manner that favors publishers over authors and conflicts with traditional ideas of original authorship); Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008) (discussing how publishers capitalized on the conceptual development of authorship to secure a copyright system more favorable to their business interests). Professor Patry has argued that, in creating the current copyright system, “Congress has exceeded its authority under the Constitution, and unless checked by the courts it is likely to transmogrify copyright from a vehicle for the promotion of learning into a form of business protectionism divorced from the creation of new works.” Patry, *supra* note 79, at 908.

⁸⁶ See discussion *infra* Part III.C. See, e.g., *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009).

⁸⁷ For an exhaustive study of termination rights under the 1976 Act, see generally Melville B. Nimmer, *Termination of Transfers under the Copyright Act of 1976*, 125 U. PENN. L. REV. 947 (1977).

⁸⁸ Under 17 U.S.C. § 304(c) (2006),

rights vest in the living author or the author's statutory heirs if the author is deceased.⁸⁹ The termination period begins either at the end of the fifty-sixth year from the date that the authors originally secured the copyright or on January 1, 1978, whichever is later.⁹⁰ Section 304(c)(4) requires the author or the executor of the grant to send notice of the intent to terminate the transfer to the assignee within a period of two to ten years before the effective date of the termination.⁹¹

B. Termination of Assignments under Section 203

Section 203 revised the reversion concept of the 1909 Act to accommodate a single term of copyright as provided under the 1976 Act.⁹² This section allows for the termination of copyright assignments executed on or after January 1, 1978 and can be "effected at any time beginning at the end of thirty-five years from the date of the execution of the grant."⁹³ Section 203 also allows for the termination of grants covering the right of publication of the work at the end of forty years from the execution of the grant if earlier than the thirty-five years from the date of publication.⁹⁴ As with Section 304, Section 203 states that the termination causes all rights subject to the initial grant to revert back to the author as of the date of the termination's execution.⁹⁵

Congress also sought to rectify the *Witmark* decision by including a

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

⁸⁹ *Id.* § 304(c)(1)-(2).

⁹⁰ *Id.* § 304(c)(3).

⁹¹ *Id.* § 304(c)(4)(A). There are additional requirements for heirs seeking to terminate based on rights acquired from the author. See Tropp, *supra* note 45, at 808; Melville B. Nimmer, *supra* note 87, at 967-70. For instance, the author or statutory heirs must also file a copy of the notice with the Copyright Office and comply with Copyright Office regulations in 37 C.F.R. § 201.10 (2011). 17 U.S.C. § 304(c)(4)(A)-(B) (2006).

⁹² 17 U.S.C. § 203 (2006).

⁹³ *Id.* § 203(a)(3).

⁹⁴ *Id.* Notably, for our purposes, Melville B. Nimmer suggested that the forty year option was likely included to facilitate the practice of publishers to sign contracts for books and songs before they were even written or composed. See Melville B. Nimmer, *supra* note 87, at 975.

⁹⁵ 17 U.S.C. § 203(b) (2006). Section 203(b) contains an exception for derivative works.

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provision that makes termination rights inalienable.⁹⁶ Section 203(a)(5) provides that “[t]ermination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”⁹⁷ The same provision is included for termination of grants executed before January 1, 1978.⁹⁸

C. *Implementation of Congress’s Termination Scheme Since January 1, 1978*

In the three decades since the passage of the Copyright Act of 1976, the ongoing struggle between authors and publishers for greater bargaining power and rights in creative works unfolded before both the courts and Congress. The most significant issues, and most relevant for the purposes of this Note, are the battles over the inalienability of termination rights and works made for hire.

1. “Inalienable” Termination Rights

Congress included Sections 203(a)(5) and 304(c)(5) in the 1976 revisions to the Copyright Act to ensure that authors would not be able to assign their termination rights until these rights vested with the author or the author’s statutory heirs.⁹⁹ Congress wanted authors to have a second opportunity to reap the profits of their creative efforts.¹⁰⁰ However, the Second and Ninth Circuit severely undermined Congress’s intent in two decisions reminiscent of *Witmark: Milne v. Stephen Slesinger, Inc.* and *Penguin Group (USA) Inc. v. Steinbeck*.¹⁰¹

Milne involved the 1930 grant by A.A. Milne of some of his copyrights in *Winnie the Pooh* to Stephen Slesinger, Inc.¹⁰² In 1956, upon his death, Milne bequeathed his full copyright interest to the Pooh Properties Trust, a trust without any members of Milne’s family.¹⁰³ Slesinger, Inc. later licensed its

⁹⁶ *Id.* § 203(a)(5).

⁹⁷ *Id.*

⁹⁸ *Id.* § 304(c)(5).

⁹⁹ See discussion *supra* notes 59-71, 96-98 and accompanying text.

¹⁰⁰ See discussion *supra* notes 59-71, 96-98 and accompanying text.

¹⁰¹ *Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036 (9th Cir. 2005), *cert. denied*, 548 U.S. 904 (2006); *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2383 (2009). For a lengthier discussion of this issue, see Menell & Nimmer, “Inalienable” Termination Rights, *supra* note 38, at 2-7.

¹⁰² *Milne*, 430 F.3d at 1039.

¹⁰³ *Id.*

rights in *Winnie the Pooh* to Disney in 1961.¹⁰⁴

When Congress provided authors and statutory successors with a termination right for pre-1978 transfers in Section 304(c) in 1976, Slesinger, Inc. and Disney sought to renegotiate their licenses with Pooh Properties Trust.¹⁰⁵ Pooh Properties, before negotiating with Slesinger and Disney, signed an agreement with A.A. Milne's son, Christopher Robert, stating that he would not serve a termination notice for works subject to termination under Section 304.¹⁰⁶ In 1983, Pooh Properties used this agreement with A.A. Milne's son to secure a more favorable royalty rate from Slesinger by first revoking its 1930 assignment and then entering into a new agreement with Slesinger.¹⁰⁷

In 1998, Congress enacted the Sonny Bono Copyright Term Extension Act ("CTEA") and extended the duration of copyright protection for an additional twenty years.¹⁰⁸ Congress also granted authors and their statutory heirs another opportunity to reclaim works assigned by original authors.¹⁰⁹ Shortly thereafter, A.A. Milne's only surviving statutory heir, Clare Milne, served notice to Slesinger of her intent to terminate the 1930 Agreement.¹¹⁰ Slesinger disputed Clare's notice. The district court held that the 1983 Agreement superseded the 1930 Agreement and, therefore, Clare had no pre-1978 copyright assignment to terminate.¹¹¹ On appeal, Clare argued that the 1983 Agreement qualified as an "agreement to the contrary" under Section 304(c)(5) and could not extinguish her right to terminate the 1930 agreement and to

¹⁰⁴ *Id.* at 1040.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* As *Winnie the Pooh* fans well know, A.A. Milne's son Christopher Robert served as the inspiration for Milne's similarly named Christopher Robin, a major character in the *Winnie the Pooh* series. For more information about A.A. Milne and his son, see ANN THWAITE, *A.A. MILNE: HIS LIFE* (Faber & Faber 2007) (1990).

¹⁰⁷ *Milne*, 430 F.3d at 1040.

¹⁰⁸ Sonny Bono Copyright Term Extension Act of 1998 ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. §§ 108, 203, 301-304).

¹⁰⁹ 17 U.S.C. § 304(d) (2006).

¹¹⁰ *Id.* at 1041. Clare is the daughter of Christopher Robert Milne. Sections 203(a)(2) and 304(c)(2) provide that, in the event of the original author's death, the termination right belongs to the author's spouse or surviving children or grandchildren. The sections outline how to proceed when more than one statutory heir survives. 17 U.S.C. §§ 203(a)(2), 304(c)(2) (2006). Section 304(d) allows statutory successors to terminate agreements seventy-five years after the pre-1978 work gained federal copyright so long as a termination had not previously been affected. See *id.*; 17 U.S.C. § 304(d) (2006).

¹¹¹ *Milne*, 430 F.3d at 1041-42.

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receive the final years of A.A. Milne’s copyright.¹¹²

The Ninth Circuit affirmed the district court and found Section 304(c)(5) ambiguous despite the fact that the statute’s plain language seemed to support Clare’s argument.¹¹³ Instead, the court turned to legislative history that indicated that “[n]othing in the Copyright Acts has altered the power of private parties to contract.”¹¹⁴ Since the statutory termination right allowed Christopher Robert Milne to receive a better deal in 1983, the court held that the termination right had served Congress’s underlying goal of safeguarding authors from improvident transfers.¹¹⁵ Therefore, Clare Milne had no statutory right to the additional twenty years granted by Congress.¹¹⁶

The Second Circuit in *Steinbeck* took a similar approach as *Milne* and held that using statutory termination rights to renegotiate a pre-1978 grant satisfied Section 304(c) and prevented further termination rights from vesting.¹¹⁷ *Steinbeck* involved a 1938 agreement between John Steinbeck and The Viking Press, the predecessor of Penguin Group, in which Steinbeck exchanged his copyrights in works like *Of Mice and Men* in exchange for royalties.¹¹⁸ The parties amended the agreement in 1939 to include other future successes such as *The Grapes of Wrath*.¹¹⁹ Under the agreement, Viking acquired the “sole and exclusive right” to publish Steinbeck’s works.¹²⁰ Steinbeck renewed these copyrights for a second twenty-eight year term.¹²¹ When Steinbeck died in

¹¹² *Id.* at 1043.

¹¹³ *Id.* at 1045. Section 304(c)(5) provides that “Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.”

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1046. The court emphasized that Pooh Properties Trust negotiated for more money based on the bargaining power wielded by A.A. Milne’s son. The use of statutory termination rights as leverage to get a better deal lied at the heart of the Ninth Circuit’s opinion. See Michael J. Bales, Note, *Grapes of Wrathful Heirs: Termination of Transfers of Copyright and “Agreements to the Contrary*, 27 CARDOZO ARTS & ENT. L.J. 663, 674 (2010).

¹¹⁶ *Milne*, 430 F.3d at 1046. Commentators have questioned the court’s lack of justification for depriving Claire Milne of her statutory termination rights. Menell & Nimmer, “*Inalienable*” *Termination Rights*, *supra* note 38, at 809.

¹¹⁷ *Penguin Group (USA) Inc. v. Steinbeck*, 537 F.3d 193, 203 (2d Cir. 2008).

¹¹⁸ *Id.* at 196.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

1968, he bequeathed his interests to his widow, Elaine.¹²²

In a 1994 agreement, Elaine used her termination of transfer rights to bargain for a more lucrative royalty agreement with Penguin Group covering the works under the prior agreements as well as several others in Elaine's possession.¹²³ The agreement provided that "when signed by the Author and Publisher, [this agreement] will cancel and supersede the previous agreements, as amended, for the [works] covered hereunder."¹²⁴ No other of Steinbeck's statutory heirs were parties to this agreement.¹²⁵ Upon her death in 2003, Elaine transferred her copyright interests and the proceeds from her new agreement with Penguin to her heirs.¹²⁶

A year later, two of Steinbeck's statutory heirs, his son Thomas and grandchild Blake Smyle, served a notice of termination on Penguin Group.¹²⁷ In this notice, Steinbeck's statutory heirs sought to terminate Steinbeck's 1938 agreement with The Viking Press pursuant to their termination right in Section 304(d).¹²⁸ In response, Penguin argued that the notice of termination was ineffective because the 1994 agreement with Elaine superseded the 1938 agreement and therefore the 1938 agreement no longer existed.¹²⁹ Penguin sought a declaratory judgment that the termination notice was ineffective because the 1994 agreement extinguished the termination right.¹³⁰ The district court rejected Penguin's argument and held that the 1994 agreement was an "agreement to the contrary" under Section 304(c)(5).¹³¹

The Second Circuit reversed on appeal for largely the same reasons as the Ninth Circuit did in *Milne*. The Second Circuit held that the 1994 agreement

¹²² *Steinbeck*, 537 F.3d at 196.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *See id.* Penguin and Elaine Steinbeck entered into a separate agreement with regard to Thomas Steinbeck's interest. Thomas Steinbeck ratified the agreement on behalf of all the remaining Steinbeck heirs on December 22, 1994. *Id.* at 196 n.1.

¹²⁶ *Id.* at 197.

¹²⁷ *Steinbeck*, 537 F.3d at 197.

¹²⁸ *Id.* at 199.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Steinbeck v. McIntosh & Otis, Inc.*, 433 F. Supp. 2d 395, 402 (S.D.N.Y. 2006). Recall that Section 304(c)(5) provides that original authors or their statutory heirs may terminate an assignment despite any "agreement to the contrary." 17 U.S.C. § 304(d)(5) (2006).

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superseded the 1938 agreement.¹³² As a result, no pre-1978 grant of copyright existed for Steinbeck’s statutory heirs to terminate.¹³³ When interpreting Section 304(c)(5), the court analyzed this section’s legislative history and plain language and found that neither indicated Congress’s intent to prevent authors and their heirs from losing their termination rights by renegotiating a pre-1978 grant.¹³⁴ The court focused on Elaine’s use of her termination rights as leverage in negotiating with Penguin and held that all Section 304(c) affords is a single opportunity to renegotiate pre-1978 assignments.¹³⁵

The *Steinbeck* decision was surprising in light of the Second Circuit’s decision in *Marvel Characters, Inc. v. Simon*, decided less than a decade earlier.¹³⁶ In that case, the Second Circuit invalidated a settlement agreement because enforcing the agreement would block the author’s termination right; the court held that the agreement was an “agreement to the contrary.”¹³⁷ The Second Circuit observed that allowing contracts to supersede termination rights ran afoul of Congress’s clear recognition of the termination right’s inalienable nature.¹³⁸ Despite strong language in *Marvel*, the *Milne* court allowed publishers to dodge the inalienability of termination rights in exactly the manner feared by the *Marvel* court.¹³⁹

Classic Media, Inc. v. Mewborn suggested some limits on the approach taken in *Milne* and *Steinbeck*.¹⁴⁰ The case involved Eric Knight’s copyrights in *Lassie* that he secured in 1938 and 1940. After assigning to Classic Media, Inc.

¹³² *Steinbeck*, 537 F.3d at 202.

¹³³ *Id.*

¹³⁴ *Id.* at 203.

¹³⁵ *Id.* at 202-04 (“Nothing in the statute suggests that an author or an author’s statutory heirs are entitled to more than one opportunity, between them, to use termination rights to enhance their bargaining power or to exercise them.”).

¹³⁶ See *Marvel Characters, Inc. v. Simon*, 310 F.3d 280 (2d. Cir. 2002).

¹³⁷ *Id.* at 290. The agreement characterized the copyright as a work made for hire and thus not eligible for termination. *Id.* at 291. For a discussion of works made for hire, see discussion *infra* Part II.C.2.

¹³⁸ *Marvel*, 310 F.3d. at 291 (“[S]uch an interpretation would likely . . . provide a blueprint by which publishers could effectively eliminate an author’s termination right. We conclude that Congress included the ‘notwithstanding any agreement to the contrary’ language in the termination provision precisely to avoid such a result.”) For a fuller discussion of the *Marvel* case, see John Molinaro, *Who Owns Captain America? Contested Authorship, Work-for-Hire, and Termination Rights under the Copyright Act of 1976*, 21 GA. ST. U. L. REV. 565 (2005).

¹³⁹ See *Steinbeck*, 537 F.3d at 203-204.

¹⁴⁰ See *Classic Media, Inc. v. Mewborn*, 532 F.3d 978 (9th Cir. 2008).

the television rights to *Lassie*, Knight died in 1943 and passed his interest in his renewal term to his widow and three surviving daughters.¹⁴¹ Each heir secured a renewal term for the copyright, prompting Classic Media to renegotiate with each heir to obtain the rights to continue exploiting Knight's copyrights in *Lassie*.¹⁴²

In 1976, one of Knight's daughters, Winifred Knight Mewborn, entered into an agreement with Classic Media assigning her part of the *Lassie* movie, television, and radio rights for a lump sum payment.¹⁴³ A subsequent agreement with Mewborn in 1978 transferred Mewborn's remaining rights in *Lassie* to Classic for an additional lump sum and re-granted the rights at stake in the 1976 agreement.¹⁴⁴ In 1996, Mewborn sought to terminate the 1976 agreement with Classic under Section 304(c).¹⁴⁵ The district court followed *Milne* and held that Mewborn's termination notice was invalid because Mewborn used her termination right to renegotiate the 1978 agreement.¹⁴⁶

The Ninth Circuit reversed on appeal and determined that the 1978 agreement was void as an "agreement to the contrary" under 17 U.S.C. § 304(c)(5).¹⁴⁷ The court noted that, because Mewborn's termination interest had not vested, Mewborn entered negotiations with Classic Media having "nothing in hand with which to bargain."¹⁴⁸ The court also observed that the 1978 agreement had not explicitly revoked the 1976 agreement, but only re-granted the rights at issue in the 1976 agreement.¹⁴⁹ In the end, the court found the 1976 agreement valid despite the 1978 agreement and held that Mewborn could terminate the 1976 agreement under 17 U.S.C. § 304(c).¹⁵⁰

Taken together, the *Milne*, *Steinbeck* and *Mewborn* decisions indicate a willingness by the Ninth and Second Circuits to interpret liberally the "notwithstanding any agreement to the contrary" language of Section 304(c)(5). Many have criticized the *Milne* and *Steinbeck* decisions as

¹⁴¹ *Id.* at 980.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Mewborn*, 532 F.3d at 981.

¹⁴⁶ *Id.* at 982.

¹⁴⁷ *Id.* at 986.

¹⁴⁸ *Id.* at 989. The Ninth Circuit distinguished *Milne* by emphasizing that *Milne*'s statutory heir had a vested termination interest and used it to secure more benefits for *Milne*'s heirs when he revoked the prior grant. *Id.*

¹⁴⁹ *Id.* at 986-87.

¹⁵⁰ *Id.*

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conflicting with the clearly expressed intent of Congress to enact Sections 203(a)(5) and 304(c)(5) to overturn the *Fred Fisher* decision.¹⁵¹ Others have responded positively, arguing that a flexible interpretation of Sections 203(a)(5) and 304(c)(5) recognizes that authors and their heirs can use their termination rights to secure better agreements without exercising those rights.¹⁵²

Overall, the Ninth and Second Circuits’ decisions have two important implications for the balance of power between the courts and Congress over termination rights. First, despite Congress’s intent to retool the bargaining positions of publishers and authors, the plain language of Sections 203(a)(5) and 304(c)(5) failed to secure inalienable termination rights after *Fred Fisher*.¹⁵³ Second, *Milne, Steinbeck*, and *Mewborn* indicate that the courts will remain active in the upcoming termination period in allocating the bargaining power between authors and publishers, regardless of how clearly Congress has spoken on the issue.

2. Works Made for Hire

The prior account of how some courts unfavorably interpreted the Copyright Act for authors might suggest that Congress was always faithful to authors. However, congressional actions with respect to works made for hire indicate that major publishers can sway Congress in their favor. Congress’s flip-flop on works made for hire in 1999 and 2000 hints that it might again legislate in favor of publishers in the face of the termination of transfer storm.¹⁵⁴

¹⁵¹ See, e.g., Menell & Nimmer, “*Inalienable*” Termination Rights, *supra* note 38, at 814; Allison M. Scott, *Oh Bother: Milne, Steinbeck, and an Emerging Circuit Split Over the Alienability of Copyright Termination Rights*, 14 J. INTELL. PROP. L. 357, 387 (2007). In particular, David Nimmer and Peter Menell suggested that *Milne* and *Steinbeck* “overstep the judicial authority within our constitutional structure” by disregarding Congress’s expressed policy. Menell & Nimmer, “*Inalienable*” Termination Rights, *supra* note 38, at 814.

¹⁵² See Bales, *supra* note 115, at 679-80. Bales creates a four-factor test for evaluating whether a termination right has been exercised that he argues better balances the rights of both assignors and assignees. *Id.* at 680-84. Professor Loren argues that the exceptions to inalienable termination rights can serve Congress’s purposes so long as courts apply the exceptions uniformly so parties understand their rights in advance. See Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the “Inalienable” Right to Terminate*, 62 FLA. L. REV. 1329, 1354-55 (2010).

¹⁵³ See also Menell & Nimmer, “*Inalienable*” Terminations Rights, *supra* note 38, at 814-15.

¹⁵⁴ While this section will focus on Congress’s interactions with the recording industry,

A work made for hire is a work created by an employee during the course of her employment or a work specially commissioned by one party from another.¹⁵⁵ The Copyright Act also provides nine classes of works that qualify as works made for hire as specially commissioned works, including commissioned works used in motion pictures, in compilations, and in instructional texts.¹⁵⁶ The list of specially commissioned works notably omits sound recordings.¹⁵⁷ Although several inferences may be drawn about Congress's intent from the omission, Congress crafted the work made for hire definition in the 1976 Act to "foreclose the possibility for commissioned status of a sound recording *per se*."¹⁵⁸

In 1999, Congress quietly added a technical amendment to the end of the Satellite Home Viewer Improvement Act that made sound recordings a category eligible for treatment as works made for hire.¹⁵⁹ Earlier drafts did not include the sound recordings provision and the amendment was a strange addition to a bill that focused on licenses for the retransmission of television signals.¹⁶⁰ The amendment was a push by record labels to make a substantive change to copyright law altering the relations of publishers and artists.¹⁶¹ Many recording artists and their representatives pointed to secret lobbying by the Recording Industry Association of America ("RIAA") as the main culprit behind the abrupt legislative change.¹⁶² These artists felt that the change's

the works made for hire provisions have also been a major battleground for authors and publishers of comics, involving both Congress and the courts. *See, e.g.,* Ashok Chandra, Note, *Crisis of Indefinite Consequence: How the Derivative Works Exception and the Lanham Act Undercut the Remunerative Value of Termination of Transfers*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 241 (2006); Molinaro, *supra* note 138.

¹⁵⁵ Menell & Nimmer, *Time Bomb*, *supra* note 32, at 388-89.

¹⁵⁶ 17 U.S.C. § 101 (2006).

¹⁵⁷ One possible explanation for the omission is that Congress did not accord copyright protection to sound recordings until 1971, right in the middle of the negotiations leading up to the Copyright Act of 1976. An Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (creating a limited copyright in sound recordings). For a discussion of the evolution of the sound recording copyright, see *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 487-90 (3d Cir. 2003).

¹⁵⁸ Menell & Nimmer, *Time Bomb*, *supra* note 32, at 388-89.

¹⁵⁹ *Id.* at 390-91.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 391-92.

¹⁶² *See id.* at 392. The amendment coincided with the peak of the RIAA's battle with Napster to stop the free distribution of copyrighted music over the Internet. At the time, file sharing represented a major threat to the profits of the recording industry. Through the

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origins betrayed the RIAA’s intent to strip recording artists of valuable rights.¹⁶³ Recording artists protested because employers own works made for hire for the duration of the entire copyright term, whereas other works are subject to statutory termination rights.¹⁶⁴ Several commentators suggested that recording industry sought to regain bargaining power and avoid statutory termination by expanding the *per se* categories of works made for hire.¹⁶⁵

After controversy over the amendment grew, the House Subcommittee on Courts and Intellectual Property convened a hearing to address whether the proceedings leading to the 1999 Amendment to the Copyright Act were too rash.¹⁶⁶ The extent of the controversy, bulwarked by the recording industry’s ongoing battle with Napster, led to the amendment’s repeal in 2000.¹⁶⁷ Congress, perhaps shamed by its rashness in adopting the amendment, sought to avoid the implication that the repeal was a substantive policy consideration by stating instead that it was merely an odd “legislative construction.”¹⁶⁸

sound recording amendment, the RIAA sought to expand its opportunity to profit off of musical works by securing copyrights through the works made for hire provision. For more information about the RIAA’s battle against Napster, see *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (holding that Napster could be held liable for contributory and vicarious copyright infringement for providing peer-to-peer file sharing). See also Lee B. Burgunder, *Reflections on Napster: The Ninth Circuit Takes a Walk on the Wild Side*, 39 AM. BUS. L.J. 683 (2002) (discussing the Ninth Circuit’s opinion in *A&M Records*); Stephanie Greene, *Reconciling Napster with the Sony Decision and Recent Amendments to Copyright Law*, 39 AM. BUS. L.J. 57 (2001) (placing *A&M Records* within the broader context of copyright law).

¹⁶³ See, e.g., Brooks Boliek, *New Music Biz Discord over ‘Work for Hire’ Status RIAA Comes Under Fire for Copyright Revisions*, HOLLYWOOD REP., May 23, 2000, at 8 (“Artists from Don Henley to Coolio have lined up to oppose the change. They feel that the change and the manner in which it was carried out, without a hearing or testimony on the subject, was an effort to undo their rights.”).

¹⁶⁴ Menell & Nimmer, *Time Bomb*, *supra* note 32, at 396.

¹⁶⁵ See Bragg, *supra* note 40, at 800-01; Robert A. Kreiss, *Abandoning Copyrights to Try to Cut Off Termination Rights*, 58 MO. L. REV. 85, 89 n.8 (1993).

¹⁶⁶ Menell & Nimmer, *Time Bomb*, *supra* note 32, at 392.

¹⁶⁷ *Id.* at 394. The Work Made for Hire and Copyright Corrections Act of 2000 provided for the repeal of the amendment. Pub. L. No. 106-379, sec. 1, 114 Stat. 1444 (Oct. 27, 2000).

¹⁶⁸ Menell & Nimmer, *Time Bomb*, *supra* note 32, at 394 (citing 146 CONG. REC. H7772 (daily ed. Sept. 19, 2000) (statement of Rep. Conyers)). Perhaps indicative of this shame, Congress’s amendment of the work made for hire definition in Section 101 also included language that the 1999 Amendment and 2000 Repeal “were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial

Congress' actions are particularly troubling for recording artists entering the termination period. Congress first surrendered to the influence of lobbyists in including the technical amendment and then, when confronted with an opportunity to address the underlying policy issues squarely, summarily declined by repealing the amendment.¹⁶⁹ Despite protecting authors during prior major revisions to the Copyright Act, Congress showed its susceptibility to the very lobbyists who may significantly influence Congress in the coming termination period.

3. The Coming Storm

As their past actions have shown, both Congress and the courts have tipped the balance of bargaining power in favor of publishers in the past. Circuit courts have stripped inalienable termination rights of their inalienability while the Supreme Court has yet to speak directly on the matter.¹⁷⁰ Equally troubling for authors, Congress wavered in its task of “promot[ing] the Progress of Science and useful Arts” by succumbing to the pressures of recording industry lobbyists to amend the works made for hire provisions in order to protect business interests, not to incentivize original creation.¹⁷¹ Industry lobbying continues to play an increasingly large role in dictating congressional action relating to the Copyright Act.¹⁷² Other areas of copyright law have seen similar struggles between authors and publishers for bargaining power and instances where both Congress and the courts failed to uphold the Constitution's goal of incentivizing artistic invention.¹⁷³ Historically, the

determinations.” Menell & Nimmer, *Time Bomb*, *supra* note 32, at 409 (quoting 17 U.S.C. § 101 (2006)).

¹⁶⁹ See Menell & Nimmer, *Time Bomb*, *supra* note 32, at 409. One commentator suggested that, while recording artists will likely be able to dodge the works made for hire exception, the provision should be revised to create better harmony in the overall termination scheme. See Daniel Gould, Note, *Time's Up: Copyright Termination, Work-For-Hire, and the Recording Industry*, 30 COLUM. J. L. & ARTS 91 (2007).

¹⁷⁰ The Supreme Court twice denied certiorari to petitions for the review of the Steinbeck decisions. *Steinbeck v. McIntosh & Otis, Inc.*, 131 S. Ct. 2991 (June 13, 2011); *Steinbeck v. Penguin Group (USA) Inc.*, 129 S. Ct. 2383 (2009).

¹⁷¹ U.S. CONST. art. I, § 8, cl. 8.

¹⁷² Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 105-33 (2004) (exploring the increasing role of lobbying on the evolution of the Copyright Act of 1976).

¹⁷³ One such area is the derivative works exception, an exception to the statutory termination rights that allows grantees to retain rights to the works they created based on copyrights received by assignment from original authors. See 17 U.S.C. §§ 203(b)(1), 304(c)(6)(A) (2006). Congress adopted the derivative works exception to appease the

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Copyright Office has played a largely advisory role in laying out the substantive termination rights of authors, leaving much of the policy and statutory interpretation to Congress and the courts.¹⁷⁴

Entering the upcoming termination period, authors have no consistent support for their interests from the courts or Congress and only limited support from the Copyright Office.¹⁷⁵ Several thousand recording artists and authors stand in a vulnerable position.¹⁷⁶ Depending on the termination gap’s resolution, authors and their heirs might lose the opportunity to renegotiate their agreements with their publishers to secure a larger share of the profits of their works and more say in their works’ exploitation.¹⁷⁷

At this time, both publishers and authors are unsure of their respective rights regarding the termination provisions, perhaps in part due to the discrepancy between the statutory language and the courts’ initial interpretation of that language. One comment to the Copyright Office’s Notice of Inquiry discussed a case involving a work in the termination gap in which the “publisher took the position that . . . terminations rights were undefined – a ‘black hole’ for exercising termination rights.”¹⁷⁸ Instead of trying to win a lawsuit “against the deep pockets of the corporate publisher,” the client decided to wait to seek

motion picture industry and to get their approval of the new statutory termination rights. See Lohmann, *supra* note 40, at 912. For a discussion of derivative works, see Lohmann, *supra* note 40; Mimms, *supra* note 36.

¹⁷⁴ See 5 WILLIAM PATRY, PATRY ON COPYRIGHT § 17.02 (2010); 2-7 MELVILLE B. NIMMER & DAVID NIMMER, JG (2010); Mimms, *supra* note 36, at 626.

¹⁷⁵ The first works eligible for termination under 17 U.S.C. § 203 become eligible for termination thirty-five years after January 1, 1978, i.e. January 1, 2013. See 17 U.S.C. § 203 (2006).

¹⁷⁶ Comments of Charles J. Sanders & Jan F. Constantine to the, U.S. Copyright Office, *supra* note 18, at 3. In making this estimate, the Authors Guild and The Songwriters Guild of America considered that

[h]undreds and perhaps thousands of independent and staff songwriters were working under exclusive songwriter agreements in the mid to late 1970s that generally carried three-to-seven year terms [and] nearly all books published in 1978, the vast majority of books published in 1979, and a substantial proportion of the books published in 1980 are affected by the ‘gap,’ since most book contracts are signed more than a year before book publication.

Id.

¹⁷⁷ See Menell & Nimmer, *Time Bomb*, *supra* note 32, at 415-16.

¹⁷⁸ Comments of Lewis Anderson, Legacyworks, LLC, to the U.S. Copyright Office (Apr. 16, 2010) at 2 (on file with author), <http://www.copyright.gov/docs/termination/comments/2010/legacyworks.pdf>.

termination with the hope that litigation or legislation would clarify the situation.¹⁷⁹ Other commentators have observed similar confusion and hesitation.¹⁸⁰ Furthermore, former Register of Copyright Marybeth Peters suggested that many authors have yet to file notice of their intent to terminate because they are unaware or unsure of their termination rights; as a result, many might wait and miss their chance to terminate.¹⁸¹

The recording industry has several incentives to bring court challenges to termination attempts by songwriters, particularly for those works caught in the termination gap, and to lobby Congress to issue a favorable amendment to Sections 203 and 304. First, and most obvious, terminations of assignments directly affect the profitability of record labels by returning control of the copyright to the original author.¹⁸² Further, older works are increasingly more valuable as they find renewed popularity on iTunes and Amazon; because of this “long tail” phenomenon, more than just major artists might consider terminating their grants.¹⁸³ Redistributing already successful records also has a

¹⁷⁹ *Id.*

¹⁸⁰ *See, e.g.*, Supplemental Comments of Michael Perlstein, Partner, Fischbach, Perlstein, Lieberman & Almond, LLP, to the U.S. Copyright Office (Apr. 25, 2010) at 2 (on file with author), <http://www.copyright.gov/docs/termination/comments/2010/perlstein-et-al-supplement.pdf>; Reply Comments of Casey Del Casino, Adams and Reese, LLP, to the U.S. Copyright Office (May 20, 2010) (on file with author), <http://www.copyright.gov/docs/termination/comments/2010/reply/casey-del-casino--adams-reese-llp.pdf>; Comments of Bill Gable, Law Offices of Bill Gable, to the U.S. Copyright Office (Apr. 8, 2010), <http://www.copyright.gov/docs/termination/comments/2010/gable-bill.pdf>.

¹⁸¹ Susan Butler, *In the Vault*, BILLBOARD, Aug. 12, 2006, at 2. Butler notes that several producers and artists who won Grammy Awards between 1978 and 1982 were unaware of the termination right but wanted to learn more. *Id.*

¹⁸² *Id.* at 415.

¹⁸³ Gould, *supra* note 169, at 93-94. *See also* Reply Comments of the Future of Music Coalition to Marybeth Peters, Register of Copyright, U.S. Copyright Office (May 21, 2010) at 2 (on file with author), <http://www.copyright.gov/docs/termination/comments/2010/reply/future-music-coalition.pdf>. The Future of Music Coalition observes that

[T]his ‘second bite at the apple’ is even more important in an environment where product and broadcast spectrum scarcity has far less bearing on whether a musical work finds an audience. As more copyrights become eligible to revert back to creators, we may find that the artists themselves exploit their works in novel ways that could be beneficial to the overall health of the music marketplace.

Id.

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relatively higher profit margin than developing new records and building interest in new artists.¹⁸⁴ Finally, record labels that have securitized their intellectual property holdings need to establish a predictable, stable catalog in order to maintain a consistent valuation, both for ongoing operation and for potential sales.¹⁸⁵

The termination gap also coincides with the diminishing importance of record sales to recording artists’ overall financial well-being.¹⁸⁶ Record sales and particularly album sales comprise an increasingly smaller chunk of a musician’s profits, and more musicians can access the music marketplace at marginal costs through multimedia sites, social networking services, and streaming music services.¹⁸⁷ Increasingly, websites and services like YouTube, Pandora, last.fm, Spotify and Napster break down the barriers to succeeding as a musical artist and diminish the importance of major record labels in allowing artists to distribute their music and to start their careers.¹⁸⁸ Musical artists’ decreased dependence on major record labels provides another significant incentive for record labels to maintain their portfolios and role in the music publishing process.

Given these incentives, record labels and publishers will likely prepare for a vigorous battle with songwriters, both in individual courtrooms and in the halls of Congress. In some instances, the struggle has already begun, as record labels and publishers have rejected termination notices from songwriters in the termination gap.¹⁸⁹ With potentially lucrative copyrights at stake, authors will continue to try to terminate their assignments. Authors remain at a significant disadvantage in terms of finances and legal resources, however, making it more difficult for them to succeed in bringing and maintaining court cases.¹⁹⁰

¹⁸⁴ Gould, *supra* note 169, at 94.

¹⁸⁵ *Id.* Gould also identifies practical advantages for record labels, including the limit of termination to copyrights in the United States and that the labels retain the right to the artist’s name, likeness, and trademarks. *See id.* at 130-31.

¹⁸⁶ *See* Kristin Thomson & Jean Cook, *Artist Revenue Streams: A Multi-Method Research Project Examining Changes in Musicians’ Sources of Income* 91-98, in The Berkman Center for Internet & Society at Harvard University, *Rethinking Music: A Briefing Book*, available at http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Rethinking_Music_Briefing_Book_April-25-2011.pdf.

¹⁸⁷ *Id.* at 89-92, 95, 98, 100.

¹⁸⁸ *See id.* at 89-91, 100.

¹⁸⁹ *See, e.g.*, Comments of Charles J. Sanders & Jan F. Constantine to the U.S. Copyright Office, *supra* note 18, at 3; Comments of Karyn Soroka to the U.S. Copyright Office, *supra* note 31, at 1.

¹⁹⁰ *See* Comments of Charles J. Sanders & Jan F. Constantine to the U.S. Copyright

The Songwriters Guild of America (“SGA”) has observed a particular willingness among those parties served with termination notices to resort to any and all defenses to avoid losing valuable copyrights.¹⁹¹ Commentators have called for action either by Congress or by the Copyright Office to “insure [sic] the rights of members of the termination class to the classic second bite of the apple” and “insure [sic] certainty in commercial transactions.”¹⁹²

IV. WHAT NOW? THE DEBATE OVER POSSIBLE COURSES OF ACTION FOR THE COPYRIGHT OFFICE

With 2013, the first year assignments could be terminated, drawing closer, the Copyright Office had the first opportunity to address the gap in termination provisions when deciding whether to accept termination notices for these copyrights at all.¹⁹³ The Office had three separate but not mutually exclusive options: interpret the statute to resolve the ambiguity, call for congressional action to address the gap, or accept termination notices but wait for court cases to decide the merits of the issue.¹⁹⁴

A. *Interpretive Action*

For Charlie Daniels and other artists, the heart of the ambiguity in the termination gap stems from the unclear coverage of Sections 203 and 304 of the Copyright Act of 1976.¹⁹⁵ Section 304 applies to copyrighted works created before January 1, 1978 and indicates that assignments of these works

Office, *supra* note 18, at 5 n.2; Reply Comments of Charles J. Sanders, Counsel, The Songwriters Guild of America, and Jan F. Constantine, Counsel, The Authors Guild, to the U.S. Copyright Office 2, *available* at <http://www.copyright.gov/docs/termination/comments/2010/reply/charles-sanders-songwriters-guild-america.pdf> (“[T]he mere cost of litigation of this issue would be sufficient to defeat the termination interests of some authors and songwriters who do not have the legal or financial resources to take on a well-financed publisher advancing a contrary view.”).

¹⁹¹ Comments of Charles J. Sanders & Jan F. Constantine to the U.S. Copyright Office, *supra* note 18, at 3 (“The parties on whom notice of termination is served often fully avail themselves of all defenses to the proposed action, and are well-versed in the wide range of statutory formalities that must be satisfied before termination can be effected [sic].”).

¹⁹² Supplemental Comments of Michael Perlstein to the U.S. Copyright Office, *supra* note 180, at 3.

¹⁹³ See Gap in Termination Provisions; Inquiry, 75 Fed. Reg. 15,390 (Mar. 29, 2010).

¹⁹⁴ See discussion *infra* Parts IV.A – IV.C.

¹⁹⁵ See *supra* notes 6-17 and accompanying text; discussion *supra* Parts II.A-B.

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are only terminable at the end of the fifty-sixth year from the date that the author secured copyright.¹⁹⁶ As many commentators agreed, Section 304(c) would not cover works in the termination gap because the copyright must “subsist” as of January 1, 1978.¹⁹⁷ Because works in the termination gap were assigned in contracts before January 1, 1978 but created after that date, they would not fall into Section 304(c).¹⁹⁸

The Copyright Office’s interpretive solution focused on reading the language of Section 203 to cover works in the termination gap, as did the solutions of many commentators.¹⁹⁹ Section 203(a) provides that

[i]n 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 termination²⁰⁰

On its face, the “executed” language of Section 203(a) indicates that it

¹⁹⁶ 17 U.S.C. § 304(c), (c)(3) (2006). Section 304(c) indicates that “[i]n the case of any copyright subsisting in either its first or renewal term on January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer or license of the renewal copyright or any right under it, executed before January 1, 1978, by any of the persons designated by subsection (a)(1)(C) of this section, otherwise than by will, is subject to termination” under certain conditions. Section 304(c)(3) provides: “Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.”

¹⁹⁷ 17 U.S.C. § 304(c). *See, e.g.*, Reply Comments of the Future of Music Coalition to the U.S. Copyright Office, *supra* note 183; Comments of Michael Perlstein, Partner, Fischbach, Perlstein, Lieberman & Almond LLP, to Maria Pallante, Deputy General Counsel, U.S. Copyright Office 1-2 (Oct. 30, 2007), *available at* <http://www.copyright.gov/docs/termination/comments/2010/perlstein-et-al.pdf>; Comments of Charles J. Sanders & Jan F. Constantine to the U.S. Copyright Office, *supra* note 17, at 4-5; Comments of Niels Schaumann, Professor of Law, Intellectual Property Institute, William Mitchell College of Law, to U.S. Copyright Office 2-3 (Apr. 28, 2010), *available at* <http://www.copyright.gov/docs/termination/comments/2010/intellectualpropertyinstitute.pdf>.

¹⁹⁸ The same reasoning applies to 17 U.S.C. § 304(d), governing termination for works with extended copyright coverage under the Sonny Bono Copyright Term Extension Act.

¹⁹⁹ Gap in Termination Provisions; Final Rule, 76 Fed. Reg. at 32,316-32,317.

²⁰⁰ 17 U.S.C. § 203(a) (2006).

applies solely to grants completed on or after January 1, 1978, thereby excluding assignments in the termination gap.²⁰¹

This interpretation draws support from an early guide to the Copyright Act of 1976 and from an early interpretation of the termination provisions by Melville B. Nimmer.²⁰² Though careful to disclaim it as not the official law regarding termination provisions, the Copyright Office issued an example in its *General Guide to the Copyright Act of 1976* suggesting that, for single-book publishing contracts, assignments of works falling in the termination gap could not be terminated under Section 203.²⁰³ Similarly, Nimmer, a noted scholar of copyright law and the original author of *Nimmer on Copyright*, observed that the Register's Supplement Report, unlike the House Report, supports an interpretation of "execution" to apply to the signing of the publication contract.²⁰⁴

The majority view of commentators to the Copyright Office's Notice of Inquiry and ultimate position of the Copyright Office after the rulemaking process, however, contends that authors cannot assign their copyrights until the author fixates the work.²⁰⁵ Under this approach, an assignment of copyright is

²⁰¹ Several commentators made this observation, noting that it leaves authors in the termination gap with no remedy. *See, e.g.*, Comments of Michael Perlstein to the U.S. Copyright Office, *supra* note 199, at 1-2; Comments of Niels Schaumann to the U.S. Copyright Office, *supra* note 197, at 2-5.

²⁰² 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 11.05[A] (2008); MARYBETH PETERS, LIBRARY OF CONGRESS, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976 6:1, 6:3 to 6:6 (1977).

²⁰³ *Id.* In the example,

A publishing company, on July 1, 1977, makes a contract with Norbert Novelist for a new book. The book is not written until July 20, 1979. The rights transferred in the July 1, 1977 contract would not be subject to termination. The grant was made before January 1, 1978 but not for a work in which copyright was subsisting on the effective date of the new law.

Id. at 6:6.

²⁰⁴ 3 NIMMER § 11.05[A], *supra* note 202, at 11-40.9.

²⁰⁵ *See infra* notes 233-41 and accompanying text. *See, e.g.*, Comments of Kenneth D. Freundlich, Freundlich Law, and Niel W. Netanel, Pete Kameron Endowed Chair in Law, UCLA School of Law, to Marybeth Peters, Register of Copyrights, Copyright Office 5 (Apr. 30, 2010), [available at](http://www.copyright.gov/docs/termination/comments/2010/freundlich-kenneth-neil-netanel.pdf) <http://www.copyright.gov/docs/termination/comments/2010/freundlich-kenneth-neil-netanel.pdf>; Reply Comments of the Future of Music Coalition to the U.S. Copyright Office, *supra* note 185; Comments of Jane C. Ginsburg, Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia University School of Law, to Maria Pallante,

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meaningless until the federal copyright exists and meets the fixation requirement of 17 U.S.C. § 102(a).²⁰⁶ The language of Section 203(a) refers to “a copyright,” suggesting that a “grant” cannot be “executed” until the copyrighted work exists.²⁰⁷ This interpretation comports with the definition of “transfer of copyright ownership” in 17 U.S.C § 101.²⁰⁸ Accordingly, the important date for authors seeking to terminate assignments is the date of creation of the work.²⁰⁹ This reading also respects Congress’s goal of providing authors with a second chance to enjoy the fruits of their creative labors.²¹⁰

There are compelling reasons to follow this interpretation despite the *General Guide* and Nimmer’s suggestion that the gap might leave some authors without termination rights. At least one commentator observed that the *General Guide* focused strictly on a single-book publishing contract, not a term songwriter agreement, and also noted that the Copyright Office’s rulemaking sought to reinterpret the given example.²¹¹ Additionally, Nimmer observed that a “grant executed before the work has been reduced to tangible form will nevertheless be regarded as a grant of statutory copyright once the work has

Associate Register, U.S. Copyright Office 2 (Apr. 27, 2010), *available at* <http://www.copyright.gov/docs/termination/comments/2010/ginsburg-jane.pdf>; Comments of Geoffrey Hull, Professor Emeritus, Middle Tennessee State University, to U.S. Copyright Office, *available at* <http://www.copyright.gov/docs/termination/comments/2010/hull-geoffrey.pdf>.

²⁰⁶ *See, e.g.*, Comments of Jane C. Ginsburg to the U.S. Copyright Office, *supra* note 205, at 1-2 & n.1 (“The copyright does not pre-exist the creation of the work.”).

²⁰⁷ *Id.* at 1-2.

²⁰⁸ Comments of Kenneth D. Freundlich & Neil Netanel to the U.S. Copyright Office, *supra* note 205, at 5 (citing 17 U.S.C. § 101 (2006)). The Copyright Act defines a “transfer of copyright ownership” as “an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights *comprised in a copyright*, whether or not it is limited in time or place of effect, but not including a nonexclusive license.” 17 U.S.C. § 101 (2006) (emphasis added).

²⁰⁹ Comments of Kenneth D. Freundlich & Neil Netanel to the U.S. Copyright Office, *supra* note 205, at 1-2; Comments of Jane C. Ginsburg to the U.S. Copyright Office, *supra* note 205, at 1-3.

²¹⁰ *See, e.g.*, Comments of Jane C. Ginsburg to the U.S., Copyright Office, *supra* note 205; Comments of Kenneth D. Freundlich & Neil Netanel to the U.S. Copyright Office, *supra* note 205, at 2 n.1. For a discussion of congressional policy behind the termination provisions, *see* discussion *supra* Parts II, III.

²¹¹ *See* Comments of Kenneth D. Freundlich & Neil Netanel to the U.S. Copyright Office, *supra* note 205.

achieved a tangible form.”²¹²

The RIAA has raised doubt about whether to interpret the term “executed” in a manner so favorable to authors. In comments to the Copyright Office’s proposed rule, the RIAA observed that Congress may have intended “executed” to mean “signed.”²¹³ The RIAA emphasized several instances in Section 204(b) and Sections 205(a) and (d) of the Copyright Act that use the term “executed” in this manner.²¹⁴ For further support, the RIAA argued that both patent and copyright law permit assignments of rights to inventions and to copyrights before their creation.²¹⁵ Worse for authors, the RIAA raised the specter of *Fred Fisher Music Co.* by citing the case for the idea that copyrights can be assigned before they vest.²¹⁶ The reference is troublesome for authors given Congress’s intent to overrule the case in the revisions adopted in the Copyright Act of 1976 as this could be an opportunity for the courts to again sidestep congressional intent.²¹⁷ Overall, the RIAA’s interpretation likely indicates that the coming termination period will revive the struggle between authors and publishers for greater bargaining power. In light of the lobbying power of the RIAA, Congress might adopt the RIAA’s approach and require these authors to wait a full fifty-six years before terminating their assignments.
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B. Call for Congressional Action

Despite a general call for action by the Copyright Office, many commentators, most notably the RIAA, suggested that the Copyright Office should pressure Congress to address the termination gap rather than act on its

²¹² MELVILLE B. NIMMER & DAVID NIMMER, 3-11 NIMMER ON COPYRIGHT § 11.02[A][1] n.8 (2010). For a fuller refutation, see Comments of Kenneth D. Freundlich & Niel W. Netanel to the U.S. Copyright Office, *supra* note 205, at 8-9.

²¹³ Reply Comments of the Recording Industry Association of America to the U.S. Copyright Office (May 21, 2010) (on file with author), <http://www.copyright.gov/docs/termination/comments/2010/reply/riaa.pdf>.

²¹⁴ *Id.*

²¹⁵ *Id.* (citing *DDB Technologies, L.L.C. v. MLB Advanced Media, L.P.*, 517 F.3d 1284, 1289-90 (Fed. Cir. 2008); *Speedplay, Inc. v. Bebop, Inc.*, 211 F.3d 1245, 1253 (Fed. Cir. 2000)).

²¹⁶ Reply Comments of the Recording Industry Association of America to the U.S. Copyright Office, *supra* note 213.

²¹⁷ See discussion *supra* Part II.B.

²¹⁸ See, e.g., Susan Butler, *In the Vault*, BILLBOARD, Aug. 12, 2006, at 3 (noting the strength of the RIAA).

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own regulatory power.²¹⁹ While some called for Congress to take similar interpretive action as the Copyright Office,²²⁰ the Authors Guild and the Songwriters Guild called for Congress to adopt a “catch-all” provision pulling all copyrights in the termination gap under the umbrella of Section 203(a).²²¹ The RIAA asked for an investigation by Congress into the underlying policy represented in the termination provisions and whether a problem exists.²²²

Some commentators questioned the authority of the Copyright Office to issue substantive regulations.²²³ A few who urged the Copyright Office to issue a regulation also advised the Copyright Office to encourage Congress to take action as a secondary solution, if the Copyright Office felt that it was not empowered to issue such regulation.²²⁴ The Authors Guild and the Songwriters Guild of America called for congressional action alone.²²⁵ While not explicitly questioning the Copyright Office’s regulatory authority, the RIAA cautioned against action by the Copyright Office in light of policy choices that are not “clear-cut.”²²⁶

Doubt regarding the Copyright Office’s ability to issue substantive rules stems from the lack of an explicit delegation of regulatory authority to the Copyright Office by Congress. The only general delegation of rulemaking authority to the Copyright Office comes in 17 U.S.C. § 702, which states that “[t]he Register of Copyrights is authorized to establish regulations not

²¹⁹ See, e.g., Reply Comments of the Recording Industry Association of America to the U.S. Copyright Office, *supra* note 213; Comments of Charles J. Sanders & Jan F. Constantine to the U.S. Copyright Office, *supra* note 18, at 5; Comments of Kenneth D. Freundlich & Neil Netanel to the U.S. Copyright Office, *supra* note 205, at 8-9.

²²⁰ See, e.g., Comments of Kenneth D. Freundlich & Neil Netanel to the U.S. Copyright Office, *supra* note 205, at 8-9.

²²¹ See Comments of Charles J. Sanders & Jan F. Constantine to the U.S. Copyright Office, *supra* note 18, at 5.

²²² See Reply Comments of the Recording Industry Association of America to the U.S. Copyright Office, *supra* note 213, at 5-6.

²²³ Such an argument would likely be brought by the RIAA in defending against individual suits regarding termination rights, especially given the numerous incentives for the recording industry to litigate all termination attempts. See discussion *supra* Part III.C.

²²⁴ See Comments of Kenneth D. Freundlich & Neil Netanel to the U.S. Copyright Office, *supra* note 205, at 11; Reply Comments of Casey Del Casino to the U.S. Copyright Office, *supra* note 180.

²²⁵ Reply Comments of Charles J. Sanders & Jan F. Constantine to the U.S. Copyright Office, *supra* note 190, at 2-3.

²²⁶ Reply Comments of the Recording Industry Association of America to the U.S. Copyright Office, *supra* note 213.

inconsistent with law for the administration of the functions and duties made the responsibility of the Register.”²²⁷ As a department of the Library of Congress, the Library’s oversight further limits the Copyright Office’s authority.²²⁸ In addition, several circuits have questioned the scope of the Copyright Office’s regulatory authority under the Office’s general authority to administer copyright law.²²⁹ However, courts generally recognize the power of the Copyright Office to clarify ambiguous terms in the Copyright Act to allow for the administration of copyright laws.²³⁰ Overall, the validity of possible Copyright Office regulations might be one of many defenses brought by publishers to avoid termination.

C. Accept Termination Notices but Wait for the Courts to Clarify the Copyright Act

A final option for the Copyright Office was to accept termination notices and wait for individual court cases to interpret the provisions of Sections 203

²²⁷ 17 U.S.C. § 702 (2006).

²²⁸ See 17 U.S.C. §§ 701, 702 (2006).

²²⁹ See *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 490-91 n.9 (3d Cir. 2003) (highlighting debate among appellate judges over whether § 702 permits the issuance of substantive regulations for the purposes of determining deference under *Chevron U.S.A., Inc. v. National Resource Defense Council, Inc.*, 467 U.S. 837 (1984)). In *Cablevision Systems Development Co. v. Motion Picture Ass’n of America, Inc.*, 836 F.2d 599, 608-09 (D.C. Cir. 1987), the Court of Appeals for the District of Columbia did not discount the general rulemaking power of the Copyright Office and explicitly found substantive rulemaking authority in 17 U.S.C. § 115’s explicit grant of regulatory authority.

The RIAA also observed that the nature of copyrights as property might restrict any action by the Copyright Office or Congress changing the termination provisions and affecting individuals’ property rights. Reply Comments of the Recording Industry Association of America to the U.S. Copyright Office, *supra* note 215, at 5. The RIAA cited *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983) for the proposition that “[a]n interest in a copyright is a property right protected by the due process and just compensation clauses of the Constitution.”

²³⁰ See 17 U.S.C. § 702 (2006); *Cablevision Systems Development Co. v. Motion Picture Ass’n of America, Inc.*, 836 F.2d 599 (D.C. Cir. 1987); *Satellite Broad. and Commc’ns Ass’n of Am. v. Oman*, 17 F.3d 344, 347 (11th Cir. 1994). Specific delegations of rulemaking authority give the Copyright Office more rulemaking authority. See, e.g., 17 U.S.C. §§ 115, 410 (2006). See also MELVILLE B. NIMMER AND DAVID NIMMER, 2-7 NIMMER ON COPYRIGHT § 7.21 (2010). For more information regarding separation of powers issues and the Copyright Office, see Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1131-33 (2007).

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and 304. Under this approach, the courts would have become the primary battleground between authors and their assignees and those seeking authoritative interpretations of the termination provisions. This option would have left copyright authors at the mercy of courts that have not always upheld Congress’s goal of giving an inalienable termination right to authors.²³¹ The RIAA was the only commentator to recommend inaction by the Copyright Office and Congress.²³² The RIAA’s position suggests that record labels believe they have a significant advantage in litigation against individual authors.

V. THE EFFECTS OF THE COPYRIGHT OFFICE’S ACTIONS

After issuing a period of notice and comment rulemaking regarding the possible termination gap, the Copyright Office issued a final rule and a policy paper indicating that the Copyright Office would accept termination notices for copyrights of works falling in the termination gap based on the Office’s construction of the term “executed.”²³³ The Copyright Office hedged in its final rule, however, by reserving a role for the courts and for Congress in definitively addressing the issue.²³⁴ The Copyright Office’s final rule leaves authors vulnerable to action by Congress or the courts by failing to take a more definitive position on Sections 203 and 304. Authors and their statutory heirs enter the termination period uncertain of their rights and without any strong support from the Copyright Office on which to claim deference in court cases.

A. *The Copyright Office’s Final Rule and Policy Position*

The Copyright Office sought to “provide immediate practical guidance in light of the fact that the first deadlines for serving Section 203 notices for grants executed in 1978 will begin to expire [in 2011].”²³⁵ The Copyright

²³¹ See discussion *supra* Parts II, III.

²³² See Reply Comments of the Recording Industry Association of America to U.S. Copyright Office, *supra* note 213, at 6. The move might be a bit of litigation gamesmanship, as any failure to act by the Copyright Office or Congress might have caused some authors in the termination gap to wait to file termination notices and therefore miss the deadline to file their notices with their assignees and the Copyright Office pursuant to 17 U.S.C. § 203(a)(4)(A) (2006).

²³³ 76 Fed. Reg. at 32316-32,317; U.S. Copyright Office, Analysis of Gap Grants under the Termination Provisions of Title 17 (2010), available at <http://www.copyright.gov/reports/gap-grant%20analysis.pdf>.

²³⁴ 76 Fed. Reg. at 32320.

²³⁵ 75 Fed. Reg. at 72772. Under the procedures of Section 203, termination notices

Office's rule adopts the position of the majority of the commentators that a grant cannot be "executed" until a work is created and, therefore, acquires statutory copyright.²³⁶ Rather than adopting its interpretation of the term "executed" in an authoritative regulation, the Copyright Office takes its position with a sole purpose of allowing authors whose works fall in the termination gap to serve and record notices of their intent to terminate as required by the statute.²³⁷ In particular, the rule provides that recordation "does not mean that it is otherwise sufficient under the law. Recordation of a notice of termination by the Copyright Office is without prejudice to any party claiming that the legal and formal requirements for issuing a valid notice have not been met."²³⁸ The Copyright Office's rule presumes that action by the courts or Congress is necessary to determine the proper interpretations of Sections 203 and 304.

The Copyright Office's policy paper further indicates that the Copyright Office intends for Congress to address the problem.²³⁹ In particular, the Copyright Office calls for a "catch-all" provision in Section 203(a)(3) indicating that the date of execution of the grant cannot predate the creation of the work.²⁴⁰ Despite providing a strong analysis supporting this view, the Copyright Office concedes that its rule provides solely "some practical

must be served at least two years before the work becomes eligible for termination. 17 U.S.C. § 203(a)(4)(A) (2006). Thus, for works created in 1978, termination notices must be served at latest in 2011.

²³⁶ 76 Fed. Reg. at 32316 ("[T]he Copyright Office concluded that the better interpretation of the law is that Gap Grants are terminable under section 203, as currently codified, because as a matter of copyright law, a transfer that predates the existence of the copyrighted work cannot be effective (and therefore cannot be "executed") until the work of authorship (and the copyright) come into existence.").

²³⁷ *Id.* ("The Office will record a notice of termination in such a case so long as the notice states that the grant was executed on a specified date that is on or after January 1, 1978.").

²³⁸ *Id.* at 32320 (citing 37 C.F.R. 201.10(f)(5) (2011)).

²³⁹ *See, e.g.*, U.S. Copyright Office, Analysis of Gap Grants under the Termination Provisions of Title 17 at iii (2010), available at <http://www.copyright.gov/reports/gap-grant%20analysis.pdf> ("Notwithstanding this conclusion [that grants cannot be executed until a work is created], the Office agrees with many stakeholders that it would be beneficial for Congress to clarify the statute."). The Copyright Office's catch-all provision is the same approach taken by many commentators. *See* discussion *supra* Part IV.A.

²⁴⁰ U.S. Copyright Office, Analysis of Gap Grants under the Termination Provisions of Title 17 at iii (2010), available at <http://www.copyright.gov/reports/gap-grant%20analysis.pdf>.

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guidance for stakeholders” and “will not necessarily reduce the threat of litigation or lack of confidence in rights to copyright titles for authors and their grantees.”²⁴¹

The Copyright Office’s failure to take a more authoritative position in its rule and analysis leaves authors whose works fall in the termination gap in a precarious position. First, as the Copyright Office admits, its decision to accept notices of termination does little to quell potential litigation over terminations and leaves authors and publishers uncertain of their rights.²⁴² The Office’s moderate approach also might manifest the Copyright Office’s uncertainty as to its authority to issue substantive regulations under 17 U.S.C. § 702 alone.²⁴³ Unless Congress acts to address the termination gap issue before the 2013 termination period begins, most battles over termination rights will take place in courts. The Copyright Office may have garnered some deference from the courts in prospective litigation with a strong definition of the term “executed” in 17 U.S.C. § 203(a), providing some leverage for authors both in negotiating with their assignees and in court. The Copyright Office’s conservative rulemaking, however, manifests its uncertainty as to its ability to qualify for deference and leaves authors vulnerable to judicial interpretations, especially since courts have not always respected the plain language of the termination provisions.²⁴⁴

B. Possible Deference to Copyright Office Regulations

In the past, courts have rarely considered deference to the Copyright Office a serious question in copyright cases.²⁴⁵ As first set out in *Chevron U.S.A., Inc. v. National Resource Defense Council, Inc.*,²⁴⁶ *Chevron* deference is an important litigation advantage for litigants seeking to argue for an agency’s interpretation of an ambiguous statute because it requires a court to accept the agency’s reasonable interpretation of the statute.²⁴⁷ For authors and statutory heirs affected by the termination gap, establishing *Chevron* deference may be the only true litigation weapon they have against well-financed publishers and

²⁴¹ *Id.* at 8.

²⁴² *Id.*

²⁴³ 76 Fed. Reg. at 32319. See discussion *supra* Part IV.B.

²⁴⁴ See discussion *supra* Part III.C.2.

²⁴⁵ See 5 WILLIAM PATRY, PATRY ON COPYRIGHT § 17.02 (2010); 2-7 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 7.26 (2010).

²⁴⁶ *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 842-45 (1984).

²⁴⁷ *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

groups like the RIAA.²⁴⁸

The Supreme Court's decision in *United States v. Mead Corporation* both established the hierarchy for determining the appropriate level of deference to accord an agency's interpretation of an ambiguous statute and signaled the Supreme Court intent's to limit the application of *Chevron* deference.²⁴⁹ At the top of the Supreme Court's hierarchy is *Chevron* deference.²⁵⁰ *Chevron* deference applies when Congress delegated to the agency the general authority to issue regulations carrying the force of law and the agency issued its regulation pursuant to that general authority.²⁵¹ The use of formal notice and comment rulemaking is important evidence that an agency issued a regulation carrying the force of law.²⁵² The next level of deference, *Skidmore* deference, requires courts to apply a multi-factor test to regulations and to defer to the agency if their interpretation is persuasive.²⁵³ Finally, courts may find that neither *Chevron* nor *Skidmore* deference apply and accord the agency's interpretation no deference at all.

As both Patry and Nimmer observe, courts both before and after *Chevron* often have given little deference to interpretations by the Copyright Office.²⁵⁴ However, *Chevron* deference has been given to the Copyright Office in two

²⁴⁸ See discussion *supra* Part III.C.3.

²⁴⁹ See *Mead*, 533 U.S. at 226-227; Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 813 (2002); Kristin E. Hickman & Matthew D. Kreuger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1249 (2007).

²⁵⁰ *Id.* at 226-27.

²⁵¹ *Id.*; Merrill, *supra* note 249, at 813.

²⁵² See *Mead*, 533 U.S. at 231-33.

²⁵³ *Mead*, 533 U.S. at 226-27; Merrill, *supra* note 249, at 813. Under *Skidmore*, courts should consider the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). For more on *Skidmore*, see Hickman & Kreuger, *supra* note 249.

²⁵⁴ See 5 WILLIAM PATRY, PATRY ON COPYRIGHT § 17.02 (2010); 2-7 MELVILLE B. NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHT § 7.26 (2010). See, e.g., *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941, 946-47 (2d Cir. 1975) (refusing to defer to Copyright Office on an issue of first impression); *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222, 1242 n.38 (3d Cir. 1986) (doubting whether any deference could be given to Copyright Office circulars on a complex matter like copyright protection for computers); *BMI v. Roger Miller Music, Inc.*, 1396 F.3d 762, 778 (6th Cir. 2005) (declining to follow Copyright Office's interpretation of renewal provisions as expressed in a letter lacking the force of law).

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post-*Chevron* cases. In *Cablevision Systems Development Co. v. Motion Picture Association of America*,²⁵⁵ the U.S. Court of Appeals for the District of Columbia gave deference to the Copyright Office’s interpretation of the term “gross receipts” under 17 U.S.C. § 111’s cable compulsory license scheme.²⁵⁶ The court focused on the general regulatory power given to the Copyright Office in 17 U.S.C. § 702 as well as the express power of the Office to issue regulations governing how cable services deposit their compulsory license royalties under 17 U.S.C. § 111(d)(1).²⁵⁷ Similarly, in *Satellite Broadcasting and Communications Association of America v. Oman*, the Eleventh Circuit deferred to a Copyright Office regulation even though it conflicted with circuit precedent.²⁵⁸ However, as a general rule, courts usually cite deference to the Copyright Office only when they agree with the Copyright Office’s interpretation.²⁵⁹

Since *Mead*, courts have struggled to determine whether the Copyright Office can qualify for anything more than *Skidmore* deference. The Third Circuit in *Bonneville International Corporation v. Peters*²⁶⁰ faced the question after a district court accorded *Chevron* deference to a regulation excluding Internet streaming from copyright coverage.²⁶¹ The Third Circuit dodged the question of the deference to the Copyright Office because the court agreed with the Copyright Office’s interpretation.²⁶² In a footnote, however, Judges Roth and Cudahy noted that only *Skidmore* deference is appropriate since the Copyright Office has only general rulemaking authority under 17 U.S.C. § 702 to administer the copyright laws, not an express delegation of authority necessary to meet *Mead*.²⁶³ Judge Smith disagreed and concluded that *Chevron* deference applied based on 17 U.S.C. § 702 and the fact that the regulation was passed via notice and comment rulemaking.²⁶⁴ More recently,

²⁵⁵ *Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of America*, 836 F.2d 599 (D.C. Cir. 1988).

²⁵⁶ *Id.* at 609.

²⁵⁷ *Id.* at 608.

²⁵⁸ *Satellite Broad. & Commc’ns Ass’n of America v. Oman*, 17 F.3d 344, 345 (11th Cir. 1994).

²⁵⁹ See 2-7 MELVILLE B. NIMMER AND DAVID NIMMER, *NIMMER ON COPYRIGHT* § 7.26 (2010).

²⁶⁰ *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485 (3d Cir. 2003).

²⁶¹ *Id.* at 487.

²⁶² *Id.* at 487, 490-91 n.9.

²⁶³ *Id.* at 490-91 n.9.

²⁶⁴ *Id.*

the Second Circuit in *Cartoon Network, LLLP v. CSC Holdings, Inc.* simply assumed that the Copyright Office was due only *Skidmore* deference.²⁶⁵

Despite a lack of consensus among the courts regarding the deference to accord to Copyright Office regulations, in 2008, the Copyright Office solicited comments and issued an interim rule regarding its authority to promulgate a rule addressing an ambiguity in Section 115 of the Copyright Act.²⁶⁶ In the rule, the Copyright Office asserted that it could both clarify the ambiguity in 17 U.S.C. § 115 and qualify for *Chevron* deference under the general rulemaking authority of 17 U.S.C. § 702 and the specific authority of 17 U.S.C. § 115.²⁶⁷ Though the Copyright Office drew support from the express delegation of rulemaking authority in Section 115, the Office's analysis suggests that Section 702 taken alone might provide the Office with sufficient authority to allow the Office to promulgate rules carrying the force of law and, therefore, qualify for *Chevron* deference.²⁶⁸ The Copyright Office pointed to the Supreme Court's decision in *Gonzales v. Oregon* in refuting an argument that the Copyright Office never has rulemaking authority.²⁶⁹ The Copyright Office argued that "*Gonzales* recognizes, as do *Cablevision* and *SBCA*, that an agency's interpretation of a statute is due deference when the statute is ambiguous, and when Congress has delegated the authority to the agency to promulgate rules carrying the force of law."²⁷⁰ This position echoes Judge Smith's minority position in *Bonneville*.²⁷¹ It also coheres with Congress's recent trend of granting the Copyright Office more substantive rulemaking authority with regard to specific aspects of the Copyright Act.²⁷²

Although it is not clear under recent precedent whether a Copyright Office interpretation of Section 203(a) would qualify for *Chevron* deference, the

²⁶⁵ *Cartoon Network, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 129 (2d Cir. 2008).

²⁶⁶ Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 Fed. Reg. 66,173, 66,174 (interim rule as of Nov. 7, 2008) (codified at 37 C.F.R. pt. 201, 255 (2010)).

²⁶⁷ *Id.* at 66,174-75 (citing *Cablevision*, 836 F.2d 599; *Oman*, 17 F.3d at 345).

²⁶⁸ *See id.* at 66,174-75 (discussing the *Cablevision* case); *id.* at 66,175 ("The Office is relying on both its general rulemaking authority under Section 702 and the specific grant of authority found in Section 115(b)(1) and (c)(4).").

²⁶⁹ *Gonzales v. Oregon*, 546 U.S. 243 (2006).

²⁷⁰ Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 Fed. Reg. at 66,175.

²⁷¹ *See* discussion *supra* notes 260-65 and accompanying text.

²⁷² *See* Liu, *supra* note 172, at 149-55 (discussing the increasing substantive discretion of the Copyright Office).

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Copyright Office concedes getting any deference at all in future litigation involving termination rights by issuing a limited rule and policy decision that call on Congress or the courts to provide a definitive answer. The rule itself disclaims having any binding impact on how future courts might interpret Section 203(a).²⁷³ The Copyright Office also limited the availability of *Skidmore* deference for its policy analysis by failing to take a more authoritative stance, instead seeking to provide only “some practical guidance” regarding the termination gap.²⁷⁴ The availability of *Skidmore* deference would have forced courts to at least consider the validity of the Copyright Office’s interpretation of Section 203(a).²⁷⁵ Despite asserting greater rulemaking power in its 2008 interim rule, the Copyright Office took a step back by offering a rule with little chance of qualifying for any deference.²⁷⁶ The Copyright Office’s limited support leaves authors whose works fall in the termination gap and their statutory heirs vulnerable to judicial decisions that may deny them the termination rights that Congress intended, thus giving publishers significant litigation, negotiation, and lobbying advantages.²⁷⁷

The Copyright Office also missed an opportunity to assert its rulemaking authority and build on some of the recent support for giving the Copyright Office *Chevron* deference in *Bonneville*. The influence of lobbyists on Congress and Congress’s heavy role in shaping the Copyright Act indicate that Congress will not give clearer general rulemaking authority to the Copyright Office without some external pressure. Under the current system, Congress

²⁷³ Gap in Termination Provisions; Inquiry, 75 Fed. Reg. 72,271, 72,772 (proposed Nov. 26, 2010) (citing 37 C.F.R. pt. 201(f)(5) (2011)).

²⁷⁴ See discussion *supra* notes 239-44 and accompanying text. Recall that one goal of the policy analysis is providing “some practical guidance” to stakeholders; this conservative goal greatly limits the persuasive value of the Copyright Office’s analysis. U.S. COPYRIGHT OFFICE, ANALYSIS OF GAP GRANTS UNDER THE TERMINATION PROVISIONS OF TITLE 17 at 8 (2010), <http://www.copyright.gov/reports/gap-grant%20analysis.pdf>.

²⁷⁵ See *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Recall that a rule carrying the force of law must be issued pursuant to general rulemaking authority delegated by Congress and through formal rulemaking procedures under this authority. See discussion *supra* notes 247-55 and accompanying text; Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 883, 885 (2001) (“*Skidmore* is properly regarded as a deference doctrine because the court cannot ignore the agency interpretation – the court must assess that interpretation against multiple factors and determine what weight they should be given.”).

²⁷⁶ Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 73 Fed. Reg. at 66174-75 (interim rule as of Nov. 7, 2008).

²⁷⁷ See discussion *supra* Parts III.C.1, 3.

and the music and other regulated industries enjoy a symbiotic relationship. Due to the limited resources of the Copyright Office and complex industry-specific problems, Congress must rely on its regulated industries to fill the gap in expertise and experience in areas that Congress and the Copyright Office lack.²⁷⁸ The Copyright Office often advises Congress, but its reports are solely advisory and its influence on Congress remains limited.²⁷⁹ In this relationship, Congress benefits from the support of the industry, Congress, in turn, provides the industries with favorable legislation at the expense of authors, and the Copyright Office, despite having some expertise, plays largely an administrative role.²⁸⁰ Congress also now plays a much larger role than the courts in enumerating the rights available to copyright holders.²⁸¹ As a result of Congress's large role in setting out copyright policy and Congress's relationship with its regulated industries, copyright law often serves the interest of its regulated industries rather than the public at large.²⁸²

Given Congress's and the industry's interest in maintaining the status quo, the Copyright Office will likely remain on the sidelines and authors, including those affected by the termination gap, might again lose their termination rights. The Copyright Office missed an opportunity to challenge the entrenched system and protect authors in its response to the termination gap. To make its limited role a more public issue, the Copyright Office could have issued a substantive regulation that would likely require some further review of its rulemaking authority. Such a rule, even if struck down or accorded no deference by the courts, might at least have started the conversation needed to get Congress or the public to reconsider the limited role given to the Copyright Office. An expanded role for the Copyright Office makes sense in the short term to allow the Copyright Office to help address the likely high number of disputes generated by the coming termination period and also make sense for the future by enabling the Copyright Office to help Congress espouse more coherent and consistent copyright policy.²⁸³ Going forward, the Copyright Office should continue to look for opportunities for substantive rulemaking, like the termination gap, and seek to politicize its lack of authority to

²⁷⁸ See Liu, *supra* note 172, at 136-37, 139.

²⁷⁹ See *id.* at 137-38.

²⁸⁰ See *id.* at 105-129; Patry, *supra* note 79, at 909.

²⁸¹ See discussion *supra* Part III.C.2; Liu, *supra* note 172, at 105-26, 136.

²⁸² *Id.* at 139.

²⁸³ See Liu, *supra*, note 172, at 137-141 (discussing how the Copyright Office's limited regulatory role contributes to the influence of industries on and incoherence of copyright policy).

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counterbalance the close Congress-industry relationship and protect authors from courts who too have shown some fidelity with publishers over authors.²⁸⁴

VI. CONCLUSION

With 2013 approaching and works in the termination gap drawing nearer to the statutory deadline to file termination notices, authors of copyrights like Charlie Daniels find themselves facing two equally troubling ways of securing their termination rights. The first is to seek legislative action by Congress addressing the termination gap issue. Although Congress has adopted the termination provisions in the 1976 revisions to the Copyright Act, Congress recently has not shown the same fidelity to ensuring authors get a second chance to profit from their original copyrights.²⁸⁵ Worse, Congress has shown its susceptibility to lobbying by the RIAA, a group representing many assignees of copyrights in the termination gap.²⁸⁶

The other alternative, and the only option if Congress does not act, is to seek a favorable judicial interpretation of Sections 203 and 304. Yet most songwriters and authors will be at a major disadvantage in terms of legal and financial resources and face a motivated recording and publishing industry with significant incentives to prevent termination of copyright assignments.²⁸⁷ Unfortunately, the courts have not heeded Congress’s intent to create inalienable termination rights, instead allowing the termination rights of all statutory heirs to be negotiated away by contract.²⁸⁸ Overall, the prospect of litigation in the courts or legislation by Congress leaves authors in a vulnerable position as an important opportunity quickly approaches for authors to secure a second chance to reap the benefits of their creative works.

The Copyright Office’s decision not to take a more authoritative position in its final rule contributes to the vulnerability of authors by failing to resolve the termination gap issue definitively entering the termination period. The Copyright Office’s rule simply forestalls any final answer to the termination

²⁸⁴ One commentator, Professor Liu, has suggested that Congress continue to expand the Copyright Office’s substantive rulemaking authority in piecemeal fashion and start to make institutional changes to the Copyright Office to allow it to deal with its increased role. See Liu, *supra* note 172, at 140. Although I mostly agree with Professor Liu, I suggest the Copyright Office try to jumpstart a conversation of the Copyright Office’s role rather than wait for Congress’s piecemeal approach.

²⁸⁵ See discussion *supra* Part III.C.2.

²⁸⁶ *Id.*

²⁸⁷ See discussion *supra* Part III.C.3.

²⁸⁸ See discussion *supra* Part III.C.1.

gap until Congress or the courts act. Despite recently claiming more power to issue substantive regulations and qualify for *Chevron* deference, the Copyright Office's conservative rulemaking indicates that the Office might still feel unsure about its regulatory authority.²⁸⁹ The conservative action of the Copyright Office increases the chances that authors with works falling in the termination gap entering the 2013 termination period might face another *Fred Fisher Music Co.* situation or backdoor attempt by Congress and recording lobbyists to deprive them of their valuable termination rights.

In spite of the historically vacillating support for authors, there is reason for hope for authors and artists like Charlie Daniels looking to secure their second bite of the apple. Under the Copyright Office's final rule, both Congress and the courts will have an opportunity to address the termination gap. Congress could correct the termination provisions to cover works in the termination gap, especially if groups like The Recording Artists' Coalition, Recording Academy and other artist rights groups band together to advocate on behalf of authorial rights.²⁹⁰ The courts might also adopt a favorable reading of Section 203(a) that provides authors affected by the termination gap with the termination right that Congress intended.

Since terminations will continue for decades under Section 203(a), Congress's best course of action is to provide the Copyright Office with express authorization to deal with issues like the termination gap through rulemaking.²⁹¹ Despite Congress and the courts' wavering support for termination rights, the Copyright Office has remained steadfast to Congress's goal of promoting science and the arts by providing an appropriate incentive to authors.²⁹² Furthermore, the express delegation would allow the Copyright Office to qualify for *Chevron* deference when interpreting the termination provisions, creating some protection against contrary interpretations by the

²⁸⁹ See discussion *supra* Parts IV.B, V.

²⁹⁰ These groups were instrumental in repealing the works made for hire legislation in 1999. See Susan Butler, *In the Vault*, BILLBOARD, Aug. 12, 2006, at 29.

²⁹¹ The Copyright Office has exerted more rulemaking authority when acting with expressly delegated authority such as found in 17 U.S.C. § 111 (2006). See discussion *supra* Parts IV.B, V.

²⁹² See William Patry, *Barbara Ringer*, The Patry Copyright Blog (Apr. 9, 2009, 1:32 PM), <http://williampatry.blogspot.com/2009/04/barbara-ringer.html> (discussing former Register of Copyright Barbara Ringer's dedication to the rights of authors); *Sound Recordings as Works Made for Hire: Hearing before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. (2000), available at <http://www.copyright.gov/docs/regstat52500.html> (statement of Marybeth Peters, Register of Copyright, U.S. Copyright Office) (expressing the importance of termination rights).

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courts that might rob authors of their termination rights. And while the Copyright Office is not necessarily immune to lobbying that has affected Congress in recent years, its nature as an independent institution and the long-term guidance of its registers like Marybeth Peters may help insulate it from the influence of lobbyists.²⁹³ Finally, the Copyright Office’s expertise might help it to evaluate the competing interests of authors and publishers, ensuring a balance of bargaining power that allows copyright law to serve the purposes envisioned in the Constitution and not as a form of business protectionism.²⁹⁴ The Copyright Office, if granted a larger role, could serve as the central policymaking institution and elaborate clear, consistent copyright policy in a statute becoming more complex and tailored to industry interests every day.²⁹⁵

The Copyright Office, however, by providing only an administrative patch to the termination gap, missed a chance to place the issue of the Copyright Office’s lack of substantive rulemaking authority before Congress and the public. The Office’s rulemaking indicates that, for authors and songwriters like Charlie Daniels, nothing much has changed. Congress remains susceptible to lobbying by the recording and publishing industries and frequently takes steps that suggest a philosophy of business protectionism rather than genuine encouragement of creativity by artists.²⁹⁶ The courts, rather than respecting the clear command of Congress to create inalienable termination rights, continue to take steps to restore the *Fred Fisher* era of termination rights, leaving authors vulnerable to the superior bargaining power of major publishers and record labels.²⁹⁷ And the Copyright Office’s recent assertion of regulatory power in other areas of copyright law falls short of termination rights, providing authors with limited support from the one governmental entity most committed to protecting authors from publishers.²⁹⁸ Unless Congress, the courts or the Copyright Office break stride with their recent trends, in the

²⁹³ Peters has a history of service on behalf of the Copyright Office, dating back to her drafting of *The General Guide to the Copyright Act of 1976*. U.S. COPYRIGHT OFFICE, *Marybeth Peters, Register of Copyrights, Biographical Information*, <http://www.copyright.gov/docs/mbpbio.html> (last visited Nov. 14, 2011). Congress could reform the Copyright Office to prevent industry capture, mainly by charging it with protecting broader copyright policy and access to the full range of interested parties, not just major publishers. See Liu, *supra* note 172, at 158-59.

²⁹⁴ See Liu, *supra* note 172, at 137-38.

²⁹⁵ See Liu, *supra* note 172, at 158.

²⁹⁶ See discussion *supra* Part III.C.2; discussion *supra* Part II.B; Patry, *supra* note 79.

²⁹⁷ See discussion *supra* Part III.C.1, 3.

²⁹⁸ See discussion *supra* Parts IV.B., V; discussion *supra* Parts II, V.

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upcoming termination period, publishers and record labels stand likely to win big whereas authors and recording artists seem positioned to get fleeced of their termination rights. For Charlie Daniels and thousands of other recording artists, come 2013, the Devil might be coming down to Georgia, except this time for their termination rights.